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J2S
J5T

THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDER'S COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, THE JURY RULES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS, ISSUED BY THE HIGH COURT; ALSO DECISIONS PASSED ON APPEALS FROM THE ORIGINAL JURISDICTION OF THE HIGH COURT, AND DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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ACT XIV. OF 1859.

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ADOPTED SON.

See Reversioner (1)

APPEAL.

During the course of a suit for damages, plaintiff applied that security might be required from the defendants under Section 81, Act VIII., 1859, and on their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on —— by the High Court. He then appealed to the Privy Council, and prayed to the High Court either to continue the attachment, or to require security from the defendants, pending the result of the ——. HELD, that the Court was not competent to adopt either course ... 16

See Practice (1)

AUCTION SALE.

HELD that a purchaser at an —— in execution of a decree under Regulation VII. of 1825 or Act VIII. of 1859 can recover back his purchase-money from the decree-holder only when the sale is set aside summarily for irregularity or the like, under Clauses 3 and 4, Section 4 of the former law or Sections 257 and 258 of the Act VIII., but not when a third party succeeds in establishing his title to the property on the ground that the sale did not affect the property; and where there is no allegation of fraud or misrepresentation on the part of the decree-holder ... 8

See Estoppel.

B.

BOND.

Where in a suit on a —— which recites that consideration passed, the defendant admits the execution of the ——, but avers that he received no consideration, or only part of the consideration, the onus lies on the defendant to show that the recitals in the —— are not correct ... 25

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ESTOPPEL.

A purchaser at an auction-sale sued to have his name registered in the zemindary serishta in respect of certain lands purchased at an auction-sale for arrears of rent, but not until after his application to the Collector under Section 27, Act X. of 1859, had been rejected. Both the Lower Courts decided that the suit was barred by Section 2, Act VIII. of 1859. HELD that the proceeding under Section 27, Act X. of 1859, held by the Collector, did not bar the subsequent suit in the Civil Court .. 30

H.

HINDOO LAW.

(1) A member of a Hindoo family, living under the Mitakshara Law and having joint family property, died entitled to an undivided share in such property, and leaving two widows surviving him. After his death, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these

HINDOO LAW—*(continued).*

decrees, an interest in certain portions of the joint family property to the extent of the share to which the deceased was entitled in his lifetime was sold by auction and the purchasers were put into possession.

HELD that the purchasers took only the rights and interests of the widows; that as the property seized did not belong to the widows or to the heirs of the deceased, but under the —— passed to the survivors, it could not be made available under a decree against the widows in their representative character, but could be made liable only in a suit properly laid against the survivors ... 1

(2) HELD that a member of a joint Hindoo family governed by the Mitakshara Law, has no authority to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account, and not for the benefit of the family ... *ib.*

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K.

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A landlord cannot bring a suit to compel a ryot to execute a —— unless he first tenders a pottah to the ryot such as he is entitled to receive under Section 9, Act X., 1859; and a suit for a —— at an enhanced rate of rent cannot be supported without a previous notice under Section 13, Act X. of 1859... 27

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When a party has been dispossessed under a decree obtained in a suit instituted under Section 15, Act XIV. of 1859, he need not bring a regular suit on proper stamp to regain possession, but may apply under Section 230, Act VIII. of 1859 ... 25

PRACTICE.

HELD (*Kemp, J., dissenting*) that when the last day for filing an appeal or review falls on a Sunday, or on a holiday on which the Court is closed, whether that holiday consists of a single day or of several days, the appeal or review may be filed on the day after the holiday ... 21

R.

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Where an instrument creates a title or interest in land and is also a bond for money lent, it may, under Act XX. of 1866, be received in evidence as a document in a suit to recover the money lent, even if it be not registered ... 11

REGULATION VII. OF 1825.

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(2) On the issue as to the failure of an —— as to which there was a conflict of evidence, the Privy Council, in the absence of strong documentary evidence confirmatory of the ——, and on a consideration of the probabilities of the case, reversed the judgment of the High Court, which upheld the ——, and confirmed that of the Judge of the original Court who saw and heard the witnesses, and who considered the witnesses in support of the —— to be unworthy of credit ... 29

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SALE—*(continued).*
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HELD that the execution and transfer of the deed of sale from *B* to *A*, and the partial payment of the purchase-money by *A* to *B*, did not pass to *A* a complete title to the lands, and that *B* in retaining possession could not be regarded as having only a lien for the unpaid portion of the purchase-money or liable to account to *A* as a mortgagee in possession of the rents and profits ... 6

(2) HELD that, even if part of the purchase-money had been paid by *A* to *B* at the time of the execution of the deed, and *A* tendered to *B* the remainder of the purchase-money, *A* would not have been entitled to a decree for specific performance, the contract sued on being eminently a speculative, not to say a gambling, one ... *ib.*

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The Weekly Reporter:

APPELLATE HIGH COURT.

The 1st June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Possession—Limitation—Section 11, Act XIV., 1859.

Case No. 179 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 2nd December 1868, reversing a decision of the Moonsiff of Futtickcherry, dated the 8th February 1868.

Mohabut Ali and another (Plaintiffs), *Appellants,*

versus

Ali Mahomed Koolal (Defendant), *Respondent.*

Mr. G. A. Twidale for Appellants.

Babu Okhil Chunder Sein for Respondent.

In a suit to establish a right derived from plaintiff's father as purchaser of certain property which the latter ceased to possess 5 years before his death, it was held that plaintiff's cause of action arose from the time of his father ceasing to possess; and as that was more than 20 years previously, his suit was barred by limitation under Section 11, Act XIV. of 1859.

Bayley, J.—We think this special appeal should be dismissed with costs.

The plaintiff sued to establish his right derived from his father as the original purchaser of the property.

The defendant claimed through one Shahmut Ali, who, he alleged, was a co-proprietor of the lands. Defendant also pleaded limitation.

The first Court gave the plaintiff a decree, holding that the defendant's kobalah was false, and that his possession was not proved.

The Lower Appellate Court has clearly found as a fact on the evidence that, from five years before the plaintiff's father's death in 1213, that is, from the year 1209, the possession was with the defendant and those through whom he claimed, and that this was shown by several acts of ownership such as the receipts of rent and the direct evidence in the case; and further that the title, under which the defendant claimed, that is, the kobalah, was a good and a valid title.

In special appeal, it is urged that the law of limitation has not been properly applied in this case, and that, whereas the first Court has given several reasons for its decision, the Lower Appellate Court has not given sufficient reasons to meet those of the first Court.

Now, the law of limitation that is applicable to this case is Section 11, Act XIV. of 1859, and that Section says: "If, at the "time when the right to bring an action "first accrues, the person to whom the right "accrues is under a legal disability, the "action may be brought by such person or "his representative within the same time "after the disability shall have ceased as "would otherwise have been allowed from "the time when the cause of action accrued, "unless such time shall exceed the period of "three years, in which case the suit shall "be commenced within three years from "the time when the disability ceased; but "if, at the time when the cause of action "accrues to any person, he is not under a "legal disability, no time shall be allowed "on account of any subsequent disability of "such person or of the legal disability of "any person claiming through him."

Here it is quite clear, that the cause of action arose to the plaintiff from the cessation

of possession on the part of his father from whom he derived; and as it has been clearly found as a fact that from more than 20 years before suit, *i. e*, five years before the plaintiff's father's death, neither the plaintiff nor his father had been in possession, the cause of action actually accrued to the plaintiff under the provisions of Section 11, so as to bar the suit.

The appeal is therefore dismissed with costs.

The 1st June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Procedure—Appeals under Section 84, Act XX. of 1866.

In the Matter of Jugun Patnee, *Petitioner.*

Baboo Rajendernath Bose for Petitioner.

A petition under Section 84, Act XX. of 1866, need not be in English, unless the party presenting it understands that language sufficiently for the purposes of verification.

When an appeal is filed under that Section, a notice, in accordance with Clause 4 thereof, ought to be issued on the registering officer and on the other persons interested.

The Deputy Registrar is competent to fix the time for hearing, and to require the appellants to insert the names of persons interested; as also to serve them with notices.

The document, the registration of which is refused, should be put in with the petition, and the presentation should be in the office.

Note by the Deputy Registrar.—THIS is the first appeal filed in this Court under Section 84, Act XX. of 1866.

I beg to refer it for the Court's orders on the following points:—

1st.—Whether the grounds of this petition ought not to have been stated in the English language?

2nd.—Whether, in accordance with the terms of Clause 4, Section 84 of the Act above adverted to, "a copy of the petition with a notice at the foot thereof" of the day fixed for the hearing of the appeal is to be issued, as in other appeals, by the Deputy Registrar, for service on the registering officer and such other persons as may be concerned in the case. The law provides for the service of the copy of the petition, &c., "on the registering officer and such other persons (if any) *as the Court* shall think fit?"

3rd.—If it should be held that the Deputy Registrar shall deal with such appeals in the preparatory stage, as he does with other appeals, is he—

(1)—To fix the time for the hearing as in other appeals; and

(2)—To require the appellant to insert at the head of the petition of appeal the names of all such persons as may be concerned, and who should be served with the notice.

The document refused registration need not, I presume, be filed with the petition of appeal, as, according to Clause 3 of the Section and law above adverted to, it "is admissible in evidence *on the presentation and hearing* of the petition."

And it is also a question for consideration, whether, under the terms of the last-named Clause, the "*presentation and hearing*," being mentioned as acts simultaneously performed, the *presentation* should not be before the Court *instead* of, as in other appeals, in the office.

Bayley, J.—With reference to the *first* point referred by the Deputy Registrar, we think that it is only when a party understands English sufficiently for the purposes of verification, that the petition should be in English. When this is not the case, a translation accompanying the vernacular petition will be proper and sufficient.

With regard to the *second* point submitted, we think that a notice in accordance with the provisions of Clause 4, Section 84, Act XX. of 1866, ought to be issued on both the registering officer and on the other persons interested in the matter.

With regard to the *third* point, we think that the Deputy Registrar is competent to fix the time for the hearing of the case, and to require the appellant to insert at the head of the petition of appeal the names of such persons as are interested in the matter, as also to serve them with notice.

We also think that the document should be always put in with the petition of appeal, and that the presentation should be in the *office* in the same way as in the case of Miscellaneous Appeals.

Let the petition be received subject to the above remarks.

The 1st June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Lease—Mokurruree istmoraree.

Case No. 3328 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 8th September 1868, reversing a decision of the Sudder Ameen of that District, dated the 31st January 1868.

Lakhoo Koer and others (Defendants), *Appellants,*

versus

Huree Kishen Roy and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Debendro Narain Bose* for Appellants.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

In the absence of any evidence to show that a grant was for life only, the words "mokurruree istmoraree" are sufficient to make it hereditary.

Glover, J.—This is a suit to set aside a mokurruree pottah granted to the husband of the defendant by the then proprietrix of the estate, Mussamut Fateemoonissa, on the ground that the lease conveyed only a life-interest to the grantee, Tek Narain. The plaintiff is the purchaser of Mussamut Fateemoonissa's rights in the estate.

The Sudder Ameen, Moulvie Waheed-ooddeen, held that the pottah gave hereditary right to hold at a fixed rate of rent, and dismissed the plaintiff's suit; but the Additional Judge, on appeal, considered that, there being no proof of intention, the absence of any direct words conveying hereditary right was fatal to the defendant's claim. He relied upon a decision of the Sudder Dewanny Adawlut in the case of Mussamut Ameeroonissa Begum *versus* Maharaj Het Narain Singh, Sudder Dewanny Adawlut Reports for 1853, page 648, and gave plaintiff a decree for possession.

The only point for consideration in special appeal is the construction of the defendant's pottah. It is contended on her behalf that the Additional Judge has misconstrued it, and that there was evidence of the grantor's intention to give the lease in perpetuity which the Lower Appellate Court misunderstood.

The last portion of this objection may, I think, be put aside from our consideration, as it is quite clear from the receipt which was read to us that the rent received by the plaintiff from the son of the original grantee was for a period when her father was alive, so that no inference can be drawn from that circumstance favorable to the special appellant.

Then as to the meaning of the pottah —The words used are "mokurruree istmoraree," and it is urged that these words are sufficiently large to include an hereditary grant at fixed rates. The cases of Munrunjun Singh *versus* Rajah Leelanund Singh, 3 Weekly Reporter 84, and 5 Weekly Reporter 101, are quoted in support of the contention with reference to the grounds of the Additional Judge's decision.

I do not understand that a Divisional Bench of this Court is bound by a decision of the late Court of Sudder Dewanny Adawlut, or that, if we held a different opinion to that expressed in former judgments of that Court, we should be obliged to refer the question to a Full Bench. In the present case, moreover, the question is the proper construction of a document, in answering which we are not, I apprehend, bound by any decision previously recorded, whether by the Sudder Court or by this Court.

It must not be forgotten, moreover, that the case of Mussamut Ameeroonissa Begum, decided by the Judges of the Sudder Adawlut, was a very peculiar one, and proceeded to a considerable extent at least on evidence which tended to qualify the wording of the pottah, and to show that it was not intended to convey hereditary title. The learned Judges of the Sudder Court say in their judgment, page 655: "The defendant's "plea, when read in the light of this "document (a letter from the grantee com-"plaining that the terms of his pottah were "not sufficiently explicit), seems to have no "good foundation."

It appears, therefore, that the decision went, not so much on the fact that the words "mokurruree istmoraree" were not *per se* sufficient to give hereditary title, as on other attendant circumstances which showed what the grantor's intentions were at the time the lease was given, and that the grantee was all along cognizant of the weakness of his title.

The case of Rajah Mode Narain Singh *versus* Kant Lall, Sudder Dewanny Adawlut Reports for 1859, Part II., page 1573, proceeds on the assumption that the Sudder Court had in previous cases ruled that the absence of words signifying "from generation to generation" took away from a mokurruree grant absolutely any claim to hold in perpetuity. For the reasons stated above, I do not consider that any such broad rule was laid down; and if it had been, I should not be prepared to assent to the ruling.

Then, as to the meaning of the words themselves, it cannot, I imagine, be for a moment contended that the words "mokurruree istmoraree" do not in their lexicographical sense mean "something that is fixed for ever." No doubt, there is a custom which adds to these words "generation after generation," but this is by no means a universal custom, and the extra words are etymologically redundant. Moreover, if the pottah were merely for the life of the grantee, what could be easier than to say so, and what was the object of using words that could be applied in their ordinary sense only to hereditary rights? I should say that, where a grantee holds under a pottah worded in this way, he has at least made out the very strongest *primâ-facie* case, and that the *onus* of showing that by the custom of the district pottahs conferring hereditary title always contained, and were obliged to contain, the words "*ba furzundan,*" "*nuslun bayd nuslun,*" or similar phrases would be heavily upon the person seeking to set aside the lease. In this case there is no evidence given as to any particular custom, and we must fall back on the words of the pottah itself.

Some stress was laid by the special appellant's pleader on the words "*kaem mokam,*" "representative," which are found in the pottah, but these appear to me to refer solely to the Rupees 411 paid as *nuzzur* or *bonus* for the grant of the lease, and do not in any way indicate that, after Tek Narain's death, he was to be succeeded *quoad* the lease by any one, or that the plaintiff received rent from the grantee's son for any period subsequent to his father's death.

It appears to me, therefore, that, in the absence of any evidence on the part of the special respondent to show that the grant was one for life only, the words "mokurruree istmoraree" are sufficient to make that grant hereditary.

I do not think that the decision of the Privy Council in the case of Dhunput Singh *versus* Gooman Singh, 9 Weekly Reporter, p. 3, applies to this case. I may remark, however, that their Lordships (page 6) seem to consider that a "mokurruree istmoraree" lease protected for ever a tenant from enhancement. They say: "If it "can be shown that the respondent's sub-"tenure is a mokurruree istmoraree, "there is an end of the matter." I refer to this case, merely because it was made use of in the argument before us.

I would reverse the decision of the Additional Judge, and restore that of the Sudder Ameen with costs of all Courts on the special respondent.

Kemp, J.—I concur in this judgment.

The 1st June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Zerat lands.

Case No. 206 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 27th November 1868, reversing a decision of the Moonsiff of Mozuffurpore, dated the 19th February 1868.

Mr. W. S. Crowdy (Plaintiff), *Appellant,*

versus

Sree Misser and others (Defendants), *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Respondents.

A suit for rent from a party holding lands as *zerat* in his own exclusive possession is one for rent as between landlord and tenant, and cognizable under Act X., 1859.

Kemp, J.—The only question in this case is one of jurisdiction. The Judge has given no reasons whatever for holding that the Civil Court had no jurisdiction to try the case; but after hearing the argument on both sides, we are of opinion that his decision is right. In the grounds of special appeal, it is said that, this being a suit for rent in the shape of damages against certain co-sharers of the plaintiff for lands occupied by them personally, the Revenue Courts had no jurisdiction to interfere in the matter.

On turning to the plaint, we find that this was a suit simply for rent, and not for damages. The defendant is sued on the footing of a ryot, and the plaintiff, prior to bringing the suit, appears to have taken proceedings under Section 10 of Act VI. of 1862, which Act, under Section 21 of the said Act, is to be read with, and taken as a part of, Act X. of 1859. Section 10 of the said Act contemplates persons entitled to receive rent of an estate or tenure, and the proceedings are as between landlord and tenant. The defendant does not set up that he holds in his own right by purchase of a proprietary right. He holds certain lands as *zerat* lands in his exclusive possession, and it follows, therefore, that he can only hold these lands as a tenant liable to pay rent to the proprietors according to their quotas.

The suit, therefore, appears to us to be one for rent as between landlord and tenant, and we think that it must be tried under Act X. of 1859, and not in the Civil Court.

The decision of the Judge is affirmed, and the special appeal dismissed with costs.

The 2nd June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Onus probandi—Rent-suit.

Case No. 538 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 17th November 1868, affirming a decision of the Deputy Collector of that District, dated the 18th June 1868.

Zimut Hossein and others (Defendants), *Appellants,*

versus

Kuneez Fatima (Plaintiff). *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Kalee Mohun Doss and *Moonshee Mahomed Yusuff* for Respondent.

In a suit for rent where a deed of sale is the foundation of plaintiff's right, he is bound to prove the deed even if it is not objected to in defendant's written statement.

Kemp, J.—THE only ground in special appeal which we think it necessary to notice is the first ground, namely, that the deed of sale, which is the foundation of the plaintiff's right, not being proved, the claim ought to have been dismissed, and that the failure to object to it in the written statement is no reason at all for exempting the plaintiff from proving it, more especially as Hosseinee, the plaintiff's alleged vendor, is no party to the present suit, and any decree for rent passed against the special appellant is not binding on her. Further, that this point was not tried by the Lower Appellate Court, although it was taken in the grounds of appeal, and the attention of the Court was drawn to it. We think that this contention is correct. The first issue in the Court of first instance is whether Mussamut Hosseinee and the plaintiff obtained possession of the share in question or not. The Deputy Collector did not try this question on the ground that no issue was raised. It is true that he found on the evidence that the zur-i-peshgee to Hosseinee and the kubooleuts of the sub-lessees of Hosseinee were proved; but there has been no finding as to whether the plaintiff's purchase from Hosseinee has been established or not. Hosseinee has not been made a party to this suit, and therefore the finding will not bind her, and it may be that, in a suit brought for rent by her, the defendants would have to pay twice over. We therefore remand the case to the first Court to try the issue whether the purchase by the plaintiff from Hosseinee has been established or not.

The parties to be at liberty to adduce evidence on the above point. Costs to follow the result.

The 2nd June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Possession—Mesne-profits—Limitation—Right of action.

Case No. 23 of 1869.

Regular Appeal from a decision passed by the Deputy Commissioner of Gowalparah, dated the 27th November 1868.

Protap Chunder Burooah (Plaintiff), *Appellant,*

versus

Ranee Surno Moyee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Tarinee Churn Bhuttacharjee* for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

A suit for mesne-profits instituted after Act XIV. of 1859 came into force is subject to its provisions, although founded on a decree for possession in a suit which was instituted before the passing of that Act.

A regular suit for mesne-profits will lie after a suit for possession, if in the latter no question of mesne-profits was raised or decided.

Macpherson, J.—THE first ground taken by Mr. Allan for the appellant in this case is that six years' limitation will not apply in the present instance; because, although this suit was instituted in 1866, the former suit, which terminated with a decree for possession in favor of the plaintiff, was instituted long before the passing of Act XIV. of 1859. But it appears to us that the present suit having been instituted after Act XIV. of 1859 came into force is subject to the provisions of that law, and that that law alone will apply. Consequently, we think that in no case can the plaintiff recover mesne-profits for more than the six years preceding the institution of the suit.

The second ground of appeal is that the Deputy Commissioner is wrong in holding that the plaintiff cannot bring a regular suit for mesne-profits which fell due within the period from the institution of the suit for possession in 1851 to the execution of the decree in 1866.

The Deputy Commissioner relies upon a decision of the Madras High Court, reported at page 453, Stokes's Madras Reports. That case does not accord with decisions of this Court; and there is no doubt that, according to the principle laid down in the decision of the Full Bench in the case of Modhoo Soodun Lall *versus* Bhikaree Singh (4 Weekly Reporter, page 109, Miscellaneous Rulings), as also in various later decisions of this Court upon this point, a regular suit for mesne-profits will lie after a suit for possession, if in that suit no question of mesne-profits was raised or decided.

The plaintiff is entitled to a decree for such mesne-profits as may have accrued within six years prior to the institution of this suit.

The case must be remanded to the Lower Court, in order that it may ascertain the amount of mesne-profits. Any claim or statement made by the defendant as regards the value of, or profits realized from, the property will be admissible as evidence against him, though not conclusive.

Each party will bear his own costs of this appeal.

The 2nd June 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Settlements—Board of Revenue—Commissioners.

Case No. 2728 of 1868.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 14th July 1868, reversing a decision of the Subordinate Judge of that District, dated the 28th February 1867.

Huro Lall Tewaree (Plaintiff), *Appellant,*

versus

The Collector of Bhaugulpore and another (Defendants), *Respondents.*

Messrs. J. W. B. Money and *J. S. Rochfort,* and *Baboos Ashootosh Chatterjee* and *Chunder Madhub Ghose* for Appellant.

Baboos Onookool Chunder Mookerjee, Juggadanund Mookerjee, and *Poorno Chunder Shome* for Respondents.

A settlement of resumed lakheraj land made by a Collector "subject to the orders of the Board of Revenue" may be set aside by that Board.

Under the Board's rules, a Commissioner has authority to set aside such a settlement, and is limited to no time in the exercise of his powers of revision.

Jackson, J.—IT appears to me that the decision of the Lower Appellate Court is correct. The agreements entered into between the Collector and the special appellants were distinctly declared by the Collector at the time and so stated in the agreements to be not final, but subject to the consent of the Board of Revenue. Those agreements were subsequently brought by the Commissioner of the Division to the notice of the Board of Revenue. The Commissioner was of opinion that the arrangements proposed by the Collector were not proper arrangements, and the Board of Revenue, concurring with the Commissioner, refused to sanction the agreements entered into by the Collector, set them aside, and ordered other agreements to be made. It is said that great delay occurred in the action taken by the Commissioner and the Board of Revenue, and it is also said that the Collector, in fact, never intended that the agreements entered into by him should be subject to the consent of the Board of Revenue; that the agreement was drawn out in an old form, which had been long abandoned, and in this way alone had the words "subject to the consent of the Board of Revenue" crept into it by accident; that, in

act, the Collector never submitted his proceedings for the sanction of that Board, but that, under the rules promulgated by the Board itself, the Collector had full authority to enter into agreements of this description of his own accord, and without obtaining the sanction of the Board. The lower Appellate Court has rejected all these objections, on the ground that the Board of Revenue had full power *under the law* to interfere in the acts of the Collector, and that, no time having been laid down in the law within which it was to exercise those powers, it could interfere at any time.

The agreements in this case referred to the settlement of some lakheraj land which had been resumed. It had been settled from time to time with different parties, but the settlement had come to an end, and it was necessary to re-settle the land. The ex-lakherajdar was the person entitled to the settlement. He put in a petition asking for a settlement at lower rates than had been proposed. The Collector considered that this petition was a refusal to take the settlement at the rates proposed. The Collector accordingly entered into a settlement with the special appellant. The ex-lakherajdar, after some delay, brought the matter to the notice of the Commissioner. That officer and the Board of Revenue considered that the ex-lakherajdar had not refused the settlement, but was entitled to it, and ordered the settlement to be made with him. The special appellant has now brought this suit to recover possession of the resumed estate, alleging that the agreement with him was final, and could not be set aside.

As the settlement made with the special appellant was distinctly declared to be subject to the orders of the Board of Revenue, and it is not shown or proved in any way that that clause of the agreement crept into the settlement by mistake, we might decide upon that alone that the Board of Revenue had full power to interfere. If the rules of the Board of Revenue are to be looked to, then the Commissioner had full power to interfere, and did interfere, in accordance with those rules, though it may be that, as there had been some delay before the case was brought to his notice, and as the agreement distinctly referred to the consent of the Board of Revenue, he preferred to obtain the Board's consent before he passed orders in the case. The argument that, if the Commissioner did interfere, he was bound to interfere within one month, because that is the period laid down for appeals to him, cannot, in my opinion, stand. It may be that appeals must be preferred within one month, but no time is laid down in the rules within which the Commissioner was bound to exercise his powers of revision, and it was these powers of revision which he exercised in this case, and not his powers on appeal. Whether, then, the Board of Revenue had power itself to interpose in the settlement or not, it does not seem to be denied that it had authority to make rules under which settlement-officers were to conduct settlement-proceedings; and, even under those rules, the orders passed by the Commissioner were legal. The Commissioner had authority to set aside the settlement, and did do so. The plaintiff must fail in his suit even upon this ground. It is not necessary under these circumstances to examine the law laid down by the Judge as regards the powers of the Board of Revenue to set aside such a settlement as this. We dismiss this appeal with costs.

Mitter, J.—I concur. The plaintiff is bound by the terms of his lease, and under those terms the Board had full power to interfere.

The 2nd June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Declaratory decree—Cause of action—Joint Hindoo property—Onus probandi.

Case No. 2951 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 19th June 1868, affirming a decision of the Subordinate Judge of that District, dated the 17th December 1867.

Gopee Lall (Plaintiff), *Appellant,*

versus

Mohunt Bhugwan Doss and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Khettur Mohun Mookerjee* for Appellant.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondents.

The fact of joint property standing upon the Collector's register in the name of the elder brother is no slur on the title of the younger, and no ground for a suit on the part of the latter for declaration of title.

In a suit to recover possession of a share of joint property sold in execution, on the ground that the judgment-debtor (plaintiff's brother) was the owner of only

a portion, where defendant pleaded that the whole property had been made over by the grandfather, by a deed of gift, to the judgment-debtor: HELD that the plaintiff was entitled to the presumption of co-partnership, and the *onus* lay with the defence to prove that the property had passed absolutely to the judgment-debtor.

Glover, J.—THE plaintiff in this case sues to recover possession of a 3 annas 1 pie share of Mouzah Waree from the hands of defendant No. 1, Mohunt Bhugwan Doss, a purchaser at an execution-sale, on the ground that the judgment-debtor, plaintiff's brother, the defendant No. 2, Ram Bullub Lall, was the owner of half the property only, the other moiety belonging to plaintiff. His allegation is that the property, along with other lands, belonged to his grandfather Kanhya Lall, from whom it descended to his (plaintiff's) father, Madhub Lall, from whom again it came to plaintiff and his brother in equal shares.

The plaintiff also sues for confirmation of his possession and a declaration of his title in a 2-annas share of Mouzah Himmutgunge. This part of the suit refers only to defendant No. 2.

The defendant No. 1 replies that the whole of Kanhya's interest in Mouzah Waree was made over by that individual by deed of gift to his grandson Ram Bullub Lall in 1834, and that neither plaintiff nor his father Madhub Lall had ever been in possession.

The defendant No. 2 filed no answer. The first Court held that the gift by Kanhya to Ram Bullub was proved, and that, so far as Mouzah Waree was concerned, plaintiff had no case. His suit for confirmation of possession in respect of Mouzah Himmutgunge was dismissed on the ground that it disclosed no cause of action against the defendant No. 2.

The Judge took up the question of general limitation, which had not been decided by the Principal Sudder Ameen, and held that, as the plaintiff had not been able to show any possession in himself or in his father for 12 years preceding the suit, his case was barred. With regard to Mouzah Himmutgunge, he agreed in opinion with the first Court.

The objections urged before us in special appeal are two—

(1) That there was a sufficient cause of action to the plaintiff as regards Mouzah Himmutgunge; and

(2) That the issue of limitation could not, under the circumstances, be properly decided without going into the question of the genuineness of the alleged gift from Kanhya to Ram Bullub.

The first objection appears to us untenable. Neither of the defendants have at any time disputed the plaintiff's right to the share he claims in Himmutgunge, nor has anything been done by either of them to cast a slur upon his title.

Ram Bullub's name is in the Collector's Register, he being the elder brother, and the plaintiff being till quite lately a minor. If the plaintiff thinks it better to have his own name registered as joint proprietor, he can apply to the Collector, but he clearly has no ground of action in a Civil Court against defendants.

In deciding the second point of special appeal, regard must be had to the peculiar circumstances of this case, and the first question is, on whom does the *onus probandi* lie. The Judge has followed the ordinary rule, and laid it on the plaintiff, and this we think was an error. The plaintiff dates his cause of action from the day on which the defendant No. 1 took possession of the entire 3 annas 1 pie share of Mouzah Waree. The defendant No. 1 dates his from the day on which Kanhya is alleged to have made the gift to his grandson, *viz.*, in 1834. Now, applying the ordinary test for settling the question of *onus*, and looking to the position of both parties, had no evidence been given, it is clear to us that the plaintiff must have gained the verdict, had neither side offered evidence.

The family is not alleged to have separated, and is, therefore, at this time presumably joint. The ostensible proprietorship of Ram Bullub is no way incompatible with the existence of joint rights in his younger brother, and the possession of Ram Bullub would *primâ facie* be the possession of Gopee Lall.

Unless this presumption were displaced by evidence that Ram Bullub held separately and of his own right, we think that the plaintiff would be entitled to the benefit (which the Hindoo law gives to all members of a joint family) of being legally presumed to be in co-partnership with Ram Bullub, and that there was no necessity on the plaintiff to prove by direct evidence either his own or his father's possession. It must not be forgotten, moreover, that up to within a

short time of suing the plaintiff was a minor and incapable of showing possession in any other way than that he was maintained out of the family estate, and as his father Madhub Lall died when the plaintiff was six years old, it is not easy to see how he could have proved his father's possession.

The Judge below has, no doubt, found as a fact that Madhub Lall never was in possession, but this of itself is not enough to do away with the presumption of Hindoo Law that Ram Bullub's possession was that of his brother also.

It appears to us that, before the plaintiff could be declared barred by limitation, the defendant No. 1 was bound to show that the property had passed absolutely to Ram Bullub in 1834.

This he did to the satisfaction of the first Court, and the Judge, we think, should have followed the same course as the Principal Sudder Ameen, and have tried the issue in bar and the issue of fact together.

We remand the case to him for re-trial accordingly. Costs to follow the result.

The 3rd June 1869.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Limitation—Possession—Section 15, Act XIV., 1859.

Case No. 203 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 10th November 1868, reversing a decision of the Moonsiff of that District, dated the 17th August 1867.

Golam Nubee and others (Plaintiffs), *Appellants,*

versus

Bissonath Kur and others (Defendants), *Respondents.*

Baboo Ramanath Bose for Appellants.

Baboos Kalee Kishen Sein and *Nuleet Chunder Sein* for Respondents.

Where plaintiffs had been out of possession for more than 12 years before the institution of a suit to recover immoveable property, it was held that forcible possession for a few months prior to dispossession under Section 15, Act XIV. of 1859, gave them no fresh cause of action.

Jackson, J.—This suit was preferred by Moonshee Golam Nubee and others, plaintiffs, to recover from Bissonath Kur and others, defendants, possession of one anna share of Kismut Nischinpore.

The plaintiffs stated that they had purchased this property on the 30th Bysack 1273; that they had obtained possession of it, but that the defendants had brought a suit against them under Section 15, Act XIV. of 1859, and under that and by the decision in that suit they had been dispossessed—and the plaintiffs alleged that their cause of action was their dispossession by the defendants under that decision.

The defendants alleged that neither the plaintiffs nor the plaintiffs' vendor had been in possession of the estate in dispute at any time within 12 years of suit, and that the plaintiffs' suit was barred by limitation.

On the point of limitation, the first Court decided that as the plaintiffs were in possession for a few months previous to the decision passed under Section 15, Act XIV. of 1859, they were in possession for those few months within 12 years of the institution of the suit, and their claim, therefore, was not barred by limitation.

The Appellate Court has reversed that decision. The Appellate Court has found that the plaintiffs' cause of action did not originate in the decision under Section 15, Act XIV. of 1859, but that for 16 or 17 years before that decision, the plaintiffs' vendor had been out of possession. The Appellate Court, therefore, considered the few months' forcible possession which the plaintiffs had obtained to be no possession at all, and in no way to bar the effect of the Law of Limitation.

The case of the plaintiffs was that their vendor and the defendants were joint members of an ijmalee Hindoo family, but that they separated in 1263; that the property now in dispute was purchased by the family prior to the separation; and that, therefore, the plaintiffs' vendor had been entitled to a share of this property along with his other

brothers, and that this share he had sold together with other properties.

The case of the defendants was that the separation between the joint brothers took place so far back as 1254, and that the disputed property had been purchased after the separation by the other brothers, and that the plaintiffs' vendor had no connection with it. The finding of the Appellate Court upon those disputed points is that from the evidence of the witnesses examined for both parties in the case, although it was not clearly found in what precise year the separation took place, but that still it was clearly established that 16 or 17 years ago the family separated. Also that the evidence on the record did not at all prove that the vendor of the plaintiffs, after he had separated from his paternal uncles, was ever in possession of the property in suit. The Subordinate Judge goes on to find that the plaintiffs also were not in possession of the disputed share within 12 years of the institution of this suit. In fact, the Judge found that within 16 or 17 years before suit, neither the plaintiffs nor their vendor had been in possession. The Judge of the Lower Appellate Court differed from the first Court and held that the few months' forcible possession prior to the decree passed under Section 15, Act XIV. of 1859, did not in any way bar limitation, but considered that in such a case the original cause of action must be looked to. Looking then to that cause of action, the Judge held that the suit was barred by limitation.

On special appeal, the same point has been taken before us. It is said that the plaintiffs obtained a fresh cause of action when they were dispossessed by the decision under Section 15, Act XIV. of 1859. The latter part of the Clause is to this effect: "But nothing in this Section shall "bar the person from whom such possession "shall have been so recovered, or any other "person, from instituting a suit to establish "his title to such property and to recover "possession thereof *within the period limit-* "*ed by this Act.*"

The first point, therefore, is as to how we are to read the words "period limited by this Act." What is the period of limitation assigned by this Act to suits to recover possession of immoveable property? Section 1, Clause 12, lays down the period of 12 years as the period of limitation from the time that the cause of action arises. Taking the facts, then, as found by the Lower Appellate Court, *viz.*, that the plaintiffs' vendor separated from the Hindoo family with which he had previously been joint about the year 1254, or at least 16 or 17 years before the institution of this suit, and that neither the plaintiffs' vendor nor the plaintiffs were ever in possession of this disputed property until they took forcible possession, and that the only time during which within that period they had been in possession was the few months during which they held such *forcible, i. e.*, wrongful possession: the question is when, under such circumstances, did the plaintiffs' cause of action arise? According to the plaintiffs' statement, their vendor was in possession in 1263 and remained in possession from 1263 up to the present time, and that the dispossession has only taken place in consequence of the decision under Section 15, Act XIV. of 1859. If the plaintiffs had proved the facts of this case as stated by them, no doubt their suit would not be barred by limitation, for the cause of action would then arise as stated by them; but the facts being found against them, it is quite clear that on the day on which they were dispossessed, no cause of action accrued to them. If they had been dispossessed for 15 years, forcible possession for a few months in the 16th year gave them no fresh cause of action. If we were to hold that any fresh cause of action arose to them on such date, it would be holding that wrongful and forcible possession was equivalent to honest and legal possession, and it would be altogether defeating the object and policy of the law. Although there is no direct precedent on the point, there is a case at page 306, Hay's Reports, Volume I., the case of Mookta Keshee *versus* Ranee Luckhee and others, in which the same view of the law has been taken with reference to a decision under Act IV. of 1840, which was an Act for possessory suits as much as Section 15, Act XIV. of 1859.

We are of opinion, then, that the plaintiffs have not proved that their cause of action arose from the date stated by them, and that they have not proved that their cause of action arose within 12 years of the institution of the suit, and on this ground we hold that the Lower Appellate Court was right in saying that limitation barred this suit.

We, therefore, dismiss this special appeal with costs.

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The 3rd June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Misjoinder—Sections 8 and 350, Act VIII. of 1859.

Case No. 592 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 14th August 1868, reversing a decision of the Subordinate Judge of that District, dated the 24th February 1868.

Mussamut Ameerun and others (Plaintiffs), *Appellants,*

versus

Mussamut Wuseehun and others (Defendants), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusuff* for Appellants.

Mr. R. E. Twidale for Respondents.

In a suit by a Mahomedan widow to have an adjudication as to her right of inheritance in her deceased husband's estate to a specified extent, and to have two deeds of *bye mukassa,* or gifts in lieu of dower, set up by two other widows of her husband, set aside on the ground that they were collusive and interfered with plaintiff's possession:

HELD by Kemp, J., (*Glover, J., dissenting*) that plaintiff had a common ground of action against the other widows, and that there was no misjoinder of different causes of action.

HELD by Glover, J., that a misjoinder of causes of action being expressly forbidden by Section 8 of the Civil Procedure Code, is not a mere irregularity within the meaning of Section 350, but an illegality barring the hearing of a suit.

Glover, J.—THIS was a suit by the widow of Kader Ali to have an adjudication as to her right of inheritance in her deceased husband's estate to the extent of 18 sehams out of 96 sehams, into which the property of the deceased is stated to have been divided according to the rules of Mahomedan Law. There were two sets of defendants, the two other widows of the deceased Kader Ali, and his sons, and other near relatives. The plaintiff further sued to have two deeds of *bye mukassa* (or gifts in lieu of dower), held by the defendants Nos. 1 and 2, set aside on the ground that they were collusive and interfered with her getting possession of her share of the property.

The widows were the only parties who defended the suit. The other relatives of Kader Ali supported the plaintiff's case. These widows stood upon their deeds of *bye mukassa* and alleged that they had been in possession of the property covered by them from the dates of the deeds, and that the plaintiff had no right to dispossess them.

The Court of first instance first took up the issue of misjoinder, and on that issue the Principal Sudder Ameen decided for the plaintiff, and then on the merits gave the plaintiff a decree for all that she sought.

The Judge, on appeal, held that the suit was barred by Section 8 of Act VIII. of 1859, inasmuch as it mixed up different causes of action against different parties.

Two grounds were taken before us in special appeal—*first,* that there was substantially no misjoinder; and, *secondly,* that if there were, under Section 350 of the Code of Civil Procedure, the Judge ought not to have dismissed the plaintiff's case in the appeal stage upon what was a mere irregularity which did not affect the merits of the case or the jurisdiction of the Court.

With regard to the *first* objection, it appears to me that the Judge was right. The plaintiff's claim to a share of her husband's property, namely, 18 sehams, was not denied, nor was it denied that the estate of Kader Ali was divided into 96 sehams. So far, therefore, nobody opposed her claim; and if, as her pleader now wishes to make out, this was her case, she had clearly no cause of action, but it is evident that what she did want to have adjudicated (and that is substantially also her ground of appeal to this Court) was, whether or not the two deeds of gift in lieu of dower propounded by the defendants Nos. 1 and 2 were genuine and a sufficient bar to her getting possession of the property sued for. Now, these deeds of gift are in favor of two separate persons, and, as the Judge finds, for two different properties; the one was executed in the year 1842, and the other in the year 1847. It is contended by the special appellant that her cause of action was not the execution of these deeds of *bye mukassa,* but the death of her husband Kader Ali, and that, therefore, it was a matter of absolute indifference to the decision of her case whether these two deeds were executed in favor of one person or of more persons, or at one time or at different times.

It appears to me that the 8th Section of the Code of Civil Procedure fully applies to a case of this description.

Granting, for the sake of argument, that the cause of action to the plaintiff herself was one, it is quite clear that the cause of action was not against the same parties inasmuch as one of the defendants was one of the widows of Kader Ali, and the other, another of those widows, and they both claimed under different deeds executed at different times for different properties. The law says that causes of action by and "against" the same parties and cognizable by the same Court may be joined together in the same suit, but it cannot be inferred that it would be sufficient under the law that the different causes of action should be common to the plaintiff only, and not common against the defendants, and it seems impossible to argue that the causes of action of the plaintiff in this case were substantially against the same parties. The application of Section 8 appears to me to have been very properly laid down in the case of Ramoona and another *versus* Manicko Moyee Chowdhrain and others, reported at Volume IX. of the Weekly Reporter, page 525, and I quite concur in the view which was there taken by Justices Phear and Hobhouse.

With regard to the *second* point, that supposing this to be a misjoinder the Judge ought not to have decided the case on appeal upon what after all was merely an irregularity, it appears to me that Section 350 of Act VIII. of 1859 has no application to the case. The words of that Section are that "no decree shall be reversed or modified in appeal, or a case remanded to the Lower Court on account of any error, defect, or irregularity not affecting the merits of the case, or the jurisdiction of the Court." Now, if the decision of the first Court on the question of misjoinder was a mere irregularity, then no doubt the words of the Section would apply; but it appears to me to be something more than an irregularity—something, in fact, expressly forbidden by Section 8 of the Code, and consequently an illegality, instead of an irregularity. It cannot, I apprehend, be contended that the words of Section 350 refer to irregularities such as are declared by other Sections of Act VIII. of 1859 to be absolute illegalities barring the hearing of a suit.

We have been referred to the case of Sooroop Chunder Pal *versus* Mothoor Mohun Pal Chowdhry and others, reported in Volume IV. of the Weekly Reporter, page 109, to show what the Judge ought to have done in a case of this description. I do not understand that that decision lays down any distinct ruling on the point: it merely sets forth that the Judge in the Appellate Court, under Act XXIII. of 1861, might have, if he chose, amended the first Court's proceedings and separated the suits. It may be that the Judge could have done so in this case, but the question is not now whether the Judge could or could not have done so, but whether he was wrong in law in dismissing the plaintiff's suit on the ground of misjoinder. With regard to the first part of the decision above quoted, the learned Judges say that if there had been a misjoinder, they had their doubts as to whether the Judge below was right in taking the steps he had taken in appeal, namely, to dismiss the plaintiff's suit. I do not think, therefore, that this decision in any way binds us, or that it ought to be taken as a ruling disposing finally of the point in question. It appears to me, therefore, that the Judge holding that the plaintiff's case was bad for misjoinder, had no other course open to him than to put the plaintiff out of Court.

The decision of the Lower Appellate Court appears to me to be correct, and I would dismiss the special appeal with costs.

Kemp, J.—I regret that I cannot concur in the judgment of Mr. Justice Glover. I am of opinion that the first ground taken in special appeal is a good ground, and that there has been no misjoinder of different causes of action in this suit. The suit was by a widow for her share in the estate left by her husband. Now, under ordinary circumstances, the share of a widow under the Mahomedan Law is plain and definite, and there could have been no difficulty whatever in her obtaining the share she was entitled to under the Mahomedan Law, were it not for the fact that her title was disputed under alleged deeds of *bye mukassa* set up by the two other widows of her deceased husband. The plaintiff, therefore, sued to have her share declared and to set aside the two alleged deeds of *bye mukassa* which alone prevented her from obtaining the share to which she was entitled under the Mahomedan Law. It appears to me that this was a case in which it was absolutely necessary that all the parties interested in this question of succession to the estate of Kader Ali ought to have been made parties.

The decision quoted from Volume IX. of the Weekly Reporter, page 525, in the case of

Ramoona and another *versus* Manick Moyee Chowdhrain and others, has reference to a very peculiar case. In that case there were two co-plaintiffs, in no way connected with each other, suing under four distinct causes of action; one plaintiff suing on two distinct against one defendant for one portion of the property, and against the other co-defendant for the other portion of the property; and the other co-plaintiff suing on two distinct causes of action against the two co-defendants in the like manner. In that case, on the particular facts brought before the learned Judges, they held that "the causes of action of the "two co-plaintiffs were so distinct in their "nature as to be dependent on entirely dif-"ferent evidence for their respective sub-"stantiation." In like manner they observed that "the defence of the two co-defend-"ants might easily be imagined to be equal-"ly different on the different cause of action." They, therefore, thought that "it would be "a monstrous injustice that the defendants "should be obliged, in spite of their protest "in the beginning, to have their distinct "defences to the one claim and the other "confused together and tried as one be-"tween them and the two several plaintiffs "in one action, just as if the two plaintiffs "had a common ground of action against "them."

Now, in the present case, the plaintiff has a common ground of action as against the two other widows of her deceased husband; the defences of the defendants will not be dependent on entirely different and distinct evidence; in short, there is nothing but these two deeds of *bye mukassa* which prevents the plaintiff from succeeding in her claim, her share in the estate being admitted and not disputed under the Mahomedan Law.

I, therefore, fail to see why the question of the genuineness or otherwise of these deeds of *bye mukassa* should not be tried in this suit; more particularly with reference to the position of the parties, to the fact that the other heirs, that is, the sons and daughters of the late Kader Ali, do not dispute the plaintiff's claim; and, lastly, to the fact that this suit will dispose of the whole question of the extent of the plaintiff's share in the estate, if any, and prevent further litigation.

In this view of the case, I would reverse the decision of the Judge, and remand the case to the Judge to be tried, as it was tried in the Court of first instance on the merits. The case is therefore remanded for trial with reference to this judgment, under Section 15 of the Letters Patent.

The 3rd June 1869.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Secondary evidence—Objection.

Case No. 765 of 1869.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 29th December 1868, reversing a decision of the Subordinate Judge of that District, dated the 18th September 1866.

Kissen Kaminee Dassee (Plaintiff), *Appellant,*

versus

Ram Chunder Mitter and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Romesh Chunder Mitter* and *Gopal Lall Mitter* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

An objection to the reception of secondary evidence is properly made in the Court of first instance, but cannot be allowed in any appeal Court.

Phear, J.—THE only question in this case now is whether or not a certain property named Dogachea is dealt with by a certain ikrar, and thereby divided amongst the members of the family into four parts. If it is, the plaintiff is entitled to succeed in her suit. This ikrar is not itself produced in Court, but the plaintiff gives secondary evidence of its contents. The Lower Appellate Court is of opinion that this secondary evidence is weak and insufficient to prove that Dogachea did form part of the property divided by the ikrar; and on that account it considered that the plaintiff had failed to make out her claim.

We think that if, under the circumstances of this case, secondary evidence was admissible, the secondary evidence in question very distinctly makes out that Dogachea *was* part of the property divided by the ikrar.

Kishoree Mohun is the principal witness, and he appears to make three unmistakeable assertions: *first*, that Dogachea was the property of Anund Chunder; *secondly*, that two years after Anund Chunder's death, all his property was divided by the ikrar,

which is now in question in this suit; and, *thirdly*, that this property (Dogachea) was particularly named as part of the property divided.

If this witness is worthy of being believed, his testimony entirely makes out the plaintiff's claim.

On the other hand, the defendant complains that secondary evidence of the contents of the deed ought not to have been received, because he says the plaintiff has given no evidence to the effect that it is not within her power to produce the deed itself.

I believe we are unanimous in thinking that this objection comes now too late.

The issue was distinctly raised in the Court of first instance as to the custody in which the deed was, and as to its contents; and it does not appear that any objection to the admission of the secondary evidence on that issue was made in that Court.

The case came up to this Court on special appeal from the decision of the Lower Appellate Court, and as far as we can learn, neither in this Court nor in the Lower Appellate Court, was any objection ever hinted relative to the reception of this evidence. It was only when the case was remanded back to the Lower Appellate Court for re-trial upon an issue named that the objection was first made.

Now, I need not point out that an objection of this kind not only comes properly in the Court of first instance, but cannot well be made in any appeal Court. For, if it were made at the time when the evidence is tendered, and were then held good, it would be in the power of the party desiring to adduce secondary evidence to take some steps for procuring the original, or at any rate to account for its absence. In a Court of appeal, this course is out of the question.

But, further, I am not altogether prepared to say that, under the circumstances of this case, the secondary evidence would have been improperly received, even had it been objected to. The plaintiff had in her verified plaint asserted that the original document was in the possession of the principal defendant, and she had asked the Court to summon him to produce it, thus doing all she could, in pursuance of the provisions of Section 40 of Act VIII. of 1859, for procuring the production of the document if she really believed, or had cause to believe, that it was in the possession of that defendant. The defendant in his written statement declared that the document was not with him, but at the same time supported the *bona fides* of the plaintiff's statement by saying that he knew where it was; that it was in the possession of Tarinee Churn, and therefore certainly not under the immediate command of the plaintiff. Then we have Tarinee Churn examined in the cause, and deposing on oath to this document, with all the other documents, being in possession of the first named defendant.

I should be very loth to say that a Court of justice having arrived at this stage of the conflict between the parties could not, in the exercise of its discretion, allow the plaintiff to produce secondary evidence of the contents of the document, to go of course for as much as it might be worth.

We think, then, that the defendant has not succeeded in his contention, and that the plaintiff has good ground, on special appeal, to complain of the conclusion at which the Judge has apparently arrived. For, to repeat, we think that the admission of secondary evidence cannot now be rightly objected to, and that the secondary evidence which the plaintiff has adduced, if it is to be believed, established the plaintiff's case.

We, therefore, reverse the decision of the Lower Appellate Court, and remand the case for re-decision, adding the direction that if the Judge believes the evidence of Kishoree Mohun Bose he ought to give a decree in favor of the plaintiff.

Costs will follow the event.

The 3rd June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Uniform rent—Rent in kind and in cash.

Case No. 608 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 12th December 1868, reversing a decision of the Deputy Collector of that District, dated the 15th September 1868.

Miterjeet Singh and others (Defendants), *Appellants,*

versus

Toondun Singh (Plaintiff), *Respondent.*

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Baboo Debendro Narain Bose for Appellants.

Moulvie Syud Murhumut Hossein for Respondent.

An arrangement, by which a certain rent in cash is to be paid in lieu of rent in kind, does not show a variation in the rate of rent, but is tantamount to saying that the money-rate represents and is equivalent to what was paid before in another way.

Glover, J.—THIS was a suit for enhancement of rent on 87 beegahs 10 cottahs of land from the year 1275, after notice.

The defendant pleaded that the land had been in the possession of himself and his predecessors from generation to generation at a uniform rate, and that he was entitled, therefore, to the presumption arising under Section 4 of Act X. of 1859. He also objected to the grounds of enhancement as stated in the notice, and likewise to the quantity of land which the plaintiff stated he was possessed of. His allegation was that he held 2 beegahs 10 cottahs less than stated by the plaintiff.

The first Court considered that there was no presumption arising in favor of the defendant: that a variation in the rate of rent was proved; and that there was no evidence that the defendant held below the rates prevailing in adjacent lands possessing similar advantages; but for the reasons given by him, the Moonsiff gave the plaintiff a decree at the rate of 3 rupees per beegah. This decision dissatisfied both parties, and two appeals were preferred to the Judge, the result of which was that the plaintiff got a decree for enhancement at the rate of 7 rupees per beegah, the Judge holding that the pottah by its terms showed that there had been a variation in the rate of rent subsequent to the Decennial Settlement, and that no presumption arose under Section 4 of Act X. of 1859.

The only point which it is necessary for us to notice in special appeal is the one arising under Section 4 of Act X. of 1859. The special appellant contends that the wording of his written statement sufficiently shows that he claimed to hold the whole of the lands from the date of the Permanent Settlement, especially when in that statement he made a special reference to, and claimed the benefit of, Section 4 of Act X. of 1859. It has been ruled in several decisions of this Court that where a ryot pleads that he and his family have held certain lands from generation to generation, and on the strength of that holding claims the benefit of the presumption arising under Section 4 of Act X. of 1859, he should be supposed to have dated his claim from the date of the Permanent Settlement; but that where a tenant fixes some particular date as the one from which his tenancy commenced, no matter how remote that date might be, if subsequent to the Permanent Settlement, he was no longer entitled to claim the benefit of the presumption arising under Section 4.

In this case, it is quite clear that the defendant did claim to be entitled to the presumption that he held from the date of the Permanent Settlement; and if he can prove that he has paid a uniform rate of rent for 20 years before the institution of the suit, he is entitled to the benefit of that presumption. It has been argued on the other side that the wording of the pottah itself shows that there was a variation in the rate of rent in the year 1249 F. S. We have had the pottah read to us, and it does not appear that there was any such variation as stated by the plaintiff. The reason for executing this pottah was that before the year 1249, the tenant in possession had been paying rent in kind, and the pottahdar was to make arrangements for the payment in future of the rent in cash; and the deed states that a rent of 2 rupees per beegah will for the future be taken in lieu of the rent in kind.

Of course, it is a simple impossibility for any body to say or prove, after such a long period of years, what was the actual value of the rent in kind paid up to the year 1249, inasmuch as that rent must have depended on very many circumstances, such as the fertility of the ground, the changes of seasons, and a hundred other things; but it seems quite clear to us that the fixing of 2 rupees a beegah in lieu of what had been paid in kind was tantamount to saying that that money-rate of rent represented, and was equivalent to, what had been paid before in another way. The law throws the burden of proving anterior variation on the party asserting it. If, in this case, the ryot shows that he has paid rent at a uniform rate for 20 years, he need do nothing more, and it will be for the landlord to prove that in some one of the years previous to the year 1249 the rate of rent had varied.

As the question of uniformity of payment of the rent for 20 years before suit has not been gone into by the Judge in the Court below, we think that the case must be remanded for that purpose. If the defendant can prove that for the last 20 years he has paid at a uniform rate of rent, and the landlord cannot disprove it, he, the tenant, will be entitled to the benefit of the presumption arising under Section 4 of Act X. of 1859, for there is nothing in the wording of the pottah showing a variation in the year 1249. Costs to follow the result.

The 4th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Section 230, Act VIII., 1859—Onus probandi—Possession.

Case No. 220 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 11th November 1868, affirming a decision of the Moonsiff of that District, dated the 27th March 1868.

Woodoy Tara Chowdhrain (Plaintiff), *Appellant,*

versus

Khajah Abdool Gunee (Defendant), *Respondent.*

Baboo Tarinee Kant Bhuttacharjee for Appellant.

Mr. C. Gregory for Respondent.

In a suit under Section 230, Code of Civil Procedure, to recover possession, as part of plaintiff's share of a pergunnah, of certain fisheries of which she had been dispossessed by defendant, though they were part of a *julkur* mehal which had been left by a partition in the joint possession of all the shareholders, defendant averring that the fisheries in dispute had been created since the partition:

HELD, that it lay with the plaintiff to start her case by showing that the fisheries were a part of the *julkur* mehal held ijmalee by the parties, and that it was specially necessary for her to prove *bonâ-fide* possession.

Hobhouse, J.—THIS was a suit under the provisions of Section 230 of the Code of Civil Procedure to recover possession of certain *julkurs*, of which the plaintiff alleged she had been in possession as part of her share of Pergunnah Attia and had been dispossessed by the defendant. The plaintiff's contention was that she was one of the 8 annas shareholders of one part of the mehal, and that the defendant was one of the 8 annas shareholders of the other part of the mehal; that this mehal had been partitioned in 1838; that by that partition the *julkur* mehal was left in the joint possession and enjoyment of all the shareholders of the 16 annas, and so had been held by them ever since; and that the particular fisheries of which plaintiff sought to recover possession were part of that mehal.

The defendant does not seem to have denied the partition in question, nor that the *julkur* mehal at the time of that partition was left and had been ever since held ijmalee; but he averred that the particular *julkurs* for which the plaintiff sued were *not* a part of the *julkur* mehal created by the partition of 1838 and held ijmalee, but had been created since the partition had been created, he said, by the diluvion of one of his villages in the mehal, and had been ever since held by him as proprietor.

Both the Courts below have found that the plaintiff has failed to establish her case, and have dismissed her suit.

In special appeal, it is urged that the Courts below have proceeded on a wrong theory and thrown the burden of proof upon the wrong person, and two cases are quoted, (1) page 41, Volume VI., Weekly Reporter; (2) page 267, Gap Volume of the Weekly Reporter of 1864.

In both these cases, it seems to us, there was no contention but that the *julkurs* in question were a part of the original *julkur* mehal, or had sprung out of it or were additions to it.

Here, however, the first question that arises and was in issue between the parties was whether the two particular *julkurs* in dispute were a part of the *julkur* mehal held ijmalee by the plaintiff and the defendant as such part of such mehal. In such a case, the burden of proof was clearly upon the plaintiff to start her case, by showing that the particular *julkurs* in question were a part of the *julkur* mehal held in ijmalee by the parties; and, as pointed out by Mr. Gregory, it was especially necessary in this case that the plaintiff should prove the possession which she set up, because a suit under the provisions of Section 230 can only proceed on the ground that the plaintiff was *bonâ fide* in possession of the property which she sues to recover; while here we have a distinct finding of the Lower Appellate Court to the effect that "there is an "entire want of evidence as to the plaintiff's "possession."

We think, therefore, that the Courts below were right in throwing the burden of proof on the plaintiff. Neither, in regard to the other ground of objection taken, do we think that the Lower Appellate Court erred in law in the reasons which it gave for rejecting the oral testimony of the plaintiff. The Court said that it was of a conflicting nature, that it was hearsay and open to doubt as that of persons who were either interested to speak for the plaintiff or not likely to have knowledge of the facts to which they were supposed to be speaking.

We dismiss this special appeal with costs.

The 5th June 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

New trial—Section 21, Act XI., 1865—Period for notice—Questions by Small Cause Court Judges.

Reference to the High Court by the Judge of the Small Cause Court at Hooghly, dated the 30th March 1869.

Petumber Shadhookhan and another (Defendants), *Petitioners*,

versus

Doya Moyee Dossee (Plaintiff), *Opposite Party.*

Notice of intention to apply for a new trial under Section 21, Act XI. of 1865, is an essential step towards such application, and without such preliminary step an application cannot be entertained.

In calculating the period within which notice is to be given, the date of the decision should be excluded.

Judges of Small Cause Courts should propound for the opinion of the High Court such questions only as arise in a suit, not speculative questions.

Case.—THIS is an application for review of judgment passed on the 14th of January last, in the original suit No. 7 of 1869, in which the petitioners were defendants, and the opposite party, the plaintiff. The case was instituted in this Court for the recovery of Rupees 30 on a simple contract-debt, and was tried on its merits and decided in favor of the plaintiff, who having applied for immediate execution of the decree against the person of the defendant No. 1, Petumber Shadhookhan, caused the amount of the decree with costs in full to be realized under a warrant of arrest issued by the Court. The money was duly paid and the judgment-debtor released from jail on the 15th idem.

On release of the judgment-debtor from jail, the petitioners had applied for a copy of decree on the 20th January last, which was granted to them on the same day.

On the day following, *viz.*, the 21st January last, the petitioners had submitted the application in question for a review of judgment under Section 21 of Act XI. of 1865.

The plaintiff was required to show cause why the application of the petitioners for a new trial should not be granted. Among other grounds on which my former judgment may not be reviewed, the plaintiff's pleader contends that as the application of the petitioner for a new trial was not preferred within seven days from the date of the decision (it having been filed only on the 21st January, being the eighth day from the 14th idem, the date of the decision), it cannot be maintained by the Court, nor its merits tried. He further argues that Section 21 of Act XI. of 1865 provides that, in cases decided on the merits, "it shall be "competent to the Court to grant a new "trial, if notice of the intention to apply "for the same at the next sitting of the "Court be given to the Court within the "period of seven days from the date of "the decision, and if the same be applied "for at the next sitting of the Court;" but no such notice having been submitted to the Court within the limited time, the application for a new trial cannot be granted, which was but a secondary step in the matter, and which was presented to the Court on the 21st January last, when the period allowed for preferring an application for a new trial had expired on the previous day under the law above quoted.

Under the circumstances stated above, two questions arise for determination, *viz.*—

1st.—Whether a notice of the intention to apply for a new trial is an essential step to be adopted by the petitioners before making a formal application at the next sitting of the Court, or without this preliminary step being taken an application for review of judgment is to be considered quite sufficient in the case, if it be presented to the Court within the period mentioned in Section 21 of Act XI. of 1865?

2ndly.—Whether the period of limitation within which such notice or application is to be presented should be computed inclusive or exclusive of the date of the decision; and whether a petitioner is in time if he comes to Court on the seventh day from, and exclusive of the date of, the decision?

In regard to the first of these questions, I am of opinion that a notice of the intention to apply for a review of judgment is not an essential step when the application itself is presented within the limited period. Under Act XLII. of 1860 (for the establishment of Courts of Small Causes, &c.), which is repealed by Act XI. of 1865, the period of limitation within which an application for review of judgment could be preferred was thirty days from the date of the decision; but under the present law the period is limited to seven days only, within which it is not possible in every case to prefer an application containing all the particulars required by law. "The discovery of new "matter or evidence which was not within "the knowledge of the petitioners or which "could not be adduced by him at the time "when such decree was passed," &c., must require time; and the notice in question, which contains merely an intention of the party to apply for a review of judgment at the next sitting of the Court, was contemplated, it appears, to precede an application with a view to take the case out of the Law of Limitation; but in a case where an application could at once be preferred within the period prescribed by law, the notice does not seem necessary to be given.

Respecting the second question at issue, I do not think that it was the intention of the Legislature to include the date of the decision in computing the period within which the notice should be given. That date should in all cases, in my opinion, be excluded from the period of limitation. "The days shall be reckoned from and exclusive of the day on which judgment was "pronounced," are the words which occur in appeal-cases under Section 333 of Act VIII., 1859. Under Section 377 of the same Code, under the head of review of judgment, the application shall be made "within ninety days from the date of the "decree, unless the party preferring the "same shall be able to show just and reasonable cause to the satisfaction of the Court "for not having preferred such application "within the limited period." But Section 21 of Act XI. of 1865 contains no words to a like effect. The period is fixed by the Act, and I am, in consequence, doubtful on the subject and refer the matter for the decision of the Hon'ble Judges of the High Court.

Another question incidentally arises which should also be determined in this case, *viz.*, whether a petitioner, under Section 21 of Act XI. of 1865, applying for a new trial after the expiration of the period of limitation, the last day of which falls during an authorized vacation or Sunday, is in time if he comes to Court on the first day the Court re-opens.

A similar question has already been disposed of by the Full Bench ruling, dated 14th June 1865, in the case of Rajkristo Roy *versus* Denobundhoo Surmah, which was referred by me for the decision of the High Court, but that was a regular suit, barred by limitation under Act XIV. of 1859, where the time for its institution expired on a holiday; and I am doubtful whether the same decision can be applied to an application for review of judgment, which is neither similar nor analogous to it. Suppose, for instance, a decree is passed by the Court at the latest hour of the day followed by authorized close holidays, extending over a period exceeding the time allowed for giving a notice or preferring an application for review of judgment, it becomes quite impossible for the party to seek redress under the Section of the law above alluded to, and it must be productive of great hardship and injustice to the applicant if no allowance be made to him in this respect.

I am, therefore, of opinion that when a Sunday or an authorized vacation during which the last day allowed for a review of judgment falls, the petitioner is entitled to the benefit of the time during which the Court is closed.

Under the circumstances stated above, I would grant the application of the petitioner for a review of judgment contingent on the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the notice of an intention to apply at the next sitting of the Court for a new trial was an essential step to be adopted, and that without such preliminary step an application to the Court cannot be entertained. In calculating the period of days

within which notice is to be given, the date of the decision should be excluded. Neither the 21st nor the 22nd of January last fell on a Sunday or on a holiday, or during an authorized vacation. The Judge of the Small Cause Court is under a mistake in saying that the question as to a case on which the last day falls on a Sunday or during an authorized vacation, incidentally arises in this case. Judges of Small Cause Courts should confine the questions which they propound for the opinion of the High Court to such as arise in a suit, and should not propound speculative questions.

The 5th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Issues—Possession—Right to usufruct—Mortgage—Encumbrances.

Case No. 346 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 25th November 1868, reversing a decision of the Moonsiff of Lechragunge, dated the 17th February 1868.

Gobind Chunder Banerjee (Defendant), *Appellant,*

versus

Mr. J. P. Wise (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellant.

Mr. C. Gregory and *Baboos Onookool Chunder Mookerjee* and *Bungshee Dhur Sein* for Respondent.

The mortgage of certain property having been purchased by *S*, he sold it to *G*, who foreclosed, got a decree for possession, and sold to *W*. *W's* intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the ryot, on the ground of a *miras* pottah obtained from the mortgagor subsequently to the mortgage, he (*W*) sued to have his right declared to the rents payable by that ryot. His suit was dismissed on certain issues in the Court of first instance, but decreed in appeal on the single issue as to the pottah having been granted subsequent to the conditional sale.

HELD, that this issue arose legitimately, and was one within the Lower Appellate Court's discretion to allow, and within his jurisdiction to determine.

HELD, that it was not only not necessary for plaintiff to prove possession, but the very ground he took was want of possession, his cause of action having been that he had been prevented from enjoying the usufruct.

HELD, that plaintiff was entitled to get the property free from the lease, for a mortgagee taking possession under the terms of the mortgage is entitled to have the property in the same condition as it was in when it was mortgaged.

HELD, that it was for defendant to show that the encumbrance did not injure the outturn of the property.

Hobhouse, J.—THE facts of this case are somewhat peculiar. The suit on the part of the plaintiff was to have his right declared to a 4-annas share of rents payable by a certain ryot on the estate which was the subject of dispute. That estate was originally the property of Koodrutoollah and another. They mortgaged the property to the Dacca Bank. That Bank, on the 24th Assar 1266, sold the mortgage to one Mahomed Sonee who, on the same date, sold to Khajah Abdool Gunny, and the Khajah, in Jyet 1272, having in the meantime foreclosed the mortgage and got a decree for possession, sold to the plaintiff. At some time or other, not stated to us, the defendant, special appellant before us, sued the ryot-defendant for arrears of rent, and although the plaintiff intervened in that suit, a decree was given to the special appellant. The special appellant set up a title intermediate between the plaintiff and the ryot defendant, on the ground of a miras pottah given to him by the mortgagor on the 24th Pous 1266, that is, subsequent to the mortgage. Certain issues were laid down by the Court of first instance, and on those issues the plaintiff's suit was dismissed. The plaintiff appealed to the Lower Appellate Court, and by the permission of that Court was allowed to rest his case on a single point, *viz.*, that as the defendant's miras pottah was granted subsequent to the date of the conditional sale, so it could not stand good against the purchasers under that sale after foreclosure of the mortgage. The plaintiff dropped all other issues and rested his case on this alone, and on this issue the Lower Appellate Court has given him a decree.

The *first* point taken in special appeal is that the issue on which the Lower Appellate Court has decided in the plaintiff's favor was an issue which changed the whole case; further, that the Court has given the plaintiff a decree upon a ground which originally he never set up.

We think that this objection is not good in law. There is no doubt that upon the facts on which either side relied, the issue on which the Lower Appellate Court allowed the plaintiff to rest his case was an issue which legitimately arose; and this being so, the Lower Appellate Court had no doubt a discretion to allow the issue, which was one of law only, to be heard, and had jurisdiction to determine it.

2ndly.—Whether the period of limitation within which such notice or application is to be presented should be computed inclusive or exclusive of the date of the decision; and whether a petitioner is in time if he comes to Court on the seventh day from, and exclusive of the date of, the decision?

In regard to the first of these questions, I am of opinion that a notice of the intention to apply for a review of judgment is not an essential step when the application itself is presented within the limited period. Under Act XLII. of 1860 (for the establishment of Courts of Small Causes, &c.), which is repealed by Act XI. of 1865, the period of limitation within which an application for review of judgment could be preferred was thirty days from the date of the decision; but under the present law the period is limited to seven days only, within which it is not possible in every case to prefer an application containing all the particulars required by law. "The discovery of new "matter or evidence which was not within "the knowledge of the petitioners or which "could not be adduced by him at the time "when such decree was passed," &c., must require time; and the notice in question, which contains merely an intention of the party to apply for a review of judgment at the next sitting of the Court, was contemplated, it appears, to precede an application with a view to take the case out of the Law of Limitation; but in a case where an application could at once be preferred within the period prescribed by law, the notice does not seem necessary to be given.

Respecting the second question at issue, I do not think that it was the intention of the Legislature to include the date of the decision in computing the period within which the notice should be given. That date should in all cases, in my opinion, be excluded from the period of limitation. "The days shall be reckoned from and ex-"clusive of the day on which judgment was "pronounced," are the words which occur in appeal-cases under Section 333 of Act VIII., 1859. Under Section 377 of the same Code, under the head of review of judgment, the application shall be made "within ninety days from the date of the "decree, unless the party preferring the "same shall be able to show just and reason-"able cause to the satisfaction of the Court "for not having preferred such application "within the limited period." But Section 21 of Act XI. of 1865 contains no word to a like effect. The period is fixed by the Act, and I am, in consequence, doubtful of the subject and refer the matter for the decision of the Hon'ble Judges of the High Court.

Another question incidentally arises which should also be determined in this case, *viz.* whether a petitioner, under Section 21 of Act XI. of 1865, applying for a new trial after the expiration of the period of limitation, the last day of which falls during an authorized vacation or Sunday, is in time if he comes to Court on the first day the Court re-opens.

A similar question has already been disposed of by the Full Bench ruling, dated 14th June 1865, in the case of Rajkristo Roy *versus* Denobundhoo Surmah, which was referred by me for the decision of the High Court, but that was a regular suit, barred by limitation under Act XIV. of 1859, where the time for its institution expired on a holiday; and I am doubtful whether the same decision can be applied to an application for review of judgment, which is neither similar nor analogous to it. Suppose, for instance, a decree is passed by the Court at the latest hour of the day followed by authorized close holidays, extending over a period exceeding the time allowed for giving a notice or preferring an application for review of judgment, it becomes quite impossible for the party to seek redress under the Section of the law above alluded to, and it must be productive of great hardship and injustice to the applicant if no allowance be made to him in this respect.

I am, therefore, of opinion that when a Sunday or an authorized vacation during which the last day allowed for a review of judgment falls, the petitioner is entitled to the benefit of the time during which the Court is closed.

Under the circumstances stated above, I would grant the application of the petitioner for a review of judgment contingent on the decision of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the notice of an intention to apply at the next sitting of the Court for a new trial was an essential step to be adopted, and that without such preliminary step an application to the Court cannot be entertained. In calculating the period of days

within which notice is to be given, the date of the decision should be excluded. Neither the 21st nor the 22nd of January last fell on a Sunday or on a holiday, or during an authorized vacation. The Judge of the Small Cause Court is under a mistake in saying that the question as to a case on which the last day falls on a Sunday or during an authorized vacation, incidentally arises in this case. Judges of Small Cause Courts should confine the questions which they propound for the opinion of the High Court to such as arise in a suit, and should not propound speculative questions.

The 5th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Issues—Possession—Right to usufruct—Mortgage—Encumbrances.

Case No. 346 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 25th November 1868, reversing a decision of the Moonsiff of Lechragunge, dated the 17th February 1868.

Gobind Chunder Banerjee (Defendant), *Appellant,*

versus

Mr. J. P. Wise (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellant.

Mr. C. Gregory and *Baboos Onookool Chunder Mookerjee* and *Bungshee Dhur Sein* for Respondent.

The mortgage of certain property having been purchased by *S*, he sold it to *G*, who foreclosed, got a decree for possession, and sold to *W*. *W's* intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the ryot, on the ground of a *miras* pottah obtained from the mortgagor subsequently to the mortgage, he (*W*) sued to have his right declared to the rents payable by that ryot. His suit was dismissed on certain issues in the Court of first instance, but decreed in appeal on the single issue as to the pottah having been granted subsequent to the conditional sale.

HELD, that this issue arose legitimately, and was one within the Lower Appellate Court's discretion to allow, and within his jurisdiction to determine.

HELD, that it was not only not necessary for plaintiff to prove possession, but the very ground he took was want of possession, his cause of action having been that he had been prevented from enjoying the usufruct.

HELD, that plaintiff was entitled to get the property free from the lease, for a mortgagee taking possession under the terms of the mortgage is entitled to have the property in the same condition as it was in when it was mortgaged.

HELD, that it was for defendant to show that the encumbrance did not injure the outturn of the property.

Hobhouse, J.—THE facts of this case are somewhat peculiar. The suit on the part of the plaintiff was to have his right declared to a 4-annas share of rents payable by a certain ryot on the estate which was the subject of dispute. That estate was originally the property of Koodrutoollah and another. They mortgaged the property to the Dacca Bank. That Bank, on the 24th Assar 1266, sold the mortgage to one Mahomed Sonee who, on the same date, sold to Khajah Abdool Gunny, and the Khajah, in Jyet 1272, having in the meantime foreclosed the mortgage and got a decree for possession, sold to the plaintiff. At some time or other, not stated to us, the defendant, special appellant before us, sued the ryot-defendant for arrears of rent, and although the plaintiff intervened in that suit, a decree was given to the special appellant. The special appellant set up a title intermediate between the plaintiff and the ryot defendant, on the ground of a miras pottah given to him by the mortgagor on the 24th Pous 1266, that is, subsequent to the mortgage. Certain issues were laid down by the Court of first instance, and on those issues the plaintiff's suit was dismissed. The plaintiff appealed to the Lower Appellate Court, and by the permission of that Court was allowed to rest his case on a single point, *viz.*, that as the defendant's miras pottah was granted subsequent to the date of the conditional sale, so it could not stand good against the purchasers under that sale after foreclosure of the mortgage. The plaintiff dropped all other issues and rested his case on this alone, and on this issue the Lower Appellate Court has given him a decree.

The *first* point taken in special appeal is that the issue on which the Lower Appellate Court has decided in the plaintiff's favor was an issue which changed the whole case; further, that the Court has given the plaintiff a decree upon a ground which originally he never set up.

We think that this objection is not good in law. There is no doubt that upon the facts on which either side relied, the issue on which the Lower Appellate Court allowed the plaintiff to rest his case was an issue which legitimately arose; and this being so, the Lower Appellate Court had no doubt a discretion to allow the issue, which was one of law only, to be heard, and had jurisdiction to determine it.

The next objection is, that upon the facts on which the plaintiff sued he was bound to prove his possession, and inasmuch as that possession was not proved, his suit should have been dismissed. No doubt, the plaintiff does seem to have thought it necessary for him to prove his possession, but it is quite clear that he erred on that point, and that on his grounds of action it was not only not necessary but that the very ground which he took was a ground to the effect that he was not in possession. Possession of landed property, such as this, means nothing more than enjoyment of the usufruct of that property by the receipt of rents from ryots and so forth; and the plaintiff's cause of action was that he had been prevented from enjoying such usufruct by the defendant, special appellant before us, setting up a *miras* pottah, suing by virtue of that pottah, and being successful in that suit, that is to say, successful in ousting the plaintiff of the usufruct of the land by taking that usufruct to himself.

The third objection is to the principle on which the Lower Appellate Court has decided the issue which was before it. That principle is to be found in the following words of the Lower Appellate Court's judgment. The Judge says: "I am of opinion that a "permanent encumbrance of the nature in-"volved in this suit cannot be created by the "mortgagor, so as to stand good as against "the mortgagee, when his right has been per-"fected by foreclosure-proceedings. Al-"though such a *miras* lease might stand good "so long as the right to redeem the mortgage "remains with the mortgagor, yet no sooner "is that right lost and the property passes "absolutely to the mortgagee, the lease will "be held as determined, and the mortgagee "will be entitled to get the property free from "the encumbrance. Such a lease partakes "of the nature of the right of the grantor, "which is but a conditional one, and it must "cease when the condition lapses. The mort-"gagee to whom the sale was made is surely "entitled to recover the property in the "state in which it was at the time of that "sale, and not at the time when his right "to enter into possession accrues after the "foreclosure-proceedings." The meaning of that decision, shortly stated, is that the mortgagee, if the mortgage is not redeemed, and if, under the terms of that mortgage, he takes possession of the property mortgaged, is entitled to have that property in the same condition as that in which it stood when it was mortgaged to him.

We think this is an equitable interpretation to put upon the contract between the parties in the case. It is pressed on us, however, or rather the argument arose out of a doubt expressed by the Court itself, that if, while the mortgagor is still in possession and before foreclosure, he can alienate the property, and that alienation will under certain circumstances be good, so it follows that he can create encumbrances on the property. This argument, however, seems to us not to be logical. No doubt, a mortgagor in possession can for certain purposes alienate the property, but that is not, as pointed out by Baboo Onookool Chunder Mookerjee, a real alienation of the property. It is nothing more than *selling the right to redeem*. If the alienee pays off the mortgage, then the mortgagee has got all that he bargained for, and the alienee's purchase must stand good. If, on the other hand, the alienee does not pay off the mortgage, the mortgagee will get possession of the property, and the question will still remain as to the state in which he should receive it. That question is not to be determined by the fact that the mortgagor can alienate pending the foreclosure.

It is further contended by the pleader for the special appellant that the burden of proof was on the plaintiff to show that the *miras* pottah in question was an encumbrance which was injurious to his interests. It seems to us almost absurd to contend, with our knowledge of the transaction comprehended in a *miras* pottah, that the creation of such a *miras* pottah does not deteriorate the property in which it is created; but even if it were not so, we should still say that the contract between the parties was at the time of the mortgage either that the mortgagor should pay off the mortgage within a certain time and thus redeem the property, or else that he should give up the property in the same state in which it stood at the time of the mortgage. And it seems to follow, therefore, that if subsequent to the mortgage the mortgagor has created any encumbrance which was not in existence at the time of the mortgage, it is upon him to show that such encumbrance has not injured the outturn of the property. This has, as above remarked, not been shown in this case. This seems to us to be the equity of the case, and we are not shown anything to the contrary.

The special appeal is dismissed with costs.

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The 7th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Decree inter alios.

Case No. 386 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 25th November 1868, modifying a decision of the Moonsiff of Bohur, dated the 31st December 1867.

Goluck Monee Debia and another (Plaintiffs), *Appellants,*

versus

Ram Monee Bose and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellants.

Baboos Romesh Chunder Mitter, Kalee Mohun Doss, and *Kalee Kishen Sein* for Respondents.

In a suit to have it declared that a certain howlah was the property of (*W*) plaintiff's judgment-debtor, defendants contended that it had been the property of another person and that they had purchased it in execution of a decree against that person. The Lower Appellate Court found for the defendants on the basis of a decree dismissing a suit by *W's* representative to have the property declared to be *W's*.

HELD that that decree could not bind plaintiffs who were not parties to it.

Hobhouse, J.—THIS was a suit on the part of the plaintiff to have it declared that a certain kharija howlah called *Saleh Mahomed*, was the property of one Wosseemooddeen, judgment-debtor.

It was contended by defendants that the property belonged to another person, and that they had purchased it in execution of decree against that person.

The Lower Appellate Court found for the defendants on the basis of a decree of the 29th of July 1865 in their favor.

That was a decree in a case in which Hatoo Bibee, the representative of Wosseemooddeen, sued to have this property declared to be Wosseemooddeen's property, and in which, in default of evidence on her part, the Court passed a decree dismissing her suit.

In special appeal, it is contended that that decree is no evidence against the plaintiffs. We think this contention is good in law.

It was a decree *inter alios*, and we cannot see how it can be held to bind the plaintiffs who were not parties to it.

It is, however, contended by the pleader for the special respondent that on the strength of the decision to be found in page 67, Volume VIII. of the Weekly Reporter, such a decree would bind the plaintiffs.

The facts stated in that decision leave some doubt as to what was exactly the position of the parties to the suit. But we think we may safely conclude that there the plaintiff was a person who sued, on the strength of a certain *zur-i-peshgee* lease, two persons who were the judgment-debtors of the defendant.

It was held that the *zur-i-peshgee* in question was the act of the judgment-debtors, and inasmuch as it was an act which preceded the defendant's execution, and which was done in good faith, the defendant was bound to take the estate of his judgment-debtors saddled with the *zur-i-peshgee* which they had executed.

That is not the case now before us. In this case, Wosseemooddeen is the judgment-debtor of the plaintiff, and there was no act on his part by which his property became alienated to the defendants. On the contrary, the defendant's contention is that the property was not the property of Wosseemooddeen, but of some one else. And if the plaintiffs are the judgment-creditors of Wosseemooddeen, we know of no law or precedent of the Court which would prevent him from seeking to have it established that the property now in dispute is the property of his judgment-debtor.

We are told that there is evidence on the record to show that the property in question is the property of Wosseemooddeen. We, therefore, reverse the judgment of the Lower Appellate Court and remand the case to be determined on the evidence on the record, excluding the decision of the 29th of July 1865.

Costs will follow the result.

The 7th June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of Contract—Limitation—Clause 9, Section 1, Act XIV., 1859.

Case No. 201 of 1868.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 1st August 1868.

Mohadeo Lall and others (Plaintiffs), *Appellants,*

versus

Nundun Lall and another (Defendants), *Respondents.*

The Advocate-General and *Mr. C. Gregory* and *Baboo Sreenath Doss* for Appellants.

Mr. G. C. Paul and *Baboos Debendro Narain Bose* and *Obinash Chunder Banerjee* for Respondents.

In a suit to enforce the performance of an agreement alleged to have been entered into between plaintiffs and the principal defendant, whereby the latter, on consideration of an undertaking subsequently carried out, was to admit the former, who were his uterine brothers, to a share of the property of his adopting father which included an interest in land :

HELD, that this was substantially a suit on a contract governed by the limitation fixed by Clause 9, Section 1, Act XIV. of 1859; that the defendant was in a position to fulfil that contract on the deaths of his adoptive parents respectively ; and that plaintiff's suit, not having been brought within three years of the dates of those deaths, was barred by limitation.

Glover, J.—THIS was a suit to enforce the performance of an agreement alleged to have been entered into between the plaintiffs and defendant Nundun Lall, whereby the latter was to admit the plaintiffs, who are his uterine brothers, to a share of the property of his adopting father Brij Beharee Lall. The consideration for this is said to have been an undertaking (subsequently carried out) to admit Nundun Lall to a share in his natural father's estate.

Nundun Lall was adopted by Brij Beharee Lall in the *Kritima* form in the year 1269 F. S., and it is alleged that his natural father Janokee Ram allowed the adoption to be made solely on the understanding that all his other sons should participate in the adoptive father's property.

Brij Beharee Lall died on the 1st of Bhadro 1270, and his widow, Anundo Koer, on the 5th of Magh 1271, from which date defendant, as adopted son, took possession of their property.

The plaintiffs allege further that in the year 1273 F. S., the defendant Nundun Lall executed a written engagement to the same effect as the verbal one entered into in 1269, that this deed was taken to the Collector's office for registration, but that Nundun Lall refused to register, and so the plaintiffs were obliged to bring this suit.

The defendant Nundun Lall (the other defendant Gopal Lall was a *pro formâ* defendant only) denied the existence of any agreement either verbal or written, and pleaded that the plaintiffs were out of time under Clause 9, Section 1, Act XIV. of 1859.

The Judge held that this Section of the Act applied, and that as plaintiffs had not brought their suit within three years of the deaths of Brij Beharee Lall and Anundo Koer, they were barred by limitation.

The plaintiffs appeal against this decision.

The principal objection taken by the learned Advocate-General on their behalf is, that their suit was not one to recover on a contract under Clause 9, Section 1 of Act XIV. of 1859, but rather one for the recovery of an interest in land, to which the 12 years' limitation under Clause 12, Section 1 of the Act would apply.

In support of this objection, it was argued that had the suit been one for breach of a contract, it would have contained a claim for damages; that the plaintiffs had no need to sue for specific performance. All they wanted was to get possession under the agreement entered into with them; that this agreement was substantially in the nature of an exchange between the parties, to which Clause 12 would undoubtedly apply, and not Clause 9. We were also referred to the ruling of the Full Bench in the case of Surwar Hossein *versus* Shahazadah Golam Mahomed, 9 Weekly Reporter, page 170, as being in point.

This case does not seem to us to have any special bearing on the point at issue. It was held in that case that the mutwallee had entered into no contract, and that as against him the suit was one to enforce a charge upon land, and that, therefore, Clause 12, Section 1 of the Limitation Act was applicable.

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Then as to the ground of the plaintiffs' suit, it is not contended that they had by inheritance any claim to share in Brij Beharee Lall's estate. On the contrary, they claim their shares on the ground that the defendant had contracted with them by an ikrarnamah to give them part of the estate, in consideration of their having given up to him a share in his natural father's property; and they date their cause of action from the date on which they say that that ikrarnamah was denied by the defendant Nundun Lall's refusal to register it. They make no mention in any part of their plaint of any other right except that given to them by Nundun Lall under the agreement. Moreover, if the plaintiffs do not sue on their contract, we fail to see what was their ground of action, or what right they had to bring a suit at all; they could only succeed in obtaining an interest in the land by proving the contract—the one thing was a condition precedent to the other.

It was contended further, though the argument was not much pressed, that the plaintiffs alleged themselves to have been in joint possession with their brother of Brij Beharee Lall's property, and that the Judge ought to have determined this question of fact whether the defendant's possession from the dates of Brij Beharee Lall's and of his widow's deaths was joint or separate.

But we find that the plaint most distinctly states that the defendant No. 1 was in possession and that the plaintiffs never held possession of the disputed property. No doubt one of the plaintiffs' vakeels, in answer to the question put to him nearly a year after the suit was instituted, stated generally that all the brothers were in possession; but this answer was in direct opposition to the terms of the plaint, and altogether inconsistent with the relief which the plaintiffs sought.

Lastly, it is urged that the Judge ought to have taken the ikrar as evidence of the contract, but this ikrar not being registered was not receivable in evidence. This point has been ruled by the Full Bench decision of this Court, dated 7th August 1868, 10 Weekly Reporter 51.

On the whole, therefore, and after considering all the arguments urged, we are of opinion that this was substantially a suit on a contract to which the limitation fixed by Clause 9, Section 1, Act XIV. of 1859 applies; that the defendant Nundun Lall was in a position to fulfil that contract on the deaths of Brij Beharee Lall and Anundo Koer respectively; and that the plaintiffs' suit, not having been brought within three years of the dates of those deaths, is barred by limitation.

The appeal is dismissed, and the Judge's order affirmed with costs.

Kemp, J.—I am of the same opinion. The plaintiffs had no title whatever in the estate claimed, which was the estate of Brij Beharee Lall, and to which the defendant Nundun Lall has succeeded as the adopted son of Brij Beharee Lall. The plaintiffs' title, if any, is under the agreement of the 1st Bhadro 1270. Nundun Lall, on the death of Brij Beharee Lall, took possession of the estate of his adopting father. From that time, Nundun Lall was in a position to perform his part of the alleged contract between him and the plaintiffs. If he did not do so, the cause of action to the plaintiffs accrued to them from the time that Nundun Lall refused to perform his part of the alleged agreement; and as more than three years had expired between the date the defendant Nundun Lall took possession of the estate of Brij Beharee Lall, and the date on which this suit is brought, it is, in my opinion, clearly barred under the provisions of Clause 9, Section 1, Act XIV. of 1859.

The 7th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Remand—Section 148, Act VIII., 1859.

Case No. 269 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th November 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 28th May 1868.

Puddo Lochun (Defendant), *Appellant,*

versus

Sirdar Khan (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboos Anund Chunder Ghossal and *Kalee Kishen Sein* for Respondent.

When a case is remanded to be re-tried under the terms of Section 148, Act VIII., 1859, a Court is not justified in taking, and determining on, any evidence not on the record at the time of remand.

Bayley, J.—We think that this special appeal ought to be decreed with costs, and the judgment of the Lower Appellate Court reversed.

Plaintiff sued for confirmation of *ijaradaree* rights, and claimed the lands as rent-paying lands; he sued also for assessment of rents.

It is necessary to see whether the lands in dispute were rent-paying lands, and whether plaintiff had evidence on the record to show that he collected rents from these lands.

The plaintiff's suit for rent was dismissed on the 27th of April 1867, and upon this dismissal the plaintiff instituted this present suit on the allegation that he had been dispossessed.

On the 10th of September 1867 he was ordered to produce his witnesses, and the 1st of November was fixed as the date of hearing. But as on that day, which was the fourth day after the re-opening of the Court, neither plaintiff nor his pleaders appeared, the case was dismissed agreeably to Section 114, Act VIII. of 1859.

An application was then made under Section 119 of the said Act for a new trial on the ground that Section 114 did not strictly apply to the present case.

The re-trial was refused, and the case was again dismissed, but the Judge, on appeal, directed a determination to be come to under the provisions of Section 148.

Then after remand for this purpose, new witnesses and new documents were produced, and the suit of the plaintiff was again dismissed.

In dissatisfaction of this decree of the first Court, an appeal was preferred to the Judge, and the Judge decreed the appeal of the plaintiff, and reversed the decision of the first Court.

The grounds taken in special appeal against the decision of the Lower Appellate Court are, *1st*, upon the plea of limitation, the Lower Appellate Court has erroneously placed the burthen of proof upon the defendants; and, *2nd*, that the Lower Appellate Court had not the authority to decide the case upon documents admitted subsequent to the completion of the record, contrary to the provisions of Section 148, Act VIII. of 1859.

The Lower Appellate Court's judgment is erroneous, and must therefore be reversed. The case was remanded to be re-tried under the terms of Section 148, Act VIII. of 1859, which is as follows: "If either "party to a suit to whom time may have "been granted shall fail to produce his "proofs, or to cause the attendance of his "witnesses, or to perform any other act "for which time may have been allowed, "the Court *shall* proceed to a decision of "the suit on the record, notwithstanding "such default."

The words of the law are that the Court *shall* proceed to a decision of the suit on the record, and not that the Court *may* proceed to a decision of the suit; and consequently the Court was not justified in taking and in determining on any evidence not on the record when the case was remanded, and such evidence must, therefore, be taken as if it had no existence.

It would then ordinarily be necessary to remand the case in order that the Judge might come to a finding on any other evidence legally on record. It is pointed out to us, however, that there is no evidence, other than that taken after remand, on the record in support of plaintiff's case. We have ascertained that the fact is so, and it is, therefore, unnecessary to remand the case, and it remains only to dismiss the plaintiff's suit, and decree this special appeal with costs of all Courts.

The 7th June 1869.

Present:

The Hon'ble H. V Bayley and C. Hobhouse, *Judges.*

Survey proceedings—Cause of action—Objection.

Case No. 2849 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 30th June 1868, affirming a decision of the Moonsiff of Bhangah, dated the 14th December 1866.

Soodukhina Chowdhrain (one of the Defendants), *Appellant,*

versus

Issur Chunder Mojoomdar (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Romesh Chunder Mitter* and *Sreenath Doss* for Appellant.

h

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondent.

Plaintiff having sued as the shebait of certain lands in defendant's talook, alleging that they belonged to his lakheraj *debutter*, and asking to have a thak demarcation amended, and his right declared, it was held that, as plaintiff had been present at the survey-proceedings which were his own act, he had no cause of action, and that in this case such an objection on the part of the defendant ought to be admitted even in special appeal.

Hobhouse, J.—In this case, it is necessary to set forth exactly what was the claim and prayer of the plaintiff, in order that we may come to a right understanding and to a right judgment upon the points taken before us in special appeal.

Plaintiff sues on the ground that he was the shebait of certain lands in the talook of the defendant (special appellant before us), and he alleged that some 13 beegahs 7½ cottahs of land belonging to his lakheraj *debutter* had, without his knowledge, been thak demarcated with the defendant's talook; and so he sued to have that thak demarcation amended, to set aside a certain Act X. decree, and to have his right declared to the lands as his *debutter*, alleging that his cause of action arose from the time of the thak measurement.

Several issues were taken in the first Court and in the Lower Appellate Court, but it is not necessary that we should now refer in detail to those issues, because there are only two points taken before us in special appeal, and they are these—

First, the thak measurement of the lands in suit being the cause of action which the plaintiffs sets up, it is urged that, as regards all the lands in dispute, the plaintiff had no cause of action against the defendants.

The second point has reference to only a small portion, *viz.*, one beegah and six cottahs of the lands in dispute. And in the matter of these lands, it is urged that the case is *res judicata* without reference to the Act X. decision which the plaintiff sues to set aside.

With reference to the second point, we think it unnecessary to give judgment upon it, because we are of opinion that the special appellant must succeed upon the first point.

In accordance with the decisions which we have from time to time given upon this point, we would not in the Court of last appeal ordinarily dismiss the plaintiff's suit, simply on the ground that that suit did not originally disclose any cause of action. But here we think that the plaintiff, upon his own showing and upon his own plaint, had no cause of action whatever against the defendant; and that this being so, he was altogether unjustified in dragging the defendant into Court.

We are referred by the special respondent's pleader to two cases, one of which is to be found at page 350, Volume XI. of the Weekly Reporter, and another at page 460, Volume X. of the Weekly Reporter, which are said to be on all fours with the present case.

We are of opinion, however, that the present case materially differs as to its facts from both those cases.

In the *first* case cited, the facts found are (page 352) that the defendants actually ousted the plaintiff out of about half of the lands in dispute, and never for a moment denied that the plaintiff had a cause of action against them in regard to the other half of the lands, but, on the contrary, at once joined issue with the plaintiff as to both the plots of lands on one common ground.

In the *second* case cited, the fact found was that the conduct of the defendants in the course of a particular suit did most certainly put an obstacle in the way of the plaintiffs' enjoying their rights, if they had them, and fully justified the plaintiffs in bringing the suit.

It is only necessary to state these facts to show that they materially differ from the facts in the present case. Here, as the Lower Appellate Court puts it, the case is of an unusual nature, the plaintiff coming in to undo an act by which he is ordinarily expected to abide. And the meaning of that is this, *viz.*, that, if there was any error in the thak proceedings, the plaintiff was himself the perpetrator of that error. He was present at the thak proceedings; and in these thak proceedings the lands were demarcated, not as his *debutter*, but as *mál* lands of this very talook of which the defendants are now the proprietors, and of which he, the plaintiff, was then the proprietor; so that, the plaintiff's cause of action, as set forth by his own plaint, being the thak proceedings, that cause of action was not only not given by the defendants or any one else, but by the plaintiff himself.

This is a much stronger case than that to be found in page 64, Volume VIII. of the Weekly Reporter, in which it was held that the plaintiff had no cause of action in a suit

of an exactly similar description, and in which the Division Bench held that the suit must be dismissed by reason that no cause of action was disclosed in it.

It is contended by the pleader for the special respondent that the thak proceedings are not shown to have been conducted with his knowledge. But on this point, we think that the record of the Court below clearly shows that those proceedings were actually the act of the plaintiff himself.

The issues between the parties were not, whether those proceedings were the act of the plaintiff, but whether those proceedings having been the act of the plaintiff, he could, in the words of the second Court, "proceed with his present suit in contravention of his own act."

Both the Courts have tried the case as if the plaintiff had admitted that the survey-proceedings were the acts of the plaintiff. The first Court said that it would be an injustice for the plaintiff if he were precluded from obtaining redress in contravention of his errors, which clearly proceeded from ignorance. And the second Court, in the words which I have already quoted, distinctly referred to the survey-proceedings as the act of the plaintiff.

We think, then, that the plaint discloses no cause of action against the defendants, and that this is quite a case in which we ought to admit the objection taken, even at the last moment, and we direct that the plaintiff's suit be dismissed with costs of all Courts.

The 7th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Alienation by Hindoo widow—Suit by reversioner—Declaratory decree.

Case No. 246 of 1868.

Regular Appeal from a decision passed by the Judge of Patna, dated the 1st September 1868.

Shewuk Ram Pershad (Plaintiff), *Appellant,*

versus

Mahomed Shumsool Hada and another (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Toolsee Dass Seal* and *Umurnath Bose* for Appellant.

Messrs. A. T. T. Peterson and *R. E. Twidale, Baboo Romesh Chunder Mitter,* and *Moonshee Mahomed Yusuff* for Respondents.

A reversioner can, during the lifetime of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor.

A deed of conveyance by a Hindoo widow is an act hostile to and invades a reversioner's rights, and as such, warrants his suing for a declaratory decree.

Kemp, J.—THIS is a suit the substantial object of which is to have a deed of conveyance by one Ranee Dhun Koer, dated the 13th of November 1854, declared to be not binding as against the plaintiff beyond the lifetime of Dhun Koer. The plaintiff has asked to have the deed of sale cancelled, but it does not follow that, because he has asked too much, the Court will refuse to give him that relief which he may be entitled to.

The plaintiff claims as reversionary heir to Hur Narain. The defendant No. 2, Dhun Koer, is the alienor. The defendant No. 1, Moulvie Shumsool Hada, is the alienee.

The Judge raised the following issues for trial:—

1st.—Has the suit been undervalued?

2nd.—Is the suit barred under the general or any special law of limitation?

3rd.—Is the plaintiff entitled to a declaratory decree?

4th.—Whether the plaintiff is the heir of Hur Narain or not; and, if so, whether the alienation by Ranee Dhun Koer, the daughter-in-law of Hur Narain, is valid or not?

5th.—Whether the properties alienated belong exclusively to Ranee Dhun Koer. or not?

The Judge disposed of the suit on the *third* issue. He observes that, granting the suit is in time, he was of opinion that there is no sufficient reason for making a declaratory decree, inasmuch as the alienation which took place fourteen years ago may be as effectually questioned on the death of Ranee Dhun Koer, whenever that event may take place, as now; that it is by no means certain whether the plaintiff will be alive to question the alienation

when the succession opens out to him on the death of the alienor. The Judge then quotes certain rulings of the High Court which are given in the margin in support of his opinion that the suit of the plaintiff is premature, and dismisses it with costs.

IX. W. R. 104.
VIII. W. R. 64.
IX. W. R. 325.
IX. W. R. 380.
IX. W. R. 460.
X. W. R. 133.
2 Wyman 271.

There is a cross-appeal by the defendant No. 1, which we shall notice hereafter.

We are of opinion that the suit of the plaintiff has been dismissed on insufficient grounds.

The first case quoted by the Judge is to the effect that, in suits where no substantial relief is sought, the Court ought to be particular in giving a declaratory decree. In this suit, a substantial relief is sought. A reversioner can, during the lifetime of the alienor, commence a suit to declare that a conveyance is not binding upon him beyond the life of the alienor. The relief sought for is plain and substantial, *viz.*, that the deed of conveyance be declared to be not binding upon the plaintiff beyond the lifetime of the alienor. It is, of course, in the discretion of the Court to make a declaratory decree, or to refuse to do so, but this discretion must be guided by reason, and not be arbitrary. A plaintiff asking for a declaratory decree must show that some act has been done which is hostile to or invades his right. In this case, the act of Dhun Koer clearly invades, and is hostile to, the plaintiff's rights as reversioner, and a suit during the lifetime of the alienor will most clearly lie. This has been ruled by the Full Bench in their decision in the case of Gobind Monee Dossee *versus* Sham Lall Bysack, dated 7th April 1864, published in the Special Number of the Weekly Reporter, pages 165—167.

The other cases alluded to by the Judge refer to suits to set aside thakbust awards, which did not invade the right of the plaintiff in those suits.

In the case of Pranputty Koer,* cited by the Judge, there had been no alienation by the widow, but a simple declaration made by her in a warasutnamah, which, of course, was no evidence against the reversioner, and could not bind him.

We are, therefore, of opinion that, under the ruling of the Full Bench quoted above, this suit will lie.

* 2 Hay 608.

The plaintiff may not be entitled to ask to have the deed cancelled, but he is competent to ask for a declaration that it is not binding upon him beyond the life of the alienor.

We now proceed to notice the cross-appeal of the defendant, which opens out the question whether the plaintiff is the reversionary heir of Hur Narain. This question has not been tried by the Judge, no evidence was taken, and moreover it is a question which was put in issue and is dependent upon many circumstances which we are not in a position to consider and decide upon without evidence.

Hur Narain, the common ancestor, had a son, Kalika Pershad, who pre-deceased his father. The son left a widow, the daughter-in-law of Hur Narain; this is defendant No. 2, Ranee Dhun Koer. Under the Hindoo Law, this lady would not be the heiress of Hur Narain; but it is said that, by a certain petition presented by Hur Narain to the authorities, she has become vested with an absolute title in the disputed properties.

Ranee Dhun Koer had two daughters, one who died childless in the lifetime of Hur Narain, and another who has left a son, the plaintiff in this suit. Now, the plaintiff's right to succeed on the death of Dhun Koer to the estate of Hur Narain depends upon whether the petition above referred to gave her only a life-interest in the estate of Hur Narain, or an absolute interest.

It has been said in the course of the argument on the cross-appeal that the plaintiff cannot under any circumstances be the heir of Hur Narain. This will mainly depend upon whether the plaintiff is a Bandhu, and entitled or not entitled to offer the funeral oblations to Hur Narain. It has been ruled by the Privy Council in the case of Gridharee Lall Roy *versus* The Government of Bengal,* July 17th, 1868, that the enumeration of Bandhus given in the Mitakshara, Chapter II., Section 6, is not exhaustive. At any rate, this is a question which must be tried after giving the parties an opportunity to produce evidence, and after argument.

The *fourth* and *fifth* issues raised by the Judge embrace the whole contention between the parties, and as no evidence has been given, and the parties have not been heard, we think that the suit must be re-

* 10 W. R. 31.

manded. The decision of the Judge, to the effect that the plaintiff's suit is premature and will not lie, is reversed, and the suit sent back for trial on the merits. Costs of this appeal to be borne by the respondents.

The 8th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Revival of a decree.

Case No. 157 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dacca, dated the 22nd January 1869, affirming an order of the Moonsiff of Naraingunge, dated the 28th July 1868.

Nilambur Sein (Judgment-debtor), *Appellant,*

versus

Kalee Kishore Sein (Decree-holder), *Respondent.*

Baboo Nil Madhub Bose for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

When a decree-holder allows his decree to be struck off, and does nothing to revive it, it cannot be revived on the motion of the judgment-debtor.

Bayley, J.—In this case it appears that the appellant Nilambur Sein was a co-sharer of certain property with his brother Pitambur Sein, and was sued by him (Pitambur) for certan money expended in the improvement of that property. The Court in that case passed a decree in favor of Pitambur, or rather in favor of his son Kalee Kishore Sein, to the effect that, should the defendant Nilambur, judgment-debtor, contribute towards the payment of the expenses of *bhuratee,* or improvement of the soil by filling up cavities, he would be entitled to a proportionate share of the profits, but that, if he did not, he should pay rent in proportion to the extent of land previously held and of rent before paid by him, and that the decree-holder Pitambur would continue to get the whole extra profits derived from the improvements above referred to.

This decree was struck off in the year 1863, and has never since been revived by the decree-holder, and it may be here noticed that, with the exception of this decree of the Moonsiff, there was no other decree given to the judgment-debtor, appellant before us, Nilambur Sein.

The present appellant Nilambur now in miscellaneous special appeal asks from us—

1stly.—That the decree obtained by the decree-holder Pitambur against him, and struck off in 1863, as above stated, may be restored to the file; and

2ndly.—That after paying the Ameen's fees and the share of expense of the *bhuratee.* he (petitioner) may be put in possession of the homestead of Kundurpo Khan.

The Moonsiff and the Judge have both rejected this prayer. The Judge has held that under no circumstances could the judgment-debtor be put in possession of the lands, as the decree does not provide for such possession, but only for a share in the extra profits.

The judgment-debtor appeals against this order, and urges that he is so far a decree-holder as that by the decree it has been ordered that he shall participate in the profits of the property if he paid a certain sum of money, and that, therefore, on payment of that sum, which he is ready to pay, he is entitled to be put in possession.

Now, in the first place, we cannot allow that, when a decree-holder himself allows his decree to be struck off, and does nothing to revive it, the decree should be revived on the motion of the judgment-debtor; and in the next place, as the judgment-debtor in this case can show us no cross-suit or decree in which any order has been passed in his favor for the possession he seeks for, we cannot grant his prayer for possession. But we think that the whole proceedings taken in this case from the date of the revival of the execution of the decree up to the present moment have been taken without jurisdiction. No application of the judgment-debtor could restore a decree of the judgment-creditor which that creditor, for reasons best known to himself, refused to execute, and no Court could revive a decree abandoned by the only person who could execute it, *viz.*, the decree-holder, or one precisely in his place.

We therefore quash the whole proceedings of the Lower Courts subsequent to the revival of the execution of the decree, as without jurisdiction.

As the special appellant, however, had no reason to come to this Court to revive a decree of which he was not the holder, we think that he must pay the costs in this Court.

The 8th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Enhancement of rent—Illegal cesses.

Case No. 2315 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 1st June 1868, affirming a decision of the Deputy Collector of that District, dated the 1st April 1867.

Burmah Chowdhry and others (Defendants), *Appellants,*

versus

Sreenund Singh (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellants.

Moonshee Mahomed Yusuff for Respondent.

In determining the enhanced rent which a ryot is liable to pay under Section 17, Act X. of 1859, a Court cannot legally include *putwareean* and other *abwabs* paid by ryots in the neighbouring lands.

Macpherson, J.—The objection taken by the special appellant in this case is that the Lower Court had no right to include certain *abwabs* in the amount of rent found by the Court to be payable by the defendant.

It appears that the Courts have arrived at the rate of 3 rupees, which they have allowed in this way; they find that Rupees 2 and 8 annas is the rent usually paid for neighbouring lands of a similar quality; and they find that, in addition to this rent of 2 rupees 8 annas, the ryots in the neighbouring lands pay an extra 8 annas *per* beegah for *putwareean* and a variety of other charges.

There is no doubt that these charges or cesses are, in fact, illegal, and not such as the plaintiff could enforce payment of by suit. It appears to us, therefore, that the Courts have erred in law in including those extra 8 annas in the enhanced rent which, under Section 17 of Act X. of 1859, the defendant is liable to pay. The decree of the Lower Court ought to have been for Rupees 2 and 8 annas only, and to that rate the decree must be reduced.

The appellant is entitled to his costs of this appeal, and the plaintiff must pay his own costs in both the Lower Courts.

The 8th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Suit for malikana—Damages—Section 27, Act XXIII., 1861.

Case No. 2327 of 1868.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 3rd June 1868, affirming a decision of the Moonsiff of Nicklee, dated the 15th December 1866.

Rasmonee Debia and others (some of the Defendants), *Appellants,*

versus

Mahomed Hafezzoollah (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

A suit to recover plaintiff's share of malikana out of a sum which the principal defendant had realized from the other defendant (the Collector of the district) was held to be a suit for damages cognizable by a Court of Small Causes. The fact of a question of right having been incidentally raised in the case did not put it beyond the provisions of Section 27, Act XXIII. of 1861.

Hobhouse, J.—The nature of this suit is accurately described in the first paragraph of the first Court's judgment. It is there said that "the plaintiff has brought this "action for the recovery of his share of "malikana of Chur Deokandee formed by "the re-formation of his few mehals, amount-"ing to Rupees 62-3 out of the entire "Rupees 311-2 which the principal defend-"ants, Nos. 2 to 8, have realized from "the Collector of Mymensingh, defendant "No. 1, on the allegation that the said "principal defendants have taken the whole "amount without giving his share."

From this statement of the plaint, it appears that the claim was to recover a sum of money to the extent of Rupees 62, on the allegation that the defendants had deprived the plaintiff of that money by keeping it themselves.

Both the Courts below have given the plaintiff a decree, and the defendants now

appear as the special appellants before us. But a preliminary objection is taken by the pleader for the plaintiff to the effect that, under the provisions of Section 27, Act XXIII. of 1861, no special appeal will lie in this case. He urges that the suit was of a nature cognizable by a Court of Small Causes; that it was a suit for damages; and that, as is admitted, the amount of the money in suit was below Rupees 500. It is contended by the pleader for the special appellant that the matter in suit was not properly damages, that it was a question of malikana or money derived from a proprietary interest in land. But it seems to us on the face of the suit that it was a suit for damages. Whatever was the original source from which the money was derived, still it was a sum of money which was taken by the defendants to the injury of the plaintiff, and it therefore represented that by which the plaintiff had been endamaged by the defendants. Clearly, therefore, the matter in dispute was a matter of damages.

It is next, however, contended by the pleader for the appellant that the suit was not cognizable by a Court of Small Causes; that a question of right was raised and determined in that suit; and that such a question is not one cognizable by a Court of Small Causes. We think, however, on a perusal of the plaint itself and on the understanding between the parties, as represented by the statements on record as to the point at issue, that no question of right was determined, and that, though such a question was raised, yet it was simply raised incidentally in order to the determination of the question of damages. The plaintiff did not sue to have his right established to a particular share in the lands from which *málikana* was derived. He simply asserted that share, and then claimed to recover the money due in reference to that share; and the case seems to us to be clearly of the nature contemplated by the decision of the Full Bench, on which the pleader for the special respondent relied, to be found at page 127 of Sutherland's Special Number of the Weekly Reporter. The suit was, in fact, a suit to recover a certain sum of money, and a question of right was simply raised as a question incidental to the question of the recovery of the money. We think, therefore, that the provisions of Section 27, Act XXIII. of 1861, bar a special appeal in this case, and we therefore dismiss this appeal with costs.

The 8th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Rent-suit by a joint proprietor—Enhancement—Documents—Proof of genuineness.

Case No. 102 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 18th November 1868, affirming a decision of the Deputy Collector of that District, dated the 29th July 1868.

Gunga Narain Doss and others (Defendants), *Appellants,*

versus

Sharoda Mohun Roy and others (Plaintiffs), *Respondents.*

Baboos Mohendro Lall Shome and *Kedarnath Chatterjee* for Appellants.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Respondents.

A suit by one of several joint proprietors to recover a certain proportion of rent said to be payable by the defendants will not lie in the absence of the other joint proprietors, unless the defendants have paid their rents to the plaintiff separately, or have agreed to do so.

In a suit for enhancement of rent, it is not enough for the Court to find generally that the plaintiff is entitled to rent at an enhanced rate; there must be a distinct finding as to the ground on which he is so entitled.

It is not necessary for a party who desires to prove a document to call the writer of it, if alive, as a witness, so long as he can give other satisfactory proof of its execution.

Macpherson, J.—I THINK that this case ought to be remanded in order that it may be tried *de novo* by the Judge, whose present decision is, in various respects, defective.

The plaintiff sues as one of several joint proprietors to recover a certain proportion of rent which he says is payable by the defendants in respect of lands occupied by them. The co-sharers are not parties to the suit.

The defendants have throughout pleaded that, as the plaintiff holds this property jointly with others, the present suit is bad in the absence of the co-sharers.

The first Court held that the proprietors were in the habit of making collections separately, and therefore that the suit would lie.

The Judge upon this part of the case simply says: "There is no doubt about "the extent of the plaintiff's interests; and "there are several precedents to the effect "that a shareholder can sue to enhance "the rent, if his share is definitely known, "and his title is not contested."

The law, as laid down by the Judge here, is correct only to a certain extent. If the plaintiff can prove that the defendants have heretofore recognized him as being the proprietor of a particular share of the property, and have paid to him separately a certain proportion of the rent, then, no doubt, the suit will lie against them, without the other joint proprietors being made parties. But unless the plaintiff either proves that the defendants have paid their rent to him separately, or proves an express agreement on their part to pay to him separately, the suit will *not* lie in the absence of the other shareholders.

The Judge must consider carefully what the facts are with reference to this part of the case.

The next point on which the judgment of the Lower Appellate Court is defective is as to the reasons for which, in the Court's opinion, the defendants are liable to pay rent at an enhanced rate for the year 1274. The defendants denying their liability to have their rents enhanced, the Judge must say distinctly on which of the grounds on which enhancement is claimed by the plaintiff, the enhancement is decreed. It is not enough for the Lower Court to find generally that the plaintiff is entitled to rent at an enhanced rate; there must be a distinct finding as to the ground on which he is so entitled.

With reference to the contention of the defendants that they have a right of occupancy, it appears to me that the Judge has quite misconceived the nature of the evidence necessary to be adduced by the defendants in order to prove certain *dakhilahs* and other documents put in by them. The Judge says: "I am obliged to concur with "the Deputy Collector that the receipts "filed are not properly proved by the best "evidence, *i. e.*, that of the writer, when "alive, in all cases."

The Judge apparently labors under the impression, that when the writer of a document is alive, the document cannot be proved save by the evidence of that writer; at any rate, that it is the duty of the person who propounds the document to bring the writer before the Court. But there may be many people who can prove a document quite as well as the writer of it; and a person who wishes to put a document in evidence is under no sort of obligation to call the writer as his witness, if he has any other sufficient means of proving what he wants.

In the case of a receipt granted to a ryot, whether the writer of the receipt be or be not alive or producible, it would be *primâ facie* quite sufficient if the ryot were to depose that he himself, on paying his rent, had received it from the zemindar's gomashtah to whom he paid his rent, and that the gomashtah gave it to him, saying that it was a receipt for the rent so paid. So, if he swore he saw the zemindar or gomashtah sign the receipt—or if he were to produce a witness (by which term I do not mean one whose name appears on the document as attesting its execution), who deposed that the receipt was written and signed by the gomashtah in his presence. The evidence of the writer of a paper is not necessarily any better evidence than would be that of other persons who can of their own knowledge speak to such facts as will satisfy the Court that the document is really what it purports to be.

The Lower Appellate Court does not seem to have wholly discredited the documents produced by the defendants. On the contrary, the Judge says: "I do not entirely concur with the Deputy Collector in his remarks on the dakhilahs; * * * they are simply not proved." It appears to me, therefore, that the Court must, in re-trying the case, be very careful to see that it does not reject, as being unsupported by evidence, documents which are, in fact, supported by good legal evidence. Of the weight to be attached to the evidence before him, the Judge will, of course, form his own opinion.

The judgment of the Judge is reversed, and the case is remanded to him, in order that it may be tried and decided anew with reference to the above remarks.

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The appellants will get their costs of this appeal.

Jackson, J.—I concur in the remarks of Mr. Justice Macpherson, and in remanding the case for a fresh decision.

The 8th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Auction-purchaser under Act VIII. (B. C.), 1865—Ouster—Under-tenures—Encumbrances.

Case No. 330 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 13th November 1868, reversing a decision of the Moonsiff of Noornuggur, dated the 6th June 1868.

Issur Chunder Chuckerbutty (one of the Defendants), *Appellant,*

versus

Bistoo Chunder Chuckerbutty (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Kalee Kant Sein for Respondent.

Where an auction-purchaser under Act VIII. (B. C.) of 1865 of a shikmee tenure receives possession from an officer of the proper Court in the usual manner, he is not chargeable with unlawful dispossession or forcible ouster.

The auction-purchaser of an under-tenure sold under this Act acquires it free from any *lakheraj* encumbrance created by the previous holder, if the latter had no authority to create such an encumbrance.

Hobhouse, J.—In this case, the plaintiff sued to recover certain lands on the following allegation. He said that the lands were lakheraj brohmuttur lands within the defendant's shikmee talook; that they had been created as such lakheraj by the Rajah of Tipperah, the zemindar of the talook, in favor of one Pran Bullubh; and that he, plaintiff, partly by inheritance and partly by purchase, had become the possessor of the said lands. Plaintiff then went on to say that on two certain dates, which he specified, the defendant, who was the auction-purchaser under Act VIII. of 1865, Bengal Council, of the under-tenure in which the lands were situated, had ousted him of the lands by causing a certain bamboo to be put up and a certain demarcation to be made by the peon who went to give the defendant possession of his purchased property.

The defendant denied that the tenure in question was a lakheraj tenure of any kind, and on the issue as to whether or not the disputed land was the plaintiff's lakheraj property as alleged by him, the first Court found against the plaintiff and dismissed his suit.

The Lower Appellate Court found the following facts: first of all the Court found that the tenure in question was not proved to be a lakheraj tenure created in the manner set up by the plaintiff; *secondly*, the Court found that the talookdar, one Gopeenath, whose rights the defendant had purchased at auction, had granted a lakheraj of the disputed brohmuttur lands of the talook, not to Pran Bullubh, as set up by the plaintiff, but to one Kasheenath; and, *thirdly*, the Court found that Kasheenath had been for a very long time in possession of the disputed lands by virtue of his lakheraj.

Having found these facts, the Lower Appellate Court gave the plaintiff a decree, not upon his title, but on the ground that he had been unlawfully dispossessed by the defendant, and that he was, therefore, unquestionably entitled to get possession until ousted by due course of law.

Now, upon the plaintiff's own averments in his plaint, it is quite clear that there was no unlawful dispossession. The defendant was an auction-purchaser of the shikmee tenure, and in furtherance of his purchase he had possession given to him by an officer of the proper Court in the usual manner, and it was not any forcible ouster which was the plaintiff's cause of action, but that cause of action was the possession given by an officer of the Court in the manner I have above described. It is clear, therefore, that, on the grounds on which the Lower Appellate Court has based its judgment, that judgment cannot stand.

But the special appellant further contends that, upon the finding of fact of the Lower Appellate Court, the plaintiff's suit absolutely fails, and we think that this contention is good in law. The plaintiff claimed to be put in possession of the lands in question as a brohmuttur tenure created by the Rajah of Tipperah, the proprietor of the talook, in favor of one Pran Bullubh. The Lower Appellate Court has found as a fact that the tenure was not so created, and this being so, it is evident that the plaintiff's case as set up by himself—the case on which he claimed the lands and on

which alone he claimed them—altogether fails. We think, therefore, that on this ground alone the plaintiff's suit is liable to be dismissed.

But there is another ground on which it is equally liable to be dismissed. The Lower Appellate Court has found as a fact that whatever title the plaintiff had, he derived from one Gopeenath, the shikmee talookdar. If this encumbrance created by Gopeenath is a legal encumbrance as against the special appellant, then, if the defendant had not had any other ground to fall back upon, it is possible that the plaintiff's suit might still have been decreed; but the law (Section 16, Act VIII. of 1865, B. C.) distinctly provides that "the purchaser "of an under-tenure sold under this Act shall "acquire it *free of all encumbrances* which "may have accrued thereon by any act of "any holder of the said under-tenure, his "representatives or assignees, unless the "right of making such encumbrances shall "have been expressly vested in the holder "by the written engagement under which "his under-tenure was created or by the "subsequent written authority of the person "who created it, his representatives or "assignees."

Now here, as we understand it, the defendant is an auction-purchaser under this particular Act. The lakheraj encumbrance is found to have been created by the previous holder of the under-tenure, and it is not shown to us that that holder was in anywise authorized under the law quoted to create such an encumbrance. This being so, we think that on this other ground also the plaintiff's suit was liable to dismissal, *viz.*, that he was an encumbrancer placed there by a person who had no authority so place him there, and whose acts at once became voidable when the defendant purchased the under-tenure.

In this view of the case, we think that the judgment of the Lower Appellate Court must be reversed, and the judgment of the first Court restored and affirmed. This special appeal is accordingly decreed with all costs of this Court and of the Lower Appellate Court.

The 10th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Objections first taken in special appeal—Limitation—Section 246, Act VIII., 1859.

Case No. 421 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 27th November 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 12th February 1868.

Wuzeer Jemadar (one of the Defendants), *Appellant,*

versus

Noor Ali (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Roy for Appellant..

No one for Respondent.

Where a deposition made in another suit to which special appellant was not a party was admitted and used by the first Court without any objection on the part of the special appellant, it was held that he could not be allowed to object to it in special appeal.

Where the Lower Appellate Court's judgment is good, and its adjudication of a plaintiff's right has been based on a sound principle, the High Court will not allow a new point to be taken in special appeal which was not taken in either of the Courts below.

The limitation of one year in Section 246, Act VIII. of 1859, does not apply to a suit for declaration of right and confirmation of possession.

Bayley, J.—I AM of opinion that this special appeal should be dismissed.

The plaintiff sues for declaration of title and confirmation of possession in respect of a certain house. The allegation of the plaintiff was that the house was made a gift of by Nawab Kumroot Dowlah to his wife Hyatoonissa; that Hyatoonissa gave it by a heba-bill-ewuz to her two sons by another husband, *viz.*, Fuzul Ali and Nuzur Ali; and that Fuzul Ali sold the same to the plaintiff with the consent of Nuzur Ali, who was an attesting witness to the deed of sale.

The defendant's case was that the property belonged to one Gazeeooddeen, son of Kumroot Dowlah, and that he (defendant) purchased it at a sale in execution of a decree against the said Gazeeooddeen, and further, that the sale to the plaintiff was void by reason of its being made whilst the property was under attachment.

Both the Courts below have decreed the plaintiff's case.

The defendant appeals specially, and urges, *firstly*, that the Lower Appellate Court is wrong in holding that the title of Hyatoonissa is proved by the evidence of Meer Mahomed Ismail taken in a regular suit, as the special appellant was not a party to that suit; *secondly*, that the Lower Appellate Court was wrong in holding that the plaintiff was not bound to sue within one year to set aside the summary order; and, *thirdly*, that the Lower Appellate Court has wrongly used the summary order of the Principal Sudder Ameen as evidence against the special appellant. In addition to these three grounds of special appeal, the special appellant requests the permission of the Court to add a *fourth* ground not taken in the petition of appeal, *viz.*, that the plaint discloses no cause of action.

On the first point, *viz.*, that the deposition of Mahomed Ismail could be no evidence against the special appellant, I would observe that the objection is too late, and cannot therefore be now allowed to be raised. The evidence was admitted and used by the first Court without any objection on the part of the special appellant, and I hold that, if the special appellant had really any objection to make to the admissibility of that evidence, it ought to have been made to the first Court, where, if that objection were allowed, the other party might have adduced other proofs in support of his case.

On the *second* point, I would observe that, under Section 246, Act VIII. of 1859, a plaintiff suing for possession and to set aside a summary order in favor of another party given on the basis of the possession of that party is bound to sue within one year, but in the present case there is nothing to show that the suit has not been brought within one year as the summary order itself is before us; and in the second place, this is not a suit to recover possession, so that the plaintiff should sue to set aside an order under Section 246 declaring the possession of another party; but it is a suit for the declaration of right and confirmation of possession; and, under these circumstances, the case cited before us from Volume VII., Weekly Reporter, page 256, seems to me to be quite inapplicable to the facts of the present case; and besides, the particular passage quoted now before us from the Chief Justice's judgment, and relied on, was a mere *obiter*, and merely indicated what the law ought to be, had the case before the Full Bench, which was of a different character, been of the nature to which the remarks applied.

On the *third* point, I would observe that the summary order of the Principal Sudder Ameen was merely used by the Lower Appellate Court as indicating the conduct of the parties in reference to this particular property, and not any further, as evidence in the suit. In other words, it was used as merely showing how the property was treated and regarded by the parties other than the special appellant, and so far I am of opinion that the Lower Appellate Court was justified in using it on the records before it.

On the last point, I am not disposed in a case of this kind—where we are satisfied that the judgment of the Lower Appellate Court is a good judgment, and that the principle on which the Court has held the right of Hyatoonissa to be proved, and the property to be that of the plaintiff's vendor, and not of the defendants, is a good principle—to allow a new point, not taken in the petition of special appeal, and which was not taken in either of the Courts below, to be now taken; and, under the circumstances of the case, we see no injustice in disallowing the objection.

The appeal is dismissed, but without costs, as no one appears for the respondent.

The 11th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Receipts—Proof of genuineness.

Case No. 224 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 11th November 1868, modifying a decision of the Deputy Collector of that District, dated the 7th July 1868.

Raj Mahomed (Plaintiff), *Appellant,*

versus

Banoo Rasmah (Defendant), *Respondent.*

Baboo Khetturnath Bose for Appellant.

Baboo Bykuntnath Paul and *Moulvie Syud Murhamut Hossein* for Respondent.

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A party is perfectly competent to prove the payment of a debt or rent by the production of the receipt and proof that it is the document which he received on paying the money; he is not bound to summon the parties who signed the receipts to prove their signatures, nor is his own evidence secondary evidence.

Norman, J.—In this case the plaintiff sues for arrears of rent. The defendant alleges that he holds under a mokurruree pottah, dated the 18th of Bhadro 1253. He produced in support of this mokurruree pottah two witnesses, Kalla Mahomed and Tuckee Mahomed, who say they witnessed the execution of the pottah, and there is a third witness, Noor Mahomed, who was the *putwarree* of the estate from 1252 to 1259, and who says that he saw the pottah on first undertaking his duties and collecting the rents. The Judge believes the evidence of this witness.

In addition to the evidence of these three witnesses, there is also a rokha, bearing a seal which is admitted to be genuine, given by one Kumul Monee, acknowledging the defendant's tenure to be mokurruree.

The Judge also finds that the wassil-bakee papers produced by the plaintiff actually confirm the defendant's statement as to the mokurruree pottah, and, in fact, it is admitted that down to 1264, the rents were paid according to the later-mentioned mokurruree pottah.

With this amount of evidence before it, it is not a little surprising that the first Court did not come to the same conclusion as the Judge as to the genuineness of the instrument. There is not the smallest ground for questioning the correctness of the Judge's finding.

The first Court rejects a quantity of receipts produced by the defendant, because the tehsildars by whom they purport to be signed were alive, and "the defendant had "failed to summon any one of them to attest "their signatures, and has shown no cause "for his failure to do so; such being the "case, *secondary evidence* in the proof of "the signature cannot be admitted." It is clear that the Deputy Collector committed a very great error in acting on any such notion.

If a man goes to a shop and pays a debt, or if he goes to the agent of the zemindar and pays his rent, and in either case takes a receipt, he is perfectly competent to prove the payment by the production of the receipt and proof that it is the document which he received on paying the money. It is a great mistake to suppose that, in the one case, he will be bound to summon the cashier of the shop-keeper, and in the other the agent of the zemindar, to prove their signatures, or that his own evidence in proof of the receipt is secondary evidence. If two persons witness a transaction, either is equally competent to speak to it.

The Judge appears to have adopted the rule laid down by the Deputy Collector, or at least to have allowed it to pass without comment, which, we think, he ought not to have done.

There is no ground for this appeal and it is, therefore, dismissed with costs.

We direct that a copy of this judgment be forwarded to the Deputy Collector for his information.

The 11th June 1869.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Mesne-profits—Rent—Mortgagee's right of action.

Case No. 3279 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 15th September 1868, affirming a decision of the Deputy Collector of that District, dated the 18th June 1868.

Woomesh Chunder Roy and others (Plaintiffs), *Appellants,*

versus

Markund Mookerjee and others (Defendants) *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Mr. J. S. Rochfort for Respondents.

A mortgagee, after having obtained foreclosure and sued out possession, has a right of action for mesne-profits against the wrong-doer from whose hands he obtained possession, but is not entitled to sue the ryots for rents which they may have paid to the party who was in possession.

Loch, J.—I think that we cannot interfere with the judgment of the Court below, though our decision is based on grounds different from those assigned by the Lower Appellate Court.

The plaintiff in this case is the mortgagee, and after obtaining foreclosure he sued for possession, and in the month of Magh 1273 he was put into possession. He then brought a suit against the defendants in this case to recover the rents of 1273 and 1274.

The defendants, who are tenants on the property, admitted that there was a balance due for 1273 and 1274, but they pleaded that the plaintiff was not entitled to ask rent from them for a period prior to the date of his obtaining possession; and the Deputy Collector, considering this defence to be good, gave the plaintiff a decree for what was due from Magh 1273 and for the arrears of 1274; and, on appeal, the Judge upheld the judgment of the Deputy Collector.

In the first Court, the defendants pleaded payment of the rents of 1273, and produced dakhilahs in proof of such payment.

The plaintiff, special appellant, now urges before us that the question ought to have been tried whether the defendants had or had not paid this money. He does not show us that he proved that sums were due, but asks us to look at the defendants' case, and to see whether they have proved their case or not.

Now, it appears to me that the party in possession—the wrong-doer from whose hands the plaintiff obtained possession—is primarily liable for this money. It forms, in fact, a part of the mesne-profits for which the party in possession is liable to the plaintiff, the decree-holder; and mesne-profits have been described, and are now known to consist, not only of what the party in possession has actually collected, but what he *might* have collected; and, therefore, it appears to me that the proper course for the plaintiff was to bring his action to recover mesne-profits from the party in possession, but that he is not entitled to harass the ryots by bringing an action against them to recover rents which they might have paid to the party who was in possession.

I would, therefore, dismiss this appeal with costs.

Jackson, J.—I quite concur. I think the plaintiff cannot obtain a decree for the rents prior to the date on which he obtained possession of the estate. Even if it was admitted that he was entitled to them, the plaintiff must prove that those rents are due, before the defendants can be put upon their evidence to prove their allegations of payment. The plaintiff, admittedly not knowing whether the defendants have paid the rents for 1273 or not, brings this suit for the whole of those rents, and his pleader urges before us that, as the defendants have stated that they have paid the greater portion of them, the Courts must require them to prove that they have so paid; and if the defendants cannot prove this, the plaintiff ought to have a decree. It seems to me that it is for the plaintiff in the first place to make out a *primâ-facie* case that the rents in question are due. As he is unable to do this, his suit, as far as it refers to these rents, must be dismissed. He has obtained a decree for all rents which have fallen due since he obtained possession of the estate. The appeal will be dismissed with costs.

The 11th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Parties as witnesses—Section 170, Act VIII., 1859.

Case No. 36 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 20th June 1868.

Ram Tuhul Thakoor (Plaintiff), *Appellant,*

versus

Oodit Narain Singh and others (Defendants), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Mr. R. E. Twidale and *Baboo Tarucknath Sein* for Respondents.

Where some of the witnesses (defendants) in a suit had been examined, and plaintiff petitioned the Court to have the remaining defendants examined as witnesses, he was held not to have taken the necessary steps required by law to enforce their attendance, because he did not make any special application to the Court, or show sufficient grounds in support of his petition.

Kemp, J.—THIS is a suit *in formâ pauperis* to obtain possession of an 8-annas share of Mouzah Rungah. The property is valued, for the purposes of this suit, at

2,505 rupees 10 annas. Wassilat was claimed originally to the amount of 96,000 rupees, but subsequently, on the petition of appeal *in formâ pauperis* being rejected, the plaintiff gave up his claim to the wassilat, and valued his appeal with reference to the property alone, namely, at 2,505 rupees 10 annas. The suit of the plaintiff is a stale one, having been brought after 11 years from the admitted cause of action according to the plaint, and the plaintiff can alone succeed by proving that he is the heir of Hur Bhullub, who represented the elder branch of the family of which Nath Thakoor was the common ancestor. The defendant's statement is that Nath Thakoor had only one son named Nowruttun, from whom they are descended, and that the plaintiff is not the descendant of Nath Thakoor.

The Principal Sudder Ameen has found, on the evidence adduced by the plaintiff and the defendants, that Nath Thakoor left only one son, Nowruttun, and that Hur Bhullub, through whom the plaintiff claims, was not the son of Nath Thakoor.

In appeal, it is contended that the plaintiff cited eight of the defendants to prove that Nath Thakoor had two sons, and that the plaintiff was the descendant of Hur Bhullub, the elder son, and that the Subordinate Judge ought not to have decided the case without examining the witnesses, namely, the defendants in the suit, for whose attendance the necessary steps were taken by the plaintiff. We find that some of the defendants were examined, and of the remainder some were women and some minors. The plaintiff on the 28th of May, certainly did petition to have the remaining defendants examined, but he did not make any special application to the Court, nor did he show sufficient grounds to its satisfaction in support of the petition. Under Section 170 of Act VIII. of 1859, where persons, who are parties to a suit, and who have been ordered to attend and give evidence, fail to comply with such orders, the Court may "either pass judgment or make "such other order in relation to the suit as "the Court may deem proper in the circum-"stances of the case." In this case, we do not think that the plaintiff took the necessary steps, such as are required by law, to enforce the attendance of these witnesses, and we cannot say that the Subordinate Judge had exercised an arbitrary discretion in deciding the case in the absence of the remaining defendants who were summoned as witnesses.

The plaintiff having wholly failed to prove that Nath Thakoor, the common ancestor, had two sons, Hur Bhullub and Nowruttun, and the plaintiff claiming through Hur Bhullub, and failing to prove that Hur Bhullub was the son of Nath Thakoor, his case must necessarily fail. The appeal is, therefore, dismissed with costs.

The 12th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Jurisdiction--Ejectment—Cause of action.

Case No. 3014 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 15th August 1868, reversing a decision of the Moonsiff of Satkaniah, dated the 11th February 1868.

Sadut Ali (one of the Defendants), *Appellant,*

versus

Mussamut Sadutoonissa (Plaintiff), *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondent.

A suit for possession of lands, alleged to have been held on a lease which has since expired, where defendant sets up an istemrari pottah, is cognizable by the Civil Court; plaintiff's cause of action being, not breach of contract, but trespass.

Hobhouse, J.—This was a suit for possession of lands, the plaintiff's allegation being that the defendant held those lands on a lease which expired in the year 1227, and that, after the expiry of that lease, the defendant refused to turn out, and thereby gave the plaintiff her cause of action.

The defendant set up an istemrari pottah, and pleaded in the first Court that the Civil Court had no jurisdiction, the case being one which was determinable only by the Revenue Courts, under the provisions of Clause 5, Section 23, Act X. of 1859.

On the question of jurisdiction, the first Court found for the plaintiff, but on the merits it dismissed the case.

The question of jurisdiction was not determined by the Lower Appellate Court, nor was it raised there, and on the merits the Appellate Court found against the defendant's istemrari tenure, and gave the plaintiff a decree for possession.

In special appeal, it is urged that, under the provisions of Clause 5, Section 23, Act X. of 1859, the Civil Court had no jurisdiction. That Clause, for the purposes of this suit declares that "all suits to eject any "ryot on account of a breach of the condi-"tions of any contract by which a ryot may "be liable to ejectment shall be cognizable "by the Revenue Courts only."

The question, therefore, before us is whether this suit was a suit to eject a ryot by reason of the breach of the conditions of any lease by which that ryot was liable to ejectment. Clearly, this was not the allegation of the plaintiff nor the issue between the parties. The plaintiff did not say that, under the terms of the contract between her and the ryot, the ryot was liable to ejectment, but what she said was that there was no contract between her and the ryot; that whatever contract there had been, had expired, and that therefore the ryot held on, not contrary to any conditions of a contract by which he was liable to ejectment, but as a trespasser without any contract at all; and the ryot himself on his part denied that there had ever been any contract of the nature set up by the plaintiff, or that he was a trespasser, and set up another contract in the matter of which the Courts have found against him. The case, therefore, is clearly, in our judgment, one cognizable by the Civil Court, and so the special appeal is dismissed with costs.

The 12th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Certificate under Act XXVII. of 1860.

Case No. 152 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 22nd February 1869.

Azeem Khan and another, *Appellants,*

versus

Mussamut Ameerun, *Respondent.*

Mr. C. Gregory for Appellants.

No one for Respondent.

If there are several applicants for a certificate under Act XXVII. of 1860, the heir or the person or persons having the largest interest in the estate are entitled to the certificate, in preference to others whose interests are less considerable. If the Court thinks any small interest not sufficiently protected, it may call upon the party taking the certificate to give security to the extent requisite for the protection of such interest.

Norman, J.—In this case, the appellants, Azeem Khan and Fyzoollah, claimed a certificate under Act XXVII. of 1860 declaring their title as representatives of the estate of their father Rujjub. Their application was opposed by Mussamut Ameerun, the daughter of Bibee Bunno, the daughter of Himmut, the father of Rujjub.

The application of Azeem and Fyzoollah was dated the 6th of August 1868, and on the 4th September following, Ameerun put in a petition objecting to their claim.

The case came on before the Judge of Bhaugulpore on the 22nd of February 1869. He says that, upon a summary inquiry, he could not accurately determine the date of Rujjub's death—whether he died before his father Himmut or not; and he ends by granting a joint certificate to Fyzoollah, Azeem, and Mussamut Ameerun.

We have considerable difficulty in understanding what importance the Judge attributes to the date of the death of Rujjub. Whether he died in 1265 or in 1275, as far as we can see, the persons entitled to represent his estate were his two sons. Ameerun, his niece, had no sort of right to represent his estate. If it be supposed that Rujjub died before Himmut, and that, upon the death of Rujjub, the property descended to Azeem and Fyzoollah, his sons, and to Himmut, his father, Himmut, the father, would take one-sixth; and if, on the death of Himmut in 1274, there were no other heirs except Azeem, Fyzoollah, and Ameerun, the share of Ameerun would be one-fifth of one-sixth, or one-thirtieth of the property of Rujjub; and we think that she would not, in respect of that small remote derivative interest, have any right to claim to be treated as the representative of Rujjub, or to ask for a certificate to enable her to collect his debts and discharge his obligations.

If there are several applicants, the heir or the person or persons having, as such, the largest interest in the estate, would appear, if otherwise unobjectionable, to be entitled to the certificate under Act XXVII. of 1860, in preference to others whose interests are less considerable.

The order of the Judge must be reversed in so far as it declares that Ameerun's name must be joined in the certificate with the names of Fyzoollah and Azeem.

If the Court thought that Ameerun had any interest which would not be sufficiently protected by allowing Azeem and Fyzoollah to administer to their father's estate, we might have called upon Azeem and Fyzoollah to give security to that extent; but her interest being so very small, we think any consideration of that kind quite unnecessary. Ameerun must pay the costs of this appeal.

The 12th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Evidence—Written statements—Unattested chittahs.

Case No. 2920 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 8th August 1868, modifying a decision of the Moonsiff of Bhanga, dated the 9th April 1868.

Ijjutoollah Khan (one of the Defendants), *Appellant,*

versus

Ram Churn Gangoolee and another (Plaintiffs), *Respondents.*

Baboos Sreenath Banerjee and *Kalee Mohun Doss* for Appellant.

Baboos Hem Chunder Banerjee and *Bungshee Dhur Sein* for Respondents.

A written statement is not legal evidence, although the same penal consequences may follow from it, if false, as from a false deposition.

Where a party putting in chittahs called in a witness to attest them, but the witness did not do so, and the party did not apply to the Court to compel him to do so, the chittahs were held to be no legal evidence even though admitted by the Lower Court without objection from the opposite party.

Bayley, J.—I AM of opinion that the judgment of the Lower Appellate Court should be reversed, and the case remanded for re-trial.

The plaintiff sued to recover possession of certain lakheraj brohmuttur lands which he stated were situated in Talook Ram Bullubh Goopto, and which were given as such to his predecessor by Ram Ram Goopto, the son of Ram Bullubh Goopto.

The plaintiff states that in Assar 1268 he was ousted by the principal defendant Ijjutoollah, acting in collusion with the 10-annas sharer of the talook.

The defendant's case was that the specific lands in suit were not the plaintiff's brohmuttur, but were given in lease to the defendant under a miras pottah by Cazee Ameerooddeen, the purchaser of the 10-annas share of the talook.

The first Court decreed that the defendant Ijjutoollah should deliver up possession to the plaintiff of a 6-annas share of the lands in suit, with costs in proportion.

The Lower Appellate Court reversed that judgment, and decreed the plaintiff's suit in full.

The defendant appeals specially, and urges, *firstly*, that the adjudication of the plea of limitation by the Lower Appellate Court is erroneous; *secondly*, that the Lower Appellate Court is wrong to rely on the written statement of the 6-annas shareholders as proving the plaintiff's case; and, *thirdly*, that there is no legal evidence of the disputed lands being the plaintiff's brohmuttur, the chittahs of 1184 and 1210 and the taidads of 1202 and 1209 affording no such evidence.

As to the first point, which is, in fact, whether the plaintiff had possession of the lands as brohmuttur within 12 years before ouster, I am of opinion that there must be a remand; and in coming to that decision, I will, at the same time, consider the other pleas taken.

Now, in order to prove the plaintiff's possession within 12 years of the lands in suit as brohmuttur, the Lower Appellate Court relied on the following evidence. I use the words of the Court: "I have carefully "looked into the testimony of the witnesses, "and have failed to find that the plaint-"iff was out of possession for more than "12 years preceding the date of the institu-"tion of the suit; therefore I do not con-"sider that the action is barred.

"At the trial, the advocates of the liti-"gants *admitted that the land in question* "*was within the talook*, and that the talook "itself was *divided into two parts of*

"$\frac{6}{16}$*ths and* $\frac{10}{16}$*ths.* The only difference "was that the land in suit was, according to "the account of the plaintiffs, brohmuttur or "rent-free, whereas the defendants in "chief say that it was rent-paying. The "plaintiffs have shown through witness-"es and the $\frac{6}{16}$ths shareholders of the "talook that they never paid the rent. "And the chittahs of 1184 and 1210 B. S., "which give the area and plots of the rent-"paying tenure in the talook, do not show "that the land was included in the talook's "plots of rent-paying holding before. It "is reasonable to conclude that the land "was rent-free or brohmuttur."

We have heard the evidence read out to us, and there is only one witness Haranoollah, a cultivator of the lands in suit, who deposes that he had seen the plaintiff in possession within 15 years until ousted by the defendant, and that he paid half of the crops in kind by way of rent to the plaintiff as the tenant of such brohmuttur. The evidence of the other witnesses has been also read out to us, but of them one Fuzloo Beparee merely said that the lands were the plaintiff's, and in his possession; but his evidence does not show that they were given to the plaintiff as brohmuttur by Ram Ram Goopto. The remaining witnesses also go no further than this last one. With the exception, therefore, of the evidence of Haranoollah Mojoomdar, the other evidence is no legal evidence to prove that the plaintiff held the lands as brohmuttur within 12 years of suit.

Next, as to the written statement of the 6-annas shareholders, it is clear that the Lower Appellate Court has treated this evidence as legal evidence, and it is equally clear that the Court has made a great error in law in so doing. A written statement is no legal evidence, although the same penal consequences may follow from a false written statement as from a false deposition.

We next have to consider the legal effect of the chittah of 1210 put in by the witness Nubo Coomar called by the plaintiff. This witness was *called* by the plaintiff to give his evidence and to attest the document, *but he never did so;* nor was the Court applied to compel him to do so. The chittahs, therefore, remain unattested, and are consequently no legal evidence.

I would here remark that Baboo Hem Chunder Banerjee states that we have frequently received and acted upon evidence when it has been admitted in the Court below without objection on the other side. This is true, but that remark does not apply in the present case, for here the plaintiff himself called in witnesses to attest documents, evidently himself considering the attestation to be necessary, and undertaking to supply it, but failing to do so.

The taidads of 1202 and 1209 were before the Lower Appellate Court, and, it may be presumed, were treated as evidence. But the Lower Appellate Court does not say that it relies on the taidads. They are, moreover, unattested taidads; but whether attested or not, they cannot of themselves prove that of which the full burthen of proof was on the plaintiff, *viz.*, that he held the lands as brohmuttur within 12 years of suit.

It is, therefore, with great reluctance that I would remand the case, but the law allows in such a case that the plaintiff may have a remand in order to obtain the opinion of the Lower Appellate Court as to the one witness who spoke directly in support of the plaintiff's case.

The Lower Appellate Court will now say whether upon the evidence of Sheikh Haranoollah it finds the following issue for or against the plaintiff, *viz.*, whether the plaintiff was in possession of the lands in dispute within 12 years of suit as the holder of the brohmuttur lands derived from Ram Ram Goopto.

Costs will follow the ultimate result.

Hobhouse, J.—I have had considerable hesitation in agreeing to the remand in this case. There was, as Mr. Justice Bayley has said, really but one issue before the Lower Appellate Court, and that was whether the plaintiff was in possession of the lands in dispute within 12 years of his alleged ouster as upon his brohmuttur tenure. He was ousted, he says, in 1268, and he takes no step to recover possession until five years after that time; neither does he account for his inaction during that period. This fact alone, in my judgment, throws a cloud over his title. He then does undoubtedly produce some evidence to show that he was in possession of the lands within 12 years of suit; but that he was in possession as a brohmuttur holder there is literally only the evidence of one witness.

Plaintiff adduces certain chittahs and certain taidads, but he does not attempt to show whence they come from, nor therefore of what value they are. He himself and his co-sharers who supported his case were the persons who must have known best whether he had held the lands as a brohmuttur tenure or as a mâl tenure, but he neither comes to the Court himself, nor does he bring into Court those co-sharers in the mehals who profess to have supported his case. The best evidence, therefore, is utterly wanting, and I have had some doubts, therefore, whether we ought to remand the case in order that the Lower Appellate Court may give an opinion on the oral testimony of the only witness who at all supports the plaintiff's case. This witness does not show that he had any special knowledge of the case, and he is brought in to prove the case when there was other and better evidence available, the absence of which has not been accounted for. But, however, the evidence of that witness is evidence for whatever it is worth, and I will, therefore, sign the order remanding the case in order that the Lower Appellate Court may give an opinion on the value of that evidence.

Costs will follow the result.

The 12th June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Liability of heir—Right of suit—Intervention—Sections 257 and 246, Act VIII., 1859—Execution-sale—Caveat emptor.

Case No. 43 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 14th December 1868.

Jummal Ali (Defendant), *Appellant,*

versus

Tirbhee Lall Doss and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondents.

An adopted son and heir is not liable for the debts of his adoptive parent unless he succeeds to and appropriates his estate.

Section 257, Act VIII. of 1859, does not bar the representative of a judgment-debtor from bringing a regular suit to set aside an execution-sale, except on the score of its having been irregularly conducted.

In a case of intervention under Section 246, when the property attached is found to be the sole property of the intervenor, and in his sole possession, it should be at once released and the decree-holder referred to a regular suit.

An auction-purchaser at a sale in execution is bound to satisfy himself of the value and quality of the thing sold, just as much as if he were purchasing the same under private contract.

Glover, J.—THIS was a suit for a declaration of the plaintiff's title to a 3-annas share of Mouzah Tegra Mudhnapore, and to set aside a sale in execution of decree held on the 19th of August 1867, by which the plaintiff's right and interest in the property had been sold in satisfaction of a decree against one Mussamut Keerutputtee.

The plaintiff's case is that Gopeenath, Munnee Lall, and himself were three uterine brothers, each holding a 1½-anna share of Mouzah Tegra Mudhnapore; that Gopeenath shortly before his death adopted plaintiff as a kurta-puttra, and that his other brother Munnee Lall, who died in 1271 F. S., made him his heir; that the elder brother's share of 1½ anna had previously to his death in 1270 F. S. been attached and sold in execution under a decree obtained by the Court of Wards, so that the plaintiff was left the owner of a 3-annas share of the estate, *viz.*, a 1½-anna of his own, and a 1½ anna which he had inherited from his brother Munnee Lall. This state of facts, we may observe, is not disputed, and it is not denied that at the time of the sale, the plaintiff was the owner and in possession of that share of the mouzah.

On the 21st of August 1862, the defendant Shaikh Jummal Ali got a decree for costs and wassilat against Mussamut Keerutputtee, the wife of Gopeenath, and in execution applied to have the plaintiff's interest in the three annas share above referred to sold, on the ground that he was the heir and representative of Mussamut Keerutputtee, who had died in the interim, and was, therefore, liable for her debts. When the attachment was made, the plaintiff objected that he was neither the adopted son nor the heir of Mussamut Keerutputtee, but the Judge rejected the intervention, and consequently the plaintiff's right, title, and interest in the three annas share of the mouzah was sold, the defendant, the judgment-debtor, purchasing it himself for Rupees 9,050.

The plaintiff seeks to have this sale cancelled, on the ground that by the terms of the High Court decree, Mussamut Keerut-

puttee was alone responsible; that the plaintiff is not the adopted son of the Mussamut, and not her heir; and that if he were both, he could not be made liable for Mussamut Keerutputtee's debts inasmuch as he succeeded to none of her property.

The defence is that the decree against Mussamut Keerutputtee was substantially one against Gopeenath, whose heir the plaintiff undoubtedly is; and that in any case Keerutputtee left considerable property of her own to which plaintiff as adopted son succeeded, and he is therefore liable. The defendant adds that as the property was sold regularly and according to law, the plaintiff, who had been declared liable for the debt, could not, in accordance with the provisions of Section 257, Act VIII. of 1859, sue to cancel the sale.

The Subordinate Judge, after overruling the pleas in bar, held that the only person liable under the decree was Mussamut Keerutputtee, and that there was no proof that the plaintiff succeeded to any property from her. He held that the sale of plaintiff's estate had been improperly made, and cancelled it accordingly.

The defendant appeals and urges—

(1). That the plaintiff, as representative of the judgment-debtor, is not competent under Section 257 of the Code of Civil Procedure to bring a regular suit to cancel the sale.

(2). That the Subordinate Judge misread the decree of the High Court which was substantially against Gopeenath, the adopting father of the plaintiff.

(3). That it has been proved that the plaintiff received and appropriated the property of Mussamut Keerutputtee on the lady's death; and

(4). That the plaintiff's conduct in raising the price of the property by bidding through third parties at the sale, and in satisfying other creditors out of the surplus sale-proceeds, bars any objection on his part to the sale.

With regard to the *first* objection, I can find nothing in the law which would prevent the plaintiff from instituting a suit to cancel the sale. The proposed issue in the first place begs the question that the plaintiff was the representative of Mussamut Keerutputtee. This would only be so, *quoad* the decree-holder defendant, on proof that Tirbhee Lall succeeded to and appropriated the assets of Mussamut Keerutputtee; and until this were proved, the plaintiff, although he might be the adopted son of the lady, and therefore her heir, would not be liable for her debts. But even if the plaintiff were considered as standing in the shoes of the judgment-debtor, I do not read Section 257 as barring him from all remedy. That Section and the preceding one (Section 256) refer to cases where there has been an irregularity in "publishing or conducting "the sale," and on this point the order of the Court is declared to be final, and the "party against whom such order shall be "given shall be precluded from bringing a "suit to establish his claim."

What is the meaning of the words "to establish his claim?" What claim was it that he had tried already summarily to establish? It seems to me clear that it was a claim to have the sale set aside *because it had been irregularly conducted*, and that on this score the law barred further remedy. If this be not so, then no sale, however fraudulent or collusive, could be set aside by a debtor unless it were irregularly conducted; and if all things connected with the sale had been done according to rule, the case of the objector would be remediless, however strong a case of fraud and collusion he might be able to prove.

I do not understand the grounds on which the Judge rejected the petition of intervention filed by the plaintiff when the property in suit was first attached. He is said to have refused it, first, because the plaintiff was the heir of Mussamut Keerutputtee; and, secondly, because, if he was not, he was clearly the representative of Gopeenath, whose property was, in equity and good conscience, answerable for the defendant's claim.

Neither of these grounds is contemplated in the Section of the law (246) under which I assume (there being no other Section applicable) that the intervention was made; for, as it is admitted that the property afterwards sold was, at the time the petition was made, the sole property and in the sole possession of the plaintiff, the property ought to have been at once released and the decree-holder referred to a regular suit.

Then, as to the wording of the High Court's decree. The case is reported in 1 Hay 174. It was a suit brought by Jummal Ali against certain Mohunts for wassilat. The suit was decreed, and in execution land was attached. Gopeenath and his wife

Keerutputtee objected to the sale, the first on the ground that he held a lien on the property in the shape of a zur-i-peshgee lease, and the Mussamut on the allegation that she had bought a 6-annas share of the estate from one of the judgment-debtors.

There was another objector whose claim does not concern this case.

The final decree made by the High Court was against Mussamut Keerutputtee, whose kobalah was declared cancelled, and who was also made liable for wassilat and for Jummal Ali's costs. Gopeenath's claim was not adjudicated upon, and he received his costs from Jummal Ali.

There cannot be the slightest doubt on reading this decree that Mussamut Keerutputtee was the only party made liable, and none, that Gopeenath was not included in it, and could not in any way have been made liable under it. We have nothing to do with any probabilities. The plaintiff is executing a decree against his judgment-debtor Keerutputtee, and we cannot go behind that decree, or find that the wife was in reality the benamee of the husband, and that the latter was the person liable.

The *third* objection appears to me untenable. The *onus* of showing that assets of Keerutputtee passed into the hands of Tirbhee Lall Doss was on the defendant, and I agree with the Subordinate Judge in thinking that he has altogether failed to support it. None of the witnesses state what Keerutputtee's property was; they merely state vaguely that all the property of Gopeenath, Munnee Lall, and Keerutputtee went to the defendant. This is manifestly insufficient to prove the fact that Tirbhee Lall succeeded to any property of Keerutputtee's. The less so, when it is considered that under ordinary circumstances Keerutputtee would have had no separate property. She was a widow, and by Mitakshara Law only entitled to maintenance, the family being admittedly joint and undivided.

Then, as to the plaintiff's conduct. I think that the reasons given by the Subordinate Judge for distrusting the evidence sufficient. But in any case, what illegality would the plaintiff have committed if he did endeavour to increase the price for which the property was sold?

With regard to the surplus proceeds, the two witnesses, who were examined, gave, it seems to me, most suspicious testimony, and the judgment-debtor, Rajah Ram, who could have given the best evidence on the point, was not examined. On this issue also, I agree with the Subordinate Judge.

A point which was a good deal argued during the hearing, although not taken as a ground of objection on the part of the respondent, was that the sale-certificate showed that what was sold was the right, title, and interest of Keerutputtee in the plaintiff's mouzah, and that, therefore, as she admittedly had no right, title, or interest in that property, the decree-holder bought a nonentity, and that the sale was *ab initio* bad as against the plaintiff.

It appears to me after a careful reading of the words of the sale-certificate that this is not the case, and I am fortified in my opinion by the fact that the plaintiff himself admits in his plaint that it was his right and interest that was sold in execution, and not Keerutputtee's.

The certificate begins by reciting that the decree-holder had applied to have the right and interest of Tirbhee Lall (as adopted son and heir of Mussamut Keerutputtee) in the disputed property sold, and a reference is made to a schedule below, which states that what is asked to be sold is the right and title of Tirbhee Lall. The Oordoo words are "*Huk o hukook* Tirbhee Lall Doss." Then comes the order of Court—that in accordance with the application, the right, title, and interest of the "*mudeoon*" in the above mentioned property be sold. I do not think that, taking the sense of the whole document, these words can apply solely to Keerutputtee as judgment-debtor. I understand it to apply to Tirbhee Lall Doss. No doubt, the word "*mudeoon*" means judgment-debtor; but if the order of the Civil Court applied to Keerutputtee only, there would have been some reason given for disallowing the prayer of the decree-holders, which was to have Tirbhee Lall Doss's interest, as representative of the Mussamut, put up for sale.

Lastly, it has been pressed upon us that if the sale cannot be upheld, at least the plaintiff must refund the surplus sale-proceeds taken away by Rajah Ram. I do not think that we ought to pass any such order. In the first place, in what shape could the decree be given? Could it be said that the plaintiff was to have the sale cancelled conditionally on his re-

paying the amount taken by Rajah Ram? This would be clearly impossible, for if the plaintiff has a right to have the sale cancelled, that right cannot be fettered by conditions which are not necessarily conditions precedent to his obtaining that right.

Besides, why should any special indulgence be shown to the defendant in this matter. He must have known perfectly well the risk of claiming the interest of a Hindoo widow, especially in the Mithila country. In any case, he was bound to satisfy himself beforehand of the value and quality of the thing sold, just as much as if he were purchasing the same under private contract, and is no more entitled to consideration for want of forethought or proper prudence in making his purchase at an auction-sale in execution than under any other circumstances of sale. This appears to me a case in which the maxim of *caveat emptor* may very properly be applied. Before proceeding to sale, he ought to have been in a position to show clearly that Tirbhee Lall had appropriated Keerutputtee's assets, and then only would he have been in a position to buy with any chance of safety. As it is, he has only himself to thank if he has made a bad bargain.

The ruling of the Court of Sudder Dewanny Adawlut in the case of Ranee Luchmee Koomaree *versus* Prannath Roy, Sudder Dewanny Adawlut Reports for 1855, pp. 549 and 550, is in point.

I think, therefore, that the plaintiff has made out his right to have the sale in execution cancelled on the ground that he was not liable for the decree against Keerutputtee, and that this appeal should be dismissed with costs on the appellant Jummal Ali.

Kemp, J.—I concur in dismissing the appeal on the ground that the plaintiff, respondent, was not liable under the decree, which was against Keerutputtee alone.

The 12th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Cause of action—Limitation.

Case No. 3099 of 1868.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 3rd September 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 28th November 1867.

Shahaboodeen (one of the Defendants), *Appellant,*

versus

Moulvie Naduroojuma (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Rajendronath Bose for Respondents.

Plaintiff sued for the confirmation of his title to, and for possession of, a jote in the Nowabad Mehal, deriving his title under a pottah from the ijaradar. Defendant's case was that he had bought the lands as a talook, and been in possession accordingly; but finding that the lands had been surveyed as a part of the Nowabad Mehal, he took a pottah from the ijaradar four years previously to plaintiff's pottah. Defendant's pottah was found to be a forgery.

HELD that plaintiff's cause of action arose solely from the title set up by the defendant under the pottah derived from the ijaradar, and not from the date when the defendant purchased the lands as a talook.

Bayley, J.—IN this case the plaintiff sued for the confirmation of his title and for possession of a certain jote in the Nowabad Mehal, on the allegation that he derived his title under a pottah granted by the ijaradar on the 17th Kartick 1228 M. S.

The defendant's case was that he had bought the lands as a talook under a turruf in 1220 M. S., and been in possession accordingly; but finding that the lands he so held had been surveyed as a part of the Nowabad Mehal, he took a pottah in Assin 1224 M. S. from the ijaradar; that the plaintiff was never in possession within 12 years of suit, and therefore his suit was barred by limitation.

Both the Courts have found the defendant's pottah to be a forgery.

On the point of limitation, the Lower Appellate Court has stated: "If the defendant's pottah be false, his possession, even "if proved, will be only the possession of a "trespasser, and will not affect the plaintiff's rights."

The only point argued in special appeal is that there has been a wrong application of the Law of Limitation in this case. It is said that as the cause of action accrued to the plaintiff by the defendant's long prior possession of the lands as belonging to the turruf, so that possession raised a bar to the plaintiff's suit, and the plaintiff not having removed that bar by showing that he was in possession within 12 years of such cause of action, the suit cannot proceed.

Although as a general rule, as laid down in the case in Volume IX., Weekly Reporter, page 131, the possession of a trespasser, if it is an adverse possession beyond 12 years of the cause of action, may be a bar to the plaintiff's suit, in this case we hold that the plaintiff's suit is not barred, because his cause of action did not originate in the title of the defendant derived from his talookee rights by purchase in 1220; but the defendant's own case was that he obtained a pottah in 1224 M. S. from the ijaradar, which gave him a title of the same character but of four years' prior date to the plaintiff's pottah from the same ijaradar. Therefore the plaintiff's cause of action arose solely from the title set up by the defendant under the pottah derived from the ijaradar, and not from the date when the defendant purchased the lands, as he alleged, as a talook.

As the cause of action, therefore, arose to the plaintiff within 12 years of suit, we are of opinion that the plea of limitation cannot be successfully maintained in this case; and we, therefore, dismiss this appeal with costs.

The 12th June 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Bona fide suit against the dead—Limitation—Deduction.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 24th February 1869.

Mohun Chunder Koondoo, *Plaintiff*,

versus

Azeem Gazee Chowkeedar, *Defendant*.

Where a defendant is found, after issue of summons, to have died before the filing of the plaint against him, the Court has no jurisdiction to decide the suit. In calculating the period of limitation against his representative, plaintiff may be allowed a deduction of the time during which the suit against the dead man was being prosecuted *bonâ fide* and with due diligence; the Judge to determine whether plaintiff was wanting in due care and caution in not ascertaining the death of the party against whom he was proceeding.

Case.—THIS was an action brought on a bond alleged to have been executed by the defendant on the 29th Falgoon 1271, corresponding with 11th March 1865, for Rupees 11, repayable with interest at 37½ per cent. per annum in Magh 1272, corresponding with February 1866.

The plaint was filed on the 18th February instant and trial was fixed for the 24th, or 14th Falgoon 1275, on which day it appeared from the evidence of the peon who went to serve the summons, that the defendant had died about a year before the filing of the plaint, and the plaintiff's pleader thereupon applied to the Court under Section 104, Act VIII. of 1859, to substitute the legal representatives as defendants; but this I refused to do, as it appeared to me that the suit would be barred as against them, under the ruling in the case noted in the margin.

Raj Kishoree Dassee *versus* Bodun Chunder Shaha, VI. Sutherland's Weekly Reporter, p. 298.

It is urged by the plaintiff's pleader that as his client was not aware that the defendant had died before the filing of the plaint, the Court should comply with the application and that the suit ought not to be held barred by lapse of time against the legal representatives, as it was originally brought against the defendant within the period of limitation.

I find that the case noted in the margin supports the contention of the pleader, as in that case it was held by Loch and Glover, *JJ.*, that the suit against the heirs of the decree-holder substituted as defendants was not barred by lapse of time as it was originally brought within the period of limitation against the decree-holder, of whose death plaintiff first learnt the news from the return made to the summons, and they drew a distinction between that case and the case cited from 6 Weekly Reporter, on the ground that in the latter case the party substituted was not the heir of the party originally sued when the cause of action accrued.

Sree Kishen Chowdhry and others *versus* Ram Kristo Bhuttacharj and others, X. Sutherland's Weekly Reporter, p. 317.

If it be held that when a person is substituted or added as a defendant under Section 73 of Act VIII of 1859, the suit is commenced against that person at the time he is made a defendant, and not before, a similar reasoning is applicable to parties made defendants under Section 104, and there seems to me to be no warrant for allowing such insertion to have retrospective effect, as it appears to me that Sections 99 to 104 of Act VIII. of 1858 contemplate the case of the parties who, being alive at the time of the filing of the plaint, die subsequent to its filing, and do not embrace a case like the present. I therefore think that the decision in Raj Kishoree Dassee *versus* Bodun Chunder Shaha must govern this case.

I also find that in the case noted in the margin, it is held by Bayley and Macpherson, *JJ.*, that when a suit is instituted and a decree is passed against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives, as Section 210 of Act VIII. of 1859 contemplates only the case of a person who being alive when the decree is passed died before execution has been fully had.

The representatives of Girendronath Tagore, Petitioners, *versus* Hurronath Roy, Opposite Party, X. Sutherland's Weekly Reporter, p. 455.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the defendant in the original suit having died before the filing of the plaint against him, the Court had no jurisdiction to decide upon the case. Under these circumstances, the time during which the suit was being prosecuted *bonâ fide* and with due diligence against the dead man may be deducted in calculating the period of limitation against his representatives. It will be for the Judge to determine whether the plaintiff was suing the deceased *bonâ fide* and with due diligence, or whether he was wanting in due care and caution in not ascertaining whether the party against whom he was proceeding was dead.

The case reported in page 298, 6 Weekly Reporter, is not applicable to a case like the present.

The 14th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Malikana—Limitation.

Case No. 701 of 1869.

Special Appeal from a decision passed by the Judge of Gya, dated the 7th January 1869, reversing a decision of the Subordinate Judge of that District, dated the 10th July 1867.

Bhoobee Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Nehmoo Bohoo (Defendant), *Respondent.*

Baboos Kalee Kishen Sein and *Nil Madhub Sein* for Appellants.

Mr. C. Gregory, Baboo Mohesh Chunder Chowdhry and *Moulvie Syud Murhamut Hossein* for Respondent.

HELD (by Kemp J., whose opinion prevailed), that the non-receipt of malikana during a period of 12 years bars a suit to recover.

HELD by Glover J. (dissenting) that malikana is in the nature of rent, and failure to pay gives a continually recurring cause of action, and enables a proprietor to recover all arrears not barred by Statute.

Kemp, J.—THIS was a suit to recover malikana. The Judge found that the plaintiff had not been able to prove receipt of any malikana during a period of 12 years prior to suit. The suit of the plaintiff was, therefore, dismissed as barred.

I am of opinion that this decision is correct under the rulings of this Court to be found in Volume VII., Weekly Reporter, page 336; Volume IX., page 102; Volume X., page 302. The appeal is dismissed.

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Glover, J.—In this matter I am compelled to differ with my brother Kemp and with the learned Judges of other Division Benches. I need not say, therefore, that my opinion is come to with much diffidence.

It appears to me that malikana is in the nature of rent. It represents the profit of the proprietor derived from the rents of his estate, and was so understood apparently by Government at the time of the Perpetual Settlement.

In Regulation VIII. of 1793, Section 44, malikana is called "an allowance in consideration of proprietary rights," and farmers are directed (Section 45) to pay it monthly according to the "kistbundee fixed for the sudder jumma." Payment of malikana was enforced in the same manner as arrears of ent (Section 46).

Malikana, therefore, has all the elements of rent. It represents the profit which the proprietor would ordinarily receive from the letting of his land if he continued in occupation thereof, and as the recipient never ceases to be proprietor, although the lands may have been let on lease to others, what he receives as malikana seems to me never to cease to be rent.

If it be rent, then, as it is due only at certain times of every year, failure to pay must, I suppose, be considered as giving a continually recurring cause of action, and enable a proprietor to recover all arrears of malikana that may not be barred by the Statute. In the present case, for instance, the proprietor would be able to recover back dues for three years.

The 15th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Unstamped documents—Evidence—Section 17, Act X., 1862—Sections 130 and 350, Act VIII. of 1859.

Case No. 363 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 18th December 1868, modifying a decision of the Deputy Collector of that District, dated the 6th October 1868.

Lalljee Singh (Defendant), *Appellant,*

versus

Akram Ser and others (Plaintiffs), *Respondents.*

Baboos Gopal Lall Mitter and *Hem Chunder Banerjee* for Appellant.

Moonshee Mahomed Yusuff for Respondents.

Where documents have been insufficiently stamped, payment may be made into Court of the proper stamp-duty; but documents not stamped at all ought not to be received as evidence.

Where unstamped receipts, which might have been properly rejected by the first Court have been filed there and accepted as evidence, an Appellate Court is bound to consider them as evidence in the case, and the decree of the Court of first instance cannot be reversed or modified for want of the stamps.

Glover, J.—THIS was a suit to recover a sum of 713 rupees, arrears of rent for the year 1275.

The defence was that all the rent had been paid except Rupees 84-12.

The first Court gave plaintiff a modified decree for 337 rupees. But the Judge, considering that the receipts not having been stamped were not receivable as evidence, disbelieved the oral evidence in support of the plaint, and gave a decree to the plaintiff in full.

It is objected in special appeal, *first*, that under the provisions of Section 350, Act VIII. of 1859, the Judge was not justified in rejecting the receipts, and that in any case he ought, under the provisions of Act X. of 1862, to have given the parties filing those documents an opportunity of paying in the sum necessary for stamping them, together with the usual penalty provided for in the Act; *secondly*, it is objected that the judgment of the Lower Appellate Court is wholly unintelligible, and is contrary to the terms of Section 259 of the Civil Procedure Code; and, *thirdly*, that, with reference to the payment said to have been made to Shujaat Ali, the Judge was wrong in dismissing the appeal on the ground that Shujaat Ali was not authorized to receive rents for the plaintiff.

With regard to the first objection, the special appellant appears to be in error in supposing that the Judge could have rectified the want of stamps on the receipts. Section 17 of the Stamp Act does undoubtedly say that documents may be stamped on payment into Court of the proper amount of stamp-duty. But this Section refers distinct-

ly to documents which are required to be stamped under Section 15 of the Act, those, namely, which were already stamped, but had been executed on paper insufficiently stamped. There is no Section of the Act which provides for the reception of documents which have not been stamped at all. Such documents ought not to be received as evidence. Section 130 of Act VIII. of 1859 is much to the same effect. It also provides for the payment of stamp on papers insufficiently stamped, but does not allow documents which have not been stamped at all to be so received.

But with regard to the first part of the objection, we think that the special appellant's contention is correct.

Section 350, Act VIII. of 1859, distinctly lays down that no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court, on account of any defect, error, or irregularity, which defect, error, or irregularity does not affect the merits of the case or the jurisdiction of the Court.

In this case, it is quite clear that the want of stamps on the receipts cannot affect either the merits of the case or the jurisdiction of the Court; and therefore we are of opinion that, although those receipts might have been very properly rejected by the first Court, still, being filed and accepted as evidence, the Judge was bound to consider them as evidence in the case.

There seems to be no reason to interfere with the Judge's decision on the second ground urged in special appeal.

With regard to the third ground, that is, the alleged payment made to Shujaat Ali, we think that the Judge was in error.

It was denied by the plaintiff that Shujaat Ali was his servant, and it was never alleged that this person had no right to receive rents for his master; and we think, therefore, that the defendant is entitled to the benefit of having paid the sum of Rupees 55 to Shujaat Ali, on behalf of his master, the plaintiff.

The case must be remanded to the Judge in order that he may take into consideration the evidence of the receipts, and pass a fresh decision with reference to the remarks made in this judgment.

Costs will follow the result.

The 15th June 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Execution—Different attachments of the same property—Illegality—Collusion.

Case No. 261 of 1868.

Regular Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 30th March 1868.

Mahomed Kuzulbash Khan (Plaintiff), *Appellant,*

versus

Mahomed Shah and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboos Hem Chunder Banerjee, Nuleet Chunder Sein, Oopendro Chunder Bose, and *Nil Madhub Sein* for Respondents.

A decree-holder may attach property and have it sold in execution of his decree, notwithstanding the existence of a previous attachment. A question might arise at the time of the distribution of the sale-proceeds, whether a party having made an attachment under Regulation II. of 1806 would be entitled to have his claim satisfied before the other decree-holders.

Where no fraud has been alleged, a sale in execution cannot be set aside as regards the auction-purchaser whether the order of Court under which it took place was legal or not. Even if the decree in execution of which the sale took place were a collusive one, the rights of the auction-purchaser would not be affected, if he was no party to the fraud; and there would be no ground for setting aside the sale.

Loch, J.—We think there are no grounds for this suit; and we agree with the Court below in the order passed dismissing the suit.

The real object of the suit was to set aside the sale of the property, which the plaintiff says he attached under Regulation II. of 1806 and also under Act VIII. of 1859. This property, it appears, was also attached by another decree-holder, Bheem Singh. It was put up for sale at his instance; it was purchased by the present plaintiff, who failed to pay the balance of the purchase-money, and who in consequence forfeited the deposit made by him. The property was again put up for sale, and has now been purchased by the defendant Preo Nath Mitter.

It is urged that there was a proceeding of the Principal Sudder Ameen, bearing date the 9th September 1864, in which Ram Surrun Lall and Bheem Singh and others were parties, and who applied for sale of this property; that an objection raised by

the present plaintiff, the execution of the decree of Bheem Singh and others was ordered to be struck off, and they were directed to attach other properties of the debtor, when their application for execution would be revived, otherwise they would be considered entitled only to any balance that might remain after the dues of the objectors had first been satisfied.

The ground upon which this order was passed was that the objector had previously attached this property under Regulation II. of 1806, and therefore Bheem Singh and others were not entitled to sell this property in execution of their decree before the sum due to the present plaintiff, the objector in that case, was realized, and the sums due to the claimant under various decrees were directed to be ascertained, and the Court held that it would be irregular for Bheem Singh to attach this property until the decrees of the claimant were satisfied.

It is said also that the order passed by the Principal Sudder Ameen on that occasion was confirmed by the High Court. This, however, is not a correct statement of what occurred. From the order passed by the Principal Sudder Ameen, an appeal was preferred to the Judge, who modified the order of the first Court; and an appeal was then preferred to the High Court on the ground that, as the law did not allow an appeal to the Judge in such a matter as this, he should not have admitted the appeal, and the High Court held on the 25th April 1865 that, as there was no appeal to the Judge, his order was irregular, and must be set aside.

It is now urged that any sale of the property, in opposition to the order passed by the Principal Sudder Ameen on the 9th September 1864, is irregular and should be set aside; for so long as that order continued in force, no sale of the property by the other decree-holders could take place. But we find a proceeding of a later date passed by the officer who then held the office of Principal Sudder Ameen, which virtually set aside the order of the 9th September. It appears that a fresh application was made by Bheem Singh for the sale of this property, on the ground that, while it remained under attachment, its value was being deteriorated, and the property was going to ruin; he therefore prayed to the Court to order the sale of it in execution of his decree, and at the same time prayed that a portion of the sale-proceeds might be put aside to satisfy the claim of the present plaintiff, and that the balance might be paid to him.

It was on this application that the first sale mentioned above took place, in which the plaintiff himself was the auction-purchaser.

Looking into the order of the Principal Sudder Ameen of the 9th September 1864, we think it altogether illegal. There is no law which could prevent the other decree-holders attaching the property and having it sold under the execution of their decrees, notwithstanding the existence of the previous attachment. A question might arise at the time of the distribution of the sale-proceeds, whether a party having made an attachment under Regulation II. of 1806 would be entitled to have his claim satisfied before the other decree-holders. But it is clear that any sale under those circumstances would be a good and valid sale.

It is urged also that the order passed by the Second Principal Sudder Ameen, setting aside the order of the 9th September 1864, was illegal. Whether it was illegal or not, it is certain that the sale took place, and the property has been purchased by a party against whom fraud has been alleged. Therefore, as regards the auction-purchaser, the sale cannot be set aside.

It is further urged that the decree of Bheem Singh, in execution of which the sale took place, was a collusive decree. No proof, however, has been given of this allegation; and, if there had been, the rights of the auction-purchaser would not be affected thereby, as he was no party to the fraud, and therefore there would be no ground for setting aside the sale.

Another ground has been taken with regard to the irregularity in conducting the sale. This ground has not been pressed, and there does not appear any evidence given in support of it.

Under these circumstances, we dismiss this appeal with costs; one set of costs being allowed to the auction-purchaser, another set of costs to the mohurrir, who ought not to have been made a party; and the decree-holders will have one set of costs.

Mitter, J.—I concur.

The 15th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal—Stamps—Order for executing arbitration award—Section 325, Act VIII., 1859.

Case No. 178 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 4th February 1869.

Wolee Alum (Defendant), *Appellant,*

versus

Bibee Misrun (Plaintiff), *Respondent.*

Messrs. A. T. T. Peterson and *R. E. Twidale* for Appellant.

Baboo Onookool Chunder Mookerjee and *Moonshee Mahomed Yusuff* for Respondent.

Under Section 325, Act VIII., 1859, the order for the execution of an arbitration-award must be considered to be a decree of Court, from which an appeal will lie. Such appeal ought to be made on the full stamp required for a regular appeal.

Kemp, J.—It appears in this case that certain disputes between the defendant, appellant, and plaintiff, respondent, were referred to private arbitrators.

The opposite party (Bibee Misrun) applied to the Court below under Section 327 of Act VIII. of 1869, on a stamp of the value for ordinary petitions to the Lower Court, *viz.*, one rupee.

The present appeal on the part of the defendant is brought on a stamp of two rupees, and not on a stamp required for a regular appeal.

Two objections have been taken by the pleader for the opposite party: *first*, that no appeal at all will lie; and, *secondly*, that, if any appeal will lie, the appeal ought to have been presented on a stamp required for a regular appeal, and not upon a two-rupees stamp.

There is no ground for the first contention that no appeal at all will lie. Inasmuch as there can be no doubt that, under the provisions of Section 325, the order for the execution of the arbitration-award must be considered to be a decree of Court, an appeal will lie.

On the second ground, we are of opinion that the contention is good, and that, in accordance with the ruling to be found in the Gap Number, Sutherland's Weekly Reporter, page 33, Miscellaneous Rulings, and in a decision dated the 22nd of December 1863, in Miscellaneous Appeal No. 71 of 1863 (Justices Loch and Norman), the appeal ought to have been made on a full stamp.

The appeal is, therefore, dismissed with costs, without prejudice to the appellant to bring a fresh appeal within 20 days on a full stamp.

The 17th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Deposit by judgment-debtor—Interest—Discretion of Court.

Case No. 142 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 5th January 1869, affirming an order of the Subordinate Judge of that District, dated the 27th April 1868.

Poreshnath Mookerjee and others (Decree-holders), *Appellants,*

versus

Kristo Mohun Shaha and another (Objectors), *Respondents.*

Baboos Kishen Succa Mookerjee and *Huree Mohun Chuckerbutty* for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A judgment-debtor having deposited a sum which he represented to be the amount due to the decree-holder, the Court found that it was not the full amount, and yet allowed the judgment-debtor the benefit of his deposit in the way of saving interest.

Held that the matter was within the discretion of the Court. As it considered the deposit to be a reasonable deposit and such as the judgment-creditor ought, in fairness to receive, and as in addition the judgment-creditor did not expressly declare that he would not receive a part-payment, the judgment-debtor ought not to be compelled to pay interest afterwards.

Jackson, J.—Two questions arise in this special appeal, both relating to interest. The decree-holder, in the first place, insists that by the terms of the decree, he was entitled to interest on the principal sum decreed to him from the date of suit, whereas the Courts below have given him only interest from the date of the decree. The terms of that decree have been read to us, and it seems to me that they certainly cannot be taken to import more than the liability to pay interest from the time when the decree was made. Not only so, but if the intention of the Court had been to grant the principal sum with interest thereupon down to the date of the decree, and interest on the aggregate sum thereafter, as the Court is empowered to do, that would have been distinctly expressed, and would have been accompanied with precise directions as to the rate of interest to be allowed for either period. I think, therefore, that upon this point the Courts below are clearly right.

The second question relates to the right of the decree-holder to receive interest upon the whole amount due, without taking into account a sum paid into Court by the judgment-debtor some months previously, which amount, at the time of deposit, the judgment-debtor represented to be all that was really due to the execution-creditor, and which, therefore, he paid in as if it were in full satisfaction of the decree, but which the Court which received the deposit did not accept as such full satisfaction, but merely as a payment on account, and directed notice of the payment to be given to the execution-creditor. It seems that, on receiving notice, the decree-holder came in and objected to the statement of accounts as given by the judgment-debtor, and also refused to receive this payment as a payment in full, but did not object to receive it as payment in part. He neither accepted nor refused it in that point of view. He allowed it to lie in the Collector's treasury.

We have been referred to a case in VII. Weekly Reporter, p. 20, in which, in a case very like the present, the learned Judges laid down the general principle of law: "That "a judgment-creditor, like any other creditor, is not bound to accept a tender of a "sum admittedly less than what is due to "him, and that he has a right to insist on "being paid the principal with interest in "full. If he refuses to receive a sum in "part of what is due to him, his refusal will "not deprive him of his right to interest; "in other words, the debtor can derive no "benefit from the rejected offer of a part-"payment."

I am not inclined to question the correctness of the principle of law therein laid down. I certainly cannot say that a judgment-creditor would be bound to accept a tender of a sum admittedly less than what is due. But it seems to me that the principle laid down in that case does not completely dispose of the case before us, because it is observed in that case that, if the creditor "refuses to receive a sum in "part of what is due to him, his refusal will "not deprive him of his right to interest; "or, in other words, the debtor can derive no "benefit from a rejected offer of part-pay-"ment." Now, we have not here a "rejected offer of part-payment." The decree-holder merely states that this is not the whole of the amount due to him, and he refuses to receive it as the whole amount.

Then, in that case, the learned Judges went on to consider the particular facts. They said: "It is impossible from the ma-"terials before us to say how the accounts "in this case were made up;" and they then went into the facts, and declared that it would be necessary to make a fresh account on the principle laid down by them, and directed that the case should be remanded for that purpose. Now, here we have no considerations of that kind. We are not called upon to consider what the amount actually due was, but simply the one proposition whether the judgment-debtor having represented the sum which he deposited to be the amount due, and the Court having found the amount not to be so, and yet having allowed the judgment-debtor to derive the benefit of his deposit in the way of saving interest, whether as a matter of law, the Courts below have acted erroneously in so doing. I think not. I think this is a matter within the discretion of the Court. While, on the one hand, I think it would be impossible for us to say that a judgment-debtor should be allowed to pay into Court a sum which amounted to nine-tenths of his debt, and that the judgment-creditor would be absolutely entitled to disregard such payment, and insist, five years afterwards, upon receiving interest in full upon the entire amount due under the judgment, as if no such deposit had ever been made; neither, on the other hand, ought we to affirm any principle of law whereby a judgment-debtor should be enabled to make re-

peated trifling deposits in part-payment of a large decree, and so cause inconvenience and give rise to perpetual taking of accounts on the part of the judgment-creditor. Without, therefore, at all questioning the correctness of the ruling in the case I have referred to, it seems to me that we ought to deal with this matter as a matter of discretion.

I observe that the Judge states that "the "Subordinate Judge finds that, as a portion "of the money for which execution was "taken out was deposited in Court for "payment to the creditor, and the Court "accepted the deposit on the 15th January "1867, the decree-holder should have taken "the money; and as he has not done so, "he is not entitled to interest." I think it a fair construction to put upon those words that the Subordinate Judge considered the deposit made by the judgment-debtor to be a reasonable and fair deposit, and such as the judgment-creditor ought in fairness to receive; and when we see, in addition to that, that the judgment-creditor did not expressly declare that he would not receive a part-payment, but merely repudiated the statement that it was a payment in full, I think the judgment-debtor was fairly entitled to suppose that this money was received as a payment on account of the judgment, and that he ought not to be compelled to pay interest afterwards upon an amount which he had so applied.

On these grounds, I think we ought not to interfere with the decision of the Courts below, and that this appeal ought to be dismissed with costs.

Markby, J.—I am of the same opinion. Upon the first point, which is, I think, an extremely clear one, I do not wish to say anything. With regard to the second point, I also entirely adopt the proposition of law as laid down in VII. Weekly Reporter, p. 20. What I consider the learned Judges have there laid down are general rules which would regulate the satisfaction of a decree by a judgment-debtor to his judgment-creditor. On the other hand, I am not at all inclined to say that the Court which has to execute the decree is entirely without discretion in the matter, as to whether or not it will allow a part-payment by the execution-debtor. Under ordinary circumstances, the execution-debtor, in my opinion, would not be allowed to make such a part-payment. Under ordinary circumstances, the execution-creditor would not be called upon to accept it. But, on the other hand, there may be circumstances under which a Court may say that this is a proper case in which part-payment ought to be allowed, and the execution-creditor asked to accept. As I understand the judgments of the Lower Courts in this case, that is what has been done; and that having been done, we ought to uphold those judgments, unless it has been shown to us that this was not a case in which that discretion may be exercised. So far as I can see, I think that it was a case in which such discretion might well be exercised; and having been exercised by both the Lower Courts, I think there is no ground for our interfering with that judgment.

The 17th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court—Evidence—Trespasser—Damages.

Case No. 677 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 31st December 1868, affirming a decision of the Subordinate Judge of that District, dated the 7th September 1867.

Mr. W. Chardon (Defendant), *Appellant,*

versus

Ajeet Singh and others (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee, Toolsee Doss Seal, and *Ummurnath Bose* for Appellant.

Baboos Unnoda Pershad Banerjee, Kishen Succa Mookerjee, and *Boodh Sein Singh* for Respondents.

It is not a condition precedent to the reception of further evidence by an Appellate Court that the reasons for doing so should be recorded.

The damages to be recovered from a trespasser for wrongful occupation should represent compensation for what the owner has lost, being, that is, what would have been a fair and reasonable rent for the land if the same had been let to tenants.

Kemp, J.—THIS was a suit for damages laid at Rupees 2,708-11. The plaintiffs allege that they are part-owners of Mouzah Aladadpore; that the defendant, Mr. Chardon, forcibly sowed indigo on 300 beegahs of land, and appropriated the produce for 1273 and the Bhadoor crop of 1274 B. S.

The defendant Chardon avers that he raised an indigo-crop on 129 beegahs of land in 1273, the said land being held by him under several leases. He further avers that he was prevented sowing indigo upon 70 beegahs of land held under a lease from the plaintiffs, and for which he has brought a separate suit; that he did not forcibly sow any lands, and that the allegations of the plaint are wholly false.

The plaintiff's proprietary share in the 300 beegahs is said to be 119 beegahs.

The Principal Sudder Ameen held that the lease of the defendant had run out, and that he was holding on as a trespasser with reference to 114 beegahs only.

On the question of damages, the Principal Sudder Ameen observes that, "exercising a sound discretion in the matter," he had no hesitation in awarding 17 rupees per beegah. The damages at this rate amounted to Rupees 1,145-12 annas, for which the defendant Chardon alone was held to be liable. The other defendants were exempted from all liability.

Both parties appealed.

The appellant Azeet Singh, plaintiff in suit No. 27, alleged that the 300 beegahs for which damages were claimed are altogether distinct from the 129 beegahs covered by the leases set up by Chardon. The amount of damages awarded by the Principal Sudder Ameen was also objected to as too low. It was also urged that the Principal Sudder Ameen should not have disallowed the claim for damages on account of the Bhadoor crop of 1274.

Chardon's appeal raised the following questions—that the decision of the Principal Sudder Ameen was against the evidence; that the Principal Sudder Ameen was wrong in holding that Chardon held 114 beegahs under leases which had expired; that the allegation of the destruction of the crops was false; that the plaintiff Ajeet Singh, having allowed the defendant Chardon to remain in possession, had a right to claim rent only, and not damages of the excessive nature demanded.

The Judge deputed his Nazir to make a local enquiry. The report of this officer was considered to be insufficient to clear up the question in issue. But on the evidence of the putwaree and other witnesses, and with reference to a butwarrah-map and chittah, the Judge found that Chardon occupied 300 beegahs or thereabouts in 1273 and 1274 B. S.; that the plaintiff Ajeet Singh was entitled with reference to his share in the mouzah of Aladadpore, to damages over beegahs 110-2-11. The Judge, on the question of damages, held on the evidence that Chardon was a trespasser, that he was liable for damages for both years, *viz.*, for 1273 as well as 1274. The indigo produced in 1273 was valued at 4,106 rupees, and the Bhadoor crops of 1274 at Rupees 1,039-10, the half of this, the malik's huk, being Rupees 2,572-13.

The Judge proceeds to quote a decision of the Privy Council published in Volume V., Weekly Reporter, page 91, and assesses the damages at Rupees 3,500 as a fair amount, taking into consideration the fact that the defendant Chardon was a trespasser by force. The Judge concurred with the first Court in finding that Chardon alone was liable, and in exempting the other defendants.

Chardon appeals specially to this Court.

The first objection taken before us is that the Judge was wrong in law in admitting fresh evidence in the appeal-stage of the case without recording his reasons for so doing, and that, as the decision of the Judge has mainly proceeded on this evidence, it ought to be set aside.

With reference to this objection, we may observe that it has been ruled by the Privy Council that "it is not a condition precedent "to the reception of further evidence by the "Appellate Court that the reasons for so do-"ing should be recorded, although their Lord-"ships hold that this proceeding is one that "ought at all times to be strictly complied "with, as it is a salutary provision which "operates as a check against a too easy recep-"tion of evidence at a late stage of litigation, "and the statement of the reasons may in-"spire confidence and disarm objection."—Weekly Reporter, Volume VII., page 25, Privy Council Rulings.

We find that the Judge did hold a proceeding in which he stated his reasons for taking fresh evidence. Moreover, we find that the special appellant did not in the Lower Appellate Court object to the reception of the further evidence, and that he cross-examined the additional witnesses who were examined by the Judge. Moreover, the Judge did not proceed upon the fresh evidence alone. We do not think we should be doing right in setting aside a decision which is a very careful one, and which is based on the evidence of both parties, unless it was

clearly shown that the merits of the case have been affected or the jurisdiction of the Court overstepped, and this has not been shown to us. We overrule this first objection.

The second point taken in argument was that the Judge had not found whether the 300 beegahs claimed by the plaintiff included the 114 beegahs held by the special appellant under leases. On turning to the decision of the Judge, we find that he considered it to be established that Chardon held 300 beegahs exclusive of the land covered by the alleged leases. This being a finding on a question of fact, it cannot be interfered with in special appeal.

The next point taken is that the butwarrah-map and chittahs were no evidence against the special appellant, as he was no party to the butwarrah-proceedings.

On this point, we find that the Judge used these papers to enable him to identify the position of the disputed lands, and for no other purpose. The question of whether Chardon was a trespasser and the quantity of land in his wrongful occupation were decided on the evidence on the record. There is, therefore, no force in this objection.

On the question of damages, the Judge admits that there is "no very precise evidence." The Judge assumes that 1,540 maunds of indigo-plant must have been produced on the land in the wrongful occupation of Chardon, which would be worth Rupees 4,106, and that the Bhadoor crop of 1274 was worth Rupees 1,039-10, total 5,145-10; that the malik's share would be a moiety of this sum, or Rupees 2,572-13. The Judges assesses the damages at Rupees 2,500.

We think that on the principle laid down in the decision of the Full Bench, published in Volume IX., Weekly Reporter, page 447, it was not right to measure the damages in this way. All that the plaintiff Ajeet Singh is entitled to recover as damages is a fair and reasonable compensation for what he has lost by being deprived of the land. The Judge will, therefore, ascertain what would have been a fair and reasonable rent for the land if the same had been let to tenants during the period of the unlawful occupation of the defendant Chardon.

The case must go back for the Judge to assess the damages on the above principle. The decision of the Judge is amended to this extent.

The 17th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Execution—Reversionary interests.

Case No. 463 of 1869.

Special Appeal from a decision passed by the Judge of Dacca, dated the 25th November 1868, affirming a decision of the Subordinate Judge of that District, dated the 25th January 1868.

Gour Huree Dutt and another (Plaintiffs), *Appellants,*

versus

Radha Gobind Shaha (Defendant), *Respondent.*

Baboo Sreenath Banerjee for Appellants.

Mr. R. T. Allan for Respondent.

A reversionary interest may be sold in execution of a decree.

Hobhouse, J.—In this case, the sole question before us is this. There were two houses originally the property of one Lokenath. Chunder Monee, his widow, was for her lifetime holding those houses as heir-at-law of Lokenath, and the plaintiff before us was, during Chunder Monee's incumbency, the reversionary heir to those houses. In this state of facts, a certain person held a decree for money against the plaintiff, and in execution of that decree he advertized for sale whatever rights and interests the plaintiff had in those houses, and the defendant became the auction-purchaser of those rights and interests. Thereafter Chunder Monee died, and the plaintiff became the heir-at-law to the property of Lokenath, and as such heir-at-law he now sues to recover possession of those two houses.

The contention is that, inasmuch as, at the time of the sale, the plaintiff had only a reversionary interest in the houses, so under the ruling to be found at page 608, Volume II., Hay's Reports, the plaintiff had no existing interest in those houses, but only a contingent interest; and thus it is argued that, when the defendant bought whatever interest the plaintiff had, he bought nothing at all, and could buy nothing. It is evident that there is on the face of it a

fallacy in this argument. In the first place, we are not shown any authority on the point that a reversionary interest cannot be sold in execution of a decree; and, secondly, it is quite clear that in this case the reversioner had some interest. It was indeed but a contingent interest, that is, contingent upon his surviving Chunder Monee, but it was not the less an interest, and no doubt had, as it is proved by the sale that it had, a marketable value, and at any rate when the defendant is found to have purchased whatever interest the plaintiff had at that time in those houses, it is not for the plaintiff, that is, the person who in some shape or other put the purchase-money in his pocket, to come in and say that the defendant has bought nothing.

We think that the sale was a good sale, and the Lower Appellate Court was right, although his reasoning may not be quite accurate in finding it to be so.

The special appeal is dismissed with costs.

The 17th June 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Cause of action — Title — Reserved rights.

Case No. 3154 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 21st July 1868, reversing a decision of the Sudder Ameen of that District, dated the 10th July 1867.

Brojo Lall Roy (one of the Defendants), *Appellant,*

versus

Kheitur Nath Mitter (Plaintiff), *Respondent.*

Baboo Mohendro Lall Shome for Appellant.

Baboo Taruck Nath Sein for Respondent.

A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to his interest which obliges him to seek the aid of a Court of justice, the other being the proof that that something affords him a valid ground for relief.

A litigant is bound to disclose all his titles at once. He cannot be allowed to keep back one, and then years after, to bring a fresh suit on the ground that he had still a right in reserve.

Glover, J.—The only point which we think it necessary to consider in this special appeal, is whether or not the plaintiff's claim is barred by the provisions of Section 2, Act VIII. of 1859.

The plaintiff sues to recover possession of 25 beegahs 14 cottahs of land as heir of his maternal grandfather, Chundee Churn. His cause of action is said to be the dismissal of a suit brought by him under Act X. of 1859 against a tenant for rent, on the 22nd of December 1862, in consequence of the defendant's intervention.

It appears that in 1865, the plaintiff brought a suit against the present defendant for recovery of the same land as that now in dispute, on the ground that his mother Arna had succeeded to it by gift from her father's widow. In that suit, the Court of first instance held that the gift was not proved, but that the plaintiff was entitled to recover as heir of his grandfather.

The Appellate Court reversed this decision, on the ground that as the plaintiff never claimed as heir he could not recover on that assumption. With respect to the right by gift, the Subordinate Judge agreed with the Moonsiff, the result being that the plaintiff's suit was dismissed.

On trying the present suit, the Court of first instance held that the cause of action as between the parties had already been heard and determined. But the Subordinate Judge considered that as the question of heirship had not been tried in the former suit, this issue was now a new one between the parties, and that the trial of it was not barred. On the merits, he held the plaintiff entitled to possession in right of succession to his mother Arna Debia, the heir-at-law of Chundee Churn.

It appears to us that this suit is undoubtedly barred. Section 2, Act VIII. of 1859, says, that a Civil Court shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties. The Subordinate Judge appears to have confounded the plaintiff's title and his cause of action together, and to have considered that because the plaintiff's title by inheritance was not decided by the judgment of 1864, that it is open to trial now; but a plaintiff's cause of action is a very different thing from his title; the one is something done contrary to a person's interest which obliges him to seek the aid of a Court of justice, the other is the proof that that something affords him a valid ground for relief. This principle has been enunciated in the case of Wooma Tara Debia *versus* Unnopoorna Dossia, 10 Weekly Reporter, p. 426.

Now, in this case, the plaintiff's cause of action is precisely the same as it was in the suit of 1864, namely, the intervention of the defendant through his ijaradar which caused the plaintiff's suit for rent under Act X. of 1859 to be dismissed.

It has been argued by the special appellant's pleader, that a cause and a cause of action are the same thing. There seems to be no ground whatever for the contention; but were it for the sake of argument admitted, the plaintiff would still fail in this suit; for, if he did not bring forward his title by inheritance in the suit of 1864, he was clearly bound to have done so. A litigant cannot be allowed to keep back one of his titles, and then, years after, to bring a fresh suit on the ground that he had still a right in reserve. He is bound to disclose all his titles at once. If the plaintiff in this case thought that he had sufficiently disclosed in his plaint of 1864 that he claimed as heir as well as by gift to his mother, he ought to have appealed against the order of the Subordinate Judge which overruled the Moonsiff's decision on this point; and not having done so, the Appellate Court's decision that he did not disclose that title is final and conclusive.

We think, therefore, that the Subordinate Judge's decision in this case was wrong and should be reversed with costs, and that the judgment of the first Court should be restored.

Mitter, J.—I concur.

The 18th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Law of partnership—Participation in profits.

Case No. 260 of 1868.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 10th September 1868.

The Collector of the 24-Pergunnahs on behalf of the Court of Wards, managing the estates of the late Rajah Protap Chunder Singh (Defendant), *Appellant,*

versus

Messrs. J. P. Mollwo and others (Plaintiffs), *Respondents.*

The Advocate-General and *Mr. G. P. Evans*, and *Baboo Juggadanund Mookerjee* for Appellant.

Messrs. G. C. Paul, E. B. Cowell, and *G. C. Sconce,* and *Baboo Obhoy Churn Bose* for Respondents.

Participation in profits does not of itself constitute a partnership. In deciding whether or no a man was a partner, it is right to consider whether or no he was interested in the profits, and very great weight would attach to that circumstance; yet the true question is not, Did the person sought to be made liable participate in the profits? but, Has the trade been carried on by persons acting on his behalf?

No rule of law exists prohibiting a man, when he advances money to others to enable them to carry on business (provided he commits no fraud and misleads no one) from securing to himself a share of the profits which may arise from the employment of the money.

Markby, J.—This was a suit brought by certain persons carrying on business as merchants in London against the late Rajah Protap Chunder Singh. The Rajah died during the progress of the suit, and the present defendants are his minor sons, represented by the Court of Wards. The suit was for the recovery of Rupees 2,92,000 as balance due up to the 19th June 1865, upon an account current between the plaintiffs and a firm carrying on business under the style of W. N. Watson and Company, of which firm it was alleged that the Rajah was a member.

There were two persons residing in Calcutta prior to 1865 of the name of Watson, Thomas Ogilvy Watson, and his son William Nicol Watson. The history of the business transactions of the Watsons prior to 1863 is not very clearly stated, but it seems that for some time they carried on business together without any agreement of partnership. The plaintiffs and the Rajah represent them as carrying on business as early as 1860, whereas the elder Watson, who has been examined, says the firm commenced in the beginning of 1862. The style of the firm from that date at any rate was "W. N. Watson and Company," and this is the firm of which the Rajah is said to have been a partner.

The dealings between the firm of W. N. Watson and Company and the plaintiffs appear to have commenced in the year 1862, and they consisted in the two firms consigning goods to each other in the usual course of business.

On the 19th January 1863, an agreement was entered into between T. O. Watson, acting on behalf of himself and his son

W. N. Watson and the plaintiffs, stating the terms on which the plaintiffs agreed to transact business with the firm of W. N. Watson and Company. It regulates the commission which is to be charged by the plaintiffs and W. N. Watson and Company on their respective consignments, and authorizes the firm of W. N. Watson and Company to draw on the plaintiffs in the usual way against consignments bearing a specified margin. This agreement was used by W. N. Watson and Company as a letter of credit in their transactions in Calcutta.

The history of the connection between the Rajah and the Watsons during its earlier period is also extremely vague. It seems to have begun about the year 1862, and to have consisted in the Rajah accepting their bills in order to enable them to raise money and carry on business as merchants, and in his occasionally advancing them money in cash. No account has been given on either side in the course of this case of the advances made by the Rajah to the Watsons prior to August 1863; but it is clear that whatever capital was required in the business came from him, the elder Watson having nothing, and the younger Watson a very vaguely stated sum, of somewhere about Rupees 10,000. It is also clear that from 1862 bills for a considerable amount were drawn by the Watsons upon the Rajah; and though the business is said to have been at that time prosperous, these bills were, for the most part, not paid by the Watsons, and the Rajah had either to pay or renew them. Thomas Ogilvie Watson states that, between January and August 1863, the Rajah advanced cash and honored bills to the amount of Rupees 90,000, and says that during the year 1862 the Rajah had assisted the firm largely by acceptances. It is therefore probable that in August 1863, from which time the history of the case becomes clearer, the firm of W. N. Watson and Company was very largely indebted to the Rajah.

Up to the last-mentioned date, there seems to have been no regular understanding between the Rajah and the firm of W. N. Waston and Company as to the terms on which he was to make advances. The Rajah states that at that time he became uneasy at seeing what he considered the reckless mode in which the Watsons were conducting their business and their extravagant mode of living, and he accordingly became desirous to obtain what he calls "an agreement to check it." The result of this was that an agreement was entered into, the terms of which we shall have to consider presently; but speaking generally, it gave the Rajah a very large control over all the affairs of the partnership; it also gave him 12 per cent. on his advances, a commission of 20 per cent. on the profits and the title-deeds of a tea-garden as security.

On the 8th September 1863, a regular deed of partnership was drawn up between the two Watsons. Its terms have not been in any way referred to in the argument before us, but it is said to have been retrospective, and to have been declared to operate from February 1862.

Subsequently to August 1863, very heavy losses were incurred by the firm. The younger Watson went to England and attempted to get up a Company, and to sell to it the tea-gardens mentioned in the above agreement, but failed. In May 1864, the firm of W. N. Watson and Company was dissolved, and the elder Watson continued to carry on business alone, but the style of the firm was apparently not changed. The advances made by the Rajah and his liabilities on account of the firm had reached a very large amount, and there seemed little prospect of an improvement. Accordingly, on the 3rd of March 1865, a fresh agreement was drawn up between the Rajah and the two Watsons by which the amount which the Rajah had paid, and for which he was still liable on account of the firm of W. N. Watson and Company, was ascertained at Rupees 3,88,218-14-3, of which he had actually paid Rupees 3,25,218-14-3; and it was agreed that in consideration of the Watsons having executed a regular mortgage to the Rajah of the tea-gardens above mentioned for Rupees 2,52,149-11-3, the Rajah should cancel his right to commission and all other rights which he might have under the agreement of 27th August 1863, and also give up all moneys payable to him by the Watsons except those secured by the mortgage. By this deed, therefore, the Rajah appears to have agreed to an entire loss of Rupees 1,36,069-3, and thus terminated the money-transactions between the Watsons and the Rajah.

The business of W. N. Watson and Company was brought to a termination in May 1865 by the arrest of the elder Watson for debt.

An attempt was made to show that the Rajah actually interfered in the business of

the firm, but it entirely failed. The statements of Juggobundhoo Chatterjee that the Rajah sometimes looked at the samples of cotton may very possibly be true; but, if so, it can only have been out of curiosity. Nothing can be more improbable than that the Rajah would in any way concern himself with, or venture an opinion on, matters of business. The power which was given by the agreement to interfere in the management of the business was undoubtedly never exercised. Had the Rajah wished to exercise it, he would have appointed an agent for that purpose. An attempt was made to show that Russeek Lall Bose was the Rajah's agent so appointed. But though it is possible that Russeek Lall may have given information to the Rajah as to how the business was going on, it is quite impossible that he can have acted in any way as the agent of the Rajah, nor does Juggobundhoo Chatterjee say so, and he certainly omitted nothing which was unfavorable to the Rajah.

We should accept with much the same caution the evidence of Juggobundhoo Chatterjee, who declares the Rajah to have been a partner, and the evidence of the elder Watson, who denies the Rajah's partnership altogether. But we see no reason to distrust the evidence of the Rajah himself. We can discover nothing in his conduct or in the circumstances of this case, which would justify us in imputing to him the least desire to conceal or misrepresent any part of these transactions. His proceedings throughout appear to us to have been straightforward and honorable. We adopt entirely his version of the connection between himself and the Watsons, namely, that he was actuated by motives of friendship, and not by any desire of gain. Even with the commission we are not sure the adventure was at all an advantageous one to the Rajah when it is considered what rate of interest may be got with good security in this country. The elder Watson says that the Cachar Tea Estate mentioned in the agreement was valued at that time at three lakhs of rupees, but it is perfectly clear that had the Watsons been able to raise that sum, or anything like that sum, upon it, they would not have submitted to such terms as the Rajah imposed upon them; we mean, not as to commission on profits and interest, but as to the management of their business and even of their private affairs. Nor do we see any reason to doubt the truth of the Rajah's assertion that the suggestion for the payment of this commission comes from the younger Watson. Indeed, there are one or two passages in the younger Watson's letters which seem to us to render this view of the origin of that clause in the agreement highly probable, particularly the passage in the letter of the 13th May 1865, where he speaks of the happiness he felt in having (as we understand him) fixed the Rajah as a partner by giving him a share of the profits.

The plaintiffs have attempted in the course of this case to represent the Rajah as a cunning man anxious by this agreement to secure the profits of a business without incurring any of the risks. But there is more than one answer to this suggestion, which seems to us quite conclusive. Is it in the least degree probable that, if this had been so, he would have surrendered the agreement of August 1863 as he did, consenting to a loss of upwards of a lakh of rupees, and making no attempt whatever to use the very extensive powers conferred upon him by the agreement to recoup himself one single farthing of the advances he had made? The conduct of the Rajah in this respect seems to us utterly inconsistent with the character which the plaintiffs would attribute to him. Moreover, had gain really been his object, he would not have left the Watsons the power which, under the agreement they clearly possess, of paying him off should the business become profitable. He would undoubtedly have secured a share in the business for at least a certain number of years, and not have left the Watsons the power to get rid of him should the business turn out a profitable one; a power which, in such an event, they would be certain to exercise.

We entirely agree with the Judge of the Lower Court that nothing was done by the Rajah which can be construed as "holding himself out as a partner." There is no evidence of a single act done, whether brought to the knowledge of the plaintiffs or not, which would suggest any inference that the Rajah was a partner. The dealings of the Rajah which could be best known by commercial men in Calcutta would be his acceptance of bills drawn upon him by the Watsons, which they afterwards discounted. It is agreed that this was the mode in which the Rajah always gave his assistance, except on the few occasions when he made advances in cash; and this so far from leading persons to suppose that the

Rajah was a partner, is *primâ facie* inconsistent with his being so. An attempt was made by the plaintiffs to establish, not that the two Watsons had ever stated to them that the Rajah was a partner, but that they had (as Mr. March puts it in his evidence) held out to them the Rajah as a partner. No correspondence of the Watsons earlier than the year 1864 has been referred to, and no definite conversations have been detailed, and we are not, therefore, in a position to judge what exactly the Watsons did say. But we do not understand that this witness undertakes to say that the Watsons ever asserted in direct terms that the Rajah was a partner; if so, he contradicts his letter of the 27th March 1865. If Mr. March means to say that his firm were induced by such statements as are referred to in this letter to give credit to W. N. Watson and Company, we must say that we do not quite understand a man of business, when he is ascertaining to whom he is giving credit, being satisfied with a statement that the only wealthy person of all the three persons with whom he supposed he was dealing was "to all intents and purposes" a partner. We do not believe that a man of business really anxious to ascertain the truth upon so important a matter would be satisfied with a vague statement of that sort.

Moreover, we have no hesitation in saying that, if the Watsons ever represented in direct terms that the Rajah was a partner, or held him out as a partner, they committed a fraud upon the Rajah. If, as they themselves say, they merely stated that he was *legally* a partner, that seems to us to involve a statement that he was not a partner in fact, and would be fatal to this claim.

But, apart from all this, we do not see how any statements made by the Watsons without his authority would affect the Rajah. The Watsons were, no doubt, at liberty to represent the facts as they stood, but no representation by them based on any inference which they drew from those facts could affect the liability of the Rajah.

The question which remains, and it is the question which has been mainly argued on this appeal, is whether, by reason of the agreement of 27th August 1863, the Rajah put himself into such a position that the Watsons had a right to pledge his credit, and did pledge his credit, in all the transactions of the firm; or, in other words, were the Watsons the agents of the Rajah in all the transactions of the firm.

It would be very easy upon this, as indeed upon all the other points of law in this case, to raise a preliminary discussion as to the general law which was to be applied to a dispute of this nature between British subjects, residents in England, and Hindoos. But it has very sensibly been conceded in the argument that in the decision of this case we ought to adopt generally the principles of English law as established by the recent decisions.

The Advocate-General, who appeared for the defendants, admitted the applicability of those decisions not exactly as authority, for that they could hardly be, but as conclusions of persons whose opinions are in this Court entitled to the greatest possible respect, upon questions bearing a very close analogy to that which we have to consider in this case. This basis of argument has been accepted by the plaintiff's Counsel, and we entirely adopt it.

Before considering the law, it seems to us that the most convenient course will be to consider what the position of the parties was under the agreement of the 17th August 1863.

By it the Rajah was not bound to make any further advances to the firm, but the agreement evidently contemplated that he would do so, and in consideration of the past and future advances W. N. Watson & Company agreed, so long as the liabilities of the firm to the Rajah remained unextinguished, not to make any shipments without the Rajah's consent; and when such shipments were made, to hold the shipping documents at the disposal of the Rajah. They also agreed not to order any goods from home, either as remittances or consignments, without the consent of the Rajah, and whenever any *remittances* arrived either in goods or money, they were to be made over to the Rajah, and dealt with under his directions, and he was to be at liberty to apply the proceeds towards the extinguishment of his debt. With regard to the *consignments* other than remittances, the proceeds of these, when sold, were to be made over to the Rajah and remitted to the consignors with his sanction. It was also agreed, with regard to the conducting of the office-business in detail, that Rajah should be consulted, and that he might direct a reduction of the establishment, if he thought proper. And it was provided that no money should be drawn for the private expenses of the members of the firm or for conducting the business of the

firm without the consent of the Rajah, and that the Rajah should have free access to all the books, documents, and correspondence of the firm. Then follows the clause which gives the Rajah a commission of 20 per cent. on all nett profits made by the firm from time to time commencing from the 1st May 1862 until the Rajah's debt was paid off, and his liabilities extinguished. The title-deeds of the Tea-gardens were handed over to the Rajah as a security for his advances, and the moveable and immoveable property of the firm, present and future, was declared generally liable for the debts due to him by the firm. As far as appears, not one of these very sweeping powers was ever put in force by the Rajah. A single sum of Rupees 27,000 was credited to him as his commission on the profits of the business up to April 1863; but that sum was subsequently credited to the firm on account of subsequent losses or losses subsequently discovered. It is, however, contended that we must look not to what actually occurred, but to the position in which the Rajah was placed and the powers which he might have exercised, had he been so minded, under the agreement.

Now, had this question come before an English Court prior to the final decision in Cox *versus* Hickman,* there can be little doubt which way it would have been decided. We may test it by the judgment of Mr. Justice Blackburn in that case upon the question referred to the Judges by the House of Lords. We select the judgment of that learned Judge, not only because of his eminent ability and great commercial experience, but because he was evidently not satisfied with the rule which he felt compelled to apply, and he undoubtedly, therefore, before he applied it, tested it with the utmost severity. But the learned Judge found himself bound by previous cases to say that, whatever the parties may have contemplated, a participation in profits (otherwise than by a person in the service of the firm as a remuneration for services performed) in itself, by operation of law, rendered the participator liable for the acts of the firm, in the same manner as a principal is liable for the acts of his agent. Applying that principle to this case, we should also be compelled to hold that the Rajah was liable.

But the decision of the House of Lords, who felt themselves emancipated from the fetters of previous authority, produced a most important change in the law of partnership. It was there held that the argument which had hitherto prevailed that, because a man was interested in the profits of a partnership, therefore he was a partner, was fallacious; that participation in profits did not of itself constitute a partnership; that it was, indeed, right in deciding whether or no a man was a partner, to consider whether or no he was interested in the profits, and their Lordships evidently attribute very great weight to that circumstance; but they emphatically put the question upon a wider ground. Henceforth, according to that decision, the true question is not did the person sought to be made liable participate in the profits? but has the trade been carried on by persons acting on his behalf?

The Judge of the Lower Court has referred to this case, and professes to be guided by it; and notwithstanding the criticisms that have been made on the language of his judgment, we think he has considered the question which has to be determined from the right point of view. It is objected in the first place that in stating the question to be considered, for "behalf," which is the term used by Lords Wensleydale and Cranworth in their judgments in the House of Lords, he has substituted "benefit." This, we think, arose from the way in which the case was put before him. It was probably contended there, as it has been contended here, that, in reality, this was the Rajah's business, carried on, as the saying here is, benamee; and if that had been established, we should have said that being carried on for his benefit was the same thing as being carried on on his behalf. As to what follows in the judgment, there is, no doubt, some slight confusion in the use of the words "principal and agent" at the bottom of page 51 of the printed case, but we think it is clear that finally the Zillah Judge places the case in the proper light.

Considering, therefore, that this is a question more of fact than of law, and considering that the Judge of the Court below has, in our opinion, considered the question which the House of Lords declared in Cox *versus* Hickman to be the right question, we should feel much hesitation in coming to a different conclusion. But it seems to us that the Zillah Judge, though he took up the right position with regard to the question which he had to decide, attributed too much weight to the participation in profits. Of course, once

* 9 C. B. (N. S.) 57; 8 H. L. cases 268; 30 L. J. (C. P.) 125.

having settled the question that participation in profits does not constitute partnership, but is only a fact which may be relied on as evidence of partnership, the cases in which the effect of a participation in profits has been considered are no longer precedents, upon which analogous cases can be decided; they are only illustrations. Yet this is one of those questions in which it is highly useful to see what weight men of judgment and experience have attributed to that circumstance. From this point of view, we refer to the case of Bullen *versus* Sharp,* and there it is clear that the majority of the Court attributed far less weight to the participation in profits than the Zillah Judge did in this case, and we may also add that Lord Wensleydale and Lord Cranworth seem to intimate that they would do, if you construe literally the expressions they used in Cox *versus* Hickman. It seems to us from that case and also from the case of Kilshaw *versus* Jukes,† that the Judges in England are inclined to use freely the power which the decision in Cox *versus* Hickman conferred upon them, of looking at this question according to the real circumstances and the intention of the parties. For our own part, we gladly avail ourselves of that power, and doing so, we can only come to one conclusion, namely, that the Rajah is not liable for the debts of the firm of W. N. Watson and Company. We are asked to find in this case that the plaintiffs sold and delivered goods to the Rajah, that they paid money for the use of the Rajah; that they lent money to the Rajah, and that they had stated accounts with the Rajah. These are not mere words; they must be proved, for they are the causes of action. The argument is that all this was done between the plaintiffs and the two Watsons, and that the Watsons were agents of the Rajah in these transactions. If that is true, the Rajah is liable; but is it true? We find not the smallest evidence of fraud on the part of the Rajah, and we are perfectly clear it was never his intention to make the Watsons in any way his agents. And we agree with Bramwell, B., that to say that a man is liable on a contract, though there has been no fraud, and though no one concerned intended that he should be liable, is a proposition which carries its own refutation.

It was a good deal pressed upon us in the course of the argument that to decide this case in favor of the Rajah would favor the practice of persons carrying on business under fictitious names, and that in this country, on account of the inveterate habit which prevails of keeping back the names of the real parties even in the most trivial transactions, it was especially necessary to be on one's guard against encouraging such a practice. So far as any danger of persons carrying on their business in the names of other persons is concerned, it is perhaps sufficient to say that the present, as already pointed out, is not such a case, and we should feel no difficulty, were such a case established, in dealing with it. And as to another somewhat similar suggestion that parties will set up in business men of straw without incurring any liability themselves, we must say that this idea has always appeared to us something of a bugbear. The simple fact is that it cannot be done. Take the present case for an illustration. Suppose the Watsons, being without money and without credit sufficient to enable them to carry on business, to be what are usually called men of straw. Could the Rajah have started them in business without incurring liability? Could he, without doing so, have increased their credit? Not by a single rupee. Only by advancing money in hard cash, or which comes to the same thing by accepting their bills, and so adding his credit to their bills, and so adding his credit to theirs, could he enable them to carry on business. And at every step the same process would be repeated. Every new advance, it is true, procured them fresh credit, but the Rajah's liability increased exactly in the same proportion, until at length it reached nearly four lakhs of rupees which the Rajah has had to pay. So that the question really in cases of this kind is not whether it shall be lawful to carry on business through men of straw without incurring liability, for that is impossible; but whether a man shall be allowed, when he advances money to others to enable them to carry on business, to measure his responsibility; whether, provided he commits no fraud and misleads no one, he may give to another, without risking every thing he has in the world, as much credit as the command of a certain sum of money will give, and no more, securing to himself a share of the profits which may arise from the employment in business of the money so advanced, if the business turns out well, and losing the money advanced if it turns out ill. We think the evils which are likely to arise

* 34 L. J. (C. P.) 174; 18 C. B. (N. S.) 614.
† 32 L. J. (Q. B.) 217; 3 B. and S. 847.

from such an arrangement have been greatly exaggerated. It might be proper that the claim of a person who thus advanced capital to re-payment should be postponed to the claims of the general creditors. It might also be desirable that there should be some system of registration which would distinguish firms which carried on business with borrowed capital from those which carried it on with their own. But we can see nothing in such transactions which would justify a sweeping law prohibiting them, nor since Cox *versus* Hickman do we consider that any such rule of law exists.

We have not hitherto referred to the provisions of Act XV. of 1866, because it was not in force when these transactions took place; but it appears to us that those provisions at least show that the Legislature do not foresee the dangers which have been predicted from allowing persons to share in the profits of a trading concern without incurring unlimited liability.

The result is that, in our opinion, the decision of the Court below ought to be reversed; the decree in favor of the plaintiffs ought to be set aside and the suit dismissed; and the plaintiffs must pay the costs both here and in the Court below.

The 17th June 1869.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Intervention—Onus probandi—Section 77, Act X., 1859—Construction.

Case No. 375 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 25th November 1868, modifying a decision of the Deputy Collector of that District, dated the 3rd September 1868.

Modhoo Soodun Bagchee (Intervenor), *Appellant,*

versus

Mohesh Chunder Singh and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Greeja Sunkur Mojoomdar* for Appellant.

Baboo Kalee Mohun Doss for Respondents.

In a suit for arrears of rent of four-fifths of a talook, an intervenor under Section 77, Act X., 1859, claimed one-fifth of the interest in the mehal, basing his right on a Civil Court decree.

HELD that the burthen was upon the intervenor to prove the actual receipt and enjoyments of the rent by him *bonâ fide* before and up to the time of the commencement of the suit.

HELD, that the words "commencement of suit" (Section 77) cannot be read to mean *commencement of the demand*; but must be construed in their ordinary acceptation; and that the intervenor must prove receipt of rent at any *reasonable time* before the commencement of the suit.

Bayley, J.—IN this case the plaintiff sued the defendant for arrears of rent for four-fifths of a certain talook called Baro Rookee mehal. The plaintiff's claim was for two months of 1271, *viz.*, Falgoon and Cheyt, for the whole of 1272 and 1273, and up to the 10th Magh 1274.

An intervenor claimed one-fifth of the interest in the mehal as heir of one Ranee Bhyrubee. It is admitted by all parties that Ranee Bhyrubee died in 1271. This intervenor based his right on a Civil Court decree of the 20th May 1868.

The first Court gave the plaintiff a decree for three-fifths of the interest of the mehal from 1272. It held that the only point to be decided in the case of the intervenor was whether he was in actual receipt and enjoyment of the rent before the institution of the suit or not. The first Court then remarked that neither of the parties (the plaintiff or the intervenor) could satisfy it upon that point, *viz.*, as to the actual receipt and enjoyment of the rent. The first Court then goes on to say that, as the intervenor acquired a right under a Civil Court decree, he had established his claim in this case.

On appeal, the Judge in the Lower Appellate Court has held that the first Court had miscarried in its issues, and he took the title of the plaintiff as meeras talookdar as the first point to be decided; the title of the intervenor as the second point for his decision, and the question of damages as the third point.

As a matter apparently of title under the decree, the Lower Appellate Court decides that there is no sufficient proof that the intervenor had received, or was entitled to receive, any rents from the defendants, and that the intervenor's claim, therefore, was improperly admitted by the first Court. The Lower Appellate Court then going upon the fact that the plaintiff's right was not denied by the defendants, and that they only pleaded payment to other parties, decreed the rent to the plaintiff for 1272, 1273, and 1274.

From this decision the intervenor appeals specially, and the real issues involved in

appeal are these: *firstly*, has the intervenor proved his case under the provisions of Section 77, Act X. of 1859; and, *secondly*, has the Judge in the Lower Appellate Court misconstrued the evidence set forth by the intervenor as proof of possession under his Civil Court decree of the 28th May 1868.

Now, it is clear that the burthen of proof was upon the intervenor to prove the actual receipt and enjoyment of the rents *bonâ fide by him before and up to the time of the commencement of the suit.* He comes in under Section 77, Act X. of 1859, and the special words of that Section, so far as they are necessary for our decision on the present point at issue are that the intervenor must prove his receipt of rent *before and up to the time of the commencement of the suit.* It has been clearly found as a fact that Bhyrubee and the plaintiff were in receipt of the rent up to the year 1271, but no one is stated to have received rent from after that period. It is pressed on us that we are to construe the words "commencement of the *suit*" to mean the "commencement of the *demand*." Now, the ordinary rule of construction is that, when the words to be interpreted are clear, that meaning should be attached to them which the words in their general acceptation bear. In this view, I cannot see how the words "commencement of the suit" can mean any thing other than what they actually state. Thus I do not think myself justified in reading the words "commencement of suit" to mean "commencement of demand." It is urged that if we were to put so literal a construction upon the words, we should be reducing the actual intention of the Legislature to a result which, if not absurd, is altogether inconsistent; and a case is put before us, where it is said that, if there was an agreement to pay rent day by day, and the landlord omitted for the one day before suit to receive rent, he could not be said to be in actual receipt of rents under Section 77 up to commencement of suit. I never heard of such a case, and it is against the custom of the country. Further, it will be time enough to decide such a case when it arises. In the meantime, we should construe the law as its unambiguous words indicate in their ordinary meaning.

On the *second* point, it is contended that the decree of the Civil Court assigning to the intervenor a one-fifth share under the solenamah and possession being made over to him, it was clear legal evidence of his title to receive rent; and in support of this contention, two cases have been cited at page 358, Volume IX., Weekly Reporter, and page 320, Volume X., Weekly Reporter. I do not think that either of those decisions goes further than to declare that, when a decree of a Civil Court awards possession to a party as the party entitled to the actual receipt and enjoyment of the rents, another party coming in without a title, but receiving rent, should not get a decree under the provisions of Section 77, Act X. of 1859. Neither of the cases cited meets the present point, for it does not appear that the decree giving the intervenor a one-fifth share under the terms of the solenamah was for any interest in the *talook* which forms the subject of the present suit, so as to show that the intervenor was entitled to be considered as the party in actual receipt and enjoyment of *the* rents of that talook under Section 77. The finding of the Lower Appellate Court on the point is that "it does not appear nor "is it urged that anything more was given "than the share of the zemindary. No "mention is made of this talook, and though "the village is named in the decree, and the "intervenor got possession of the zemindary-"property in the village Boro Rookee, yet "that does not prove that the intervenor "is entitled to demand or receive any rent "from the defendants direct." It cannot, I think, be fairly said that a higher class of possession than mere ordinary symbolical possession was given to the intervenor under the decree, when it appears that no such objection as is now taken was urged before the Lower Appellate Court.

On the whole, I see no error in law in the decision of the Lower Appellate Court, and would dismiss this special appeal with costs.

Hobhouse, J.—The plaintiff in this case sued for arrears of rent. The special appellant before us intervened under the provisions of Section 77, Act X. of 1859.

The first Court supported the intervenor, and gave the plaintiff a decree for rent, less that sum which the Court held to be the intervenor's share in those rents.

The Lower Appellate Court reversed the decision of the first Court, and dismissed the intervenor's claim.

There are a great number of objections taken in the written grounds of special appeal against the judgment of the Lower

Appellate Court, but it is curious enough that, on the one point on which that judgment is manifestly wrong and cannot stand, there is only very indirectly any ground of special appeal taken.

As between the plaintiff and the intervenor, the Lower Appellate Court lays down this issue, *viz.*, has the intervenor claimed or proved that he was entitled to receive any rent direct from the defendant?

On this issue, the Lower Appellate Court found that there was no proof that the intervenor was entitled to demand or receive any rent from the defendants direct, and so the Lower Appellate Court dismissed the intervenor's claim.

Now, in my judgment, the Lower Appellate Court had no jurisdiction to entertain or determine, so far as the intervenor was concerned, any question as to that intervenor's title. The sole question which the Lower Appellate Court had to determine was that which was much more nearly hit off by the first Court, when it said that in the case of the intervenor the only point for determination was, who was in actual receipt of the rents in question before the institution of the suit? Even that issue is not quite correct, but it is far more nearly so than that of the Judge. The question to be determined was that of the actual receipt and enjoyment of the rents by the intervenor. When, therefore, the Lower Appellate Court had tried and determined a question which it had no jurisdiction to try or determine, and has not tried or determined the sole question at issue, so far as the intervenor was concerned, we should be bound to reverse the Lower Appellate Court's decree and to remand the case. But the question then arises as to whether, upon the statement of the case as disclosed to us in the pleadings and evidence, there is any justification for our making the remand, or whether we should not rather dismiss the intervenor's claim as one for which there was no warrant in law, and thus support the decision of the Lower Appellate Court, though upon grounds other than those on which that decision is based.

Now, it seems to me, upon the most obvious construction of the terms of Section 77, Act X. of 1859, that an intervenor has no right to claim to be made a party to a suit of this nature, unless, in the words of the Act, it be found that such intervenor was "in the actual receipt and enjoyment of "the rents of the land *bonâ fide before and* "*up to the time of the commencement of* "*the suit.*" The question to be determined is the question of such actual receipt and enjoyment. Now, here in this case, it is admitted by the pleader for the special appellant that the last time at which any person through whom he claims did actually receive the rents of the lands in question was so far back as the year 1271, or *four* years before the commencement of the suit. The question, therefore, is whether a person who has been in receipt of the rent, not at the time of the institution of the suit, but *four* years previous to that time, has any claim to be admitted as a party to the suit, under the provisions of Section 77.

I agree with Mr. Justice Bayley that he has not. I quite think with the pleader for the special appellant that a reasonable construction must be put upon the terms "before and up to the time of the commencement of the suit," and therefore in the case which he has put and which Mr. Justice Bayley has cited, we should most possibly say that a person intervening under those circumstances was entitled to be heard. It would then have to be determined, and it has now, in fact, to be determined, whether the intervenor or any one through whom he claims has been in receipt of the rents at any *reasonable time* before the commencement of the suit; but in my judgment *four* years is not a reasonable time, and I think there is nothing in the words of Section 77 which contemplates the case of an intervenor who had no actual receipt and enjoyment of the rents of the lands in dispute at any time within four years before the institution of the suit. The words of the law directly and obviously exclude such an interpretation, and I agree with the learned Judges in the case to be found at page 331, Volume I., Weekly Reporter, where it is said that Section 77 applies "only to the case of a person "who claims a present right which is sup-"ported by proof of actual prior receipt and "enjoyment of the rent up to the time of "the suit either by himself or by the person "through whom he claims his right;" that is, I think that the right set up should be a present right, and not a right placed so far back in its exercise as is the period of *four* years before the commencement of the suit; and indeed, if *four* years be taken, I do not know why ten years should not be taken, and in the same manner a more distant period; and if we were to allow any such distant period, we should be clearly taking away all

force from those words of the Section which form the present subject of our consideration, *viz.*, "before and up to the time of the commencement of the suit."

I think, therefore, though on other grounds, that the Lower Appellate Court was right in dismissing the intervenor's claim, and I agree in dismissing this special appeal with costs.

The 17th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Execution—Jurisdiction—Correcting a decree—Limitation.

Case No 148 of 1869.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 18th January 1869.

Modhoo Soodun Ghose and others (Decree-holders), *Appellants,*

versus

Romanath Ghose (Judgment-debtor), *Respondent.*

Baboos Poorno Chunder Shome and *Rash Beharee Ghose* for Appellants.

No one for Respondent.

A Judge has no jurisdiction to entertain a petition from, and order the release of, a judgment-debtor imprisoned in execution of a decree, while the execution-proceedings are before the Subordinate Judge.

Where a Judge finds that a decree passed by his predecessor contains something, or bears a construction, evidently not contemplated by the judgment of that Judge, he is quite competent to alter the decree so as to bring it into conformity with the judgment.

The limitation prescribed for an application for review does not apply to an alteration of a clerical error in a decree.

Jackson, J.—THE appellants before us, Modhoo Soodun Ghose and others, were defendants in a suit brought by Ram Chunder Ghose and another, in the Court of the Principal Sudder Ameen of Burdwan. The plaintiffs made one Romanath Ghose and other persons defendants, as well as the appellants before us, and the Principal Sudder Ameen gave judgment for the plaintiffs. Against this decision, an appeal was preferred to the Zillah Judge by Modhoo Soodun Ghose and others, who are the appellants before us, and they made both the original plaintiffs and also Romanath Ghose, respondents, and they appear to have made this case, that Romanath, whose written statement went to support the plaintiff's case, was really the prime mover in the matter, and they appear to have sought to make Romanath liable, accordingly, for their costs. The Zillah Judge, on hearing the appeal, reversed the decision of the Court below, and ordered that the respondents should pay the costs of the appellant.

The Judge who gave this decision afterwards quitted the district, and Modhoo Soodun Ghose and others, who had succeeded on that appeal, took out execution for costs against Romanath, and obtained an order for his arrest and imprisonment. This was in the Court of the Subordinate Judge of Burdwan. Romanath, on being imprisoned, made a petition to the present Judge of Burdwan, representing that the decree on which execution had been taken out did not make him liable for the costs, but that only the plaintiffs were intended to pay the costs of the appellants. On receiving the petition, the Judge, Mr. Russell, appears to have called for the proceedings, and given the following judgment: "This case has been "taken up to-day in the presence of the va-"keels on the part of the prisoner, peti-"tioner, and the decree-holder. Having "referred to the English judgment of the "Judge, we find that he decided the case "as between the decree-holder, appellant, "and Sreeram Ghose and another, plaintiffs, "respondents. Under these circumstances "the decree for costs against the petitioner "founded on that order, was clearly erro-"neous, and it not being in accordance with "the judgment of this Court, the decree "must be altered. As both parties are in at-"tendance, it is unnecessary to prolong the "imprisonment of the petitioner by issuing "notice on the decree-holder. The execu-"tion taken out against him cannot hold "good, and the entry of costs against his "name in the decree must be expunged."

Now, it does not appear how the Judge had got before him the proceedings in this execution-case, which could only be properly carried on in the Court of the Subordinate Judge, nor, consequently, what jurisdiction the Judge would have to receive the petition and order the release of Romanath.

The parties executing their decree have come up before us in special appeal, and they contend that the Judge had no jurisdiction to entertain the petition while the execution-proceedings were before the Subordinate Judge. This ground, as already intimated, I consider to be a valid

one. I do not think that for the purpose of making any order in the execution-proceedings, the Judge was competent to entertain that petition. He ought to have referred it to the Subordinate Judge in whose Court the proceedings were.

Secondly, it is urged, that the Judge was not competent to alter the decree in the execution-department. I do not know what the execution department is; but I think it very clear, that if on referring to a decree passed by the predecessor of the present Judge, and comparing it with the judgment of that Judge, it was found that the two were not in conformity with each other, but that the decree contained something, or bore a construction evidently not contemplated by the judgment, I think the present Judge was quite competent, on the matter being brought to his notice, to alter the decree so as to bring it into conformity with the judgment.

The third contention is that as Romanath had been made a respondent and was alleged to be in collusion with the plaintiffs, the decree of the former Judge was quite correct, and ought not to have been summarily altered by his successor. I do not understand the appellant in this part of his argument to contend that the Judge was not competent to make the alteration, but that the circumstances of the case showed the particular alteration to be improper. I think the Judge had to consider whether the decree was in accordance with the judgment, and on this point I do not consider his judgment to be open to appeal.

It is then urged that more than 90 days have expired from the date of the decree, and as no satisfactory reason had been shown for the judgment-debtor's delay, the Judge was not competent to alter the decree. This is not a matter of the nature of an application for review, but merely an alteration of a clerical error in the decree to which the 90 days' rule does not apply, and therefore this objection has no force. The result, I think, is that we must declare the Judge to have acted without jurisdiction in ordering the release of Romanath, but that we cannot say that the Judge acted either irregularly or improperly in altering the decree when the discrepancy between it and the judgment was brought to his notice. We make no order as to costs nor as to the re-arrest of Romanath against whom, indeed, we understand, there is no decree now capable of execution.

Markby, J.—The judgment of the Judge in this case consists of two distinct parts. By one, he makes an alteration in the decree which was made by his predecessor. He considered that the decree had by inadvertence been drawn up not in accordance with the judgment, and he altered it accordingly. I think it is quite clear that the Judge who succeeded to the office of the Judge who made the decree, was the only person who could do that; and, though I must say, a Judge ought to be exceedingly wary and exceedingly careful in making any material alteration in a decree of his predecessor, I cannot say that he had no jurisdiction to do so, if he was satisfied that the decree was drawn up wrongly, and upon that part of his judgment there can be no appeal to this Court.

Then the other part of the judgment was, that the person who had been arrested and imprisoned as the record originally stood, should be liberated. It appears to me that he had no jurisdiction to make that order. The execution-proceedings were not in his Court, but in the Court of the Subordinate Judge. I apprehend that the Subordinate Judge was the only person who could make any order with reference to the execution while the proceedings remained in his Court. Therefore, that part of his judgment which was clearly without jurisdiction must be set aside.

The 17th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Attachment—Section 243, Act VIII. of 1859.

Case No. 168 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 31st March 1869.

Deb Koomaree (Judgment-debtor), *Appellant,*

versus

Ram Lall Mookerjee (Decree-holder), *Respondent.*

Baboo Ashootosh Dhur for Appellant.

Baboo Gopal Lall Mitter for Respondent.

A mokurrureedar having failed to make due payment of her rent to the zemindar, the dur-mokurrureedar paid the rent, and obtained a decree against her for the

amount. In satisfaction he attached the very property of which he was her lessee. Upon this, the mokurruree-dar petitioned the Judge, under Section 243, Act VIII. of 1859, offering to place this and other property under the management of the Court, so that after the payment of a small yearly sum for her maintenance the profits should be carried to account in payment of the sum due. The Judge refused to make such an order.

HELD that the circumstance of her having other property of inferior value such as could be more conveniently dealt with for the purpose of saving the property under attachment, was a ground, not for rejecting, but for complying with the judgment-debtor's petition.

Jackson, J.—THIS is an appeal against an order made by the Zillah Judge refusing to make an order at the instance of a judgment-debtor under Section 243, Act VIII. of 1859. It appears that the respondent, Ram Lall Mookerjee, holds a dur-mokurruree tenure of an estate held in mokurruree by the judgment-debtor, Deb Koomaree. Deb Koomaree having failed to make due payment of her rent to the zemindar, Ram Lall in order to protect his own sub-tenure, paid the rent, and subsequently sued her and obtained a decree against her for the amount. In satisfaction of that decree, he had attached the very property of which she holds the mokurruree, and of which he is her lessee.

Upon this, Deb Koomaree petitioned the Judge, setting forth that she had this and other property which had been granted to her for her maintenance, and proposing to place this and the other estates in question under the management of the Court, so that, after the payment of a small yearly sum for her maintenance, the profit should be carried to account towards the payment of the sum due under the decree, and thus in the course of a few years the whole amount could be satisfied.

The Judge has refused to make such an order, apparently upon two grounds. The *first* of those grounds is that the judgment-debtor, he says, has other property, that is, other property than the property under attachment; and, *secondly*, he says that, as the profits of the mehal in question are only 650 rupees annually, if the prayer of the judgment-debtor were acceded to, the decree-holder would be kept out of his just dues for a long period, and would have to run the risk of bad collections and similar losses in the profits.

Now, it seems to me that the circumstance of the judgment-debtor being possessed of other property, instead of being a ground for refusing this prayer, ought rather to have been a ground for complying with it, because, if those were properties of inferior value and such as would be more conveniently dealt with for the purpose of saving this one, then that would be a good reason for staying the sale and making such use of those other properties. The particular property under attachment is, I presume, the most valuable that this lady possesses. The Judge's observation that the decree-holder would have to run the risk of bad collections, and the like, suggest to my mind that he has forgotten what the real relative position of the parties is. The risk of bad collections is one which the decree-holder has already taken upon himself, because he, and not the judgment-debtor, is the party who is to collect the rents, and she has only to receive from him a fixed reserved rental every year. It seems under these circumstances that an arrangement by which the decree-holder, instead of paying his lessor, should pay himself annually, either after reserving, or without reserving a sufficient sum for her maintenance, is one of obvious convenience.

An appeal against an order made under this Section is one which the Appellate Court must always have great difficulty in dealing with. I felt that opinion so strongly that I felt compelled to dissent from the opinion of the Full Bench, in which it was held that such an appeal would lie. This case is to be found in 10 Weekly Reporter, p. 5, Full Bench Rulings. From the circumstances of this particular case, the difficulty is not so great as it often would be. But even here, I feel that it would be quite impossible for us to make any specific order, and under these circumstances I think all that we can do is to set aside the order of the Judge positively refusing to make an order under Section 243, and to remit the case to him with instructions that the sale be stayed for two months, in order to enable the judgment-debtor to make a fresh application to him for an order under Section 243. It would be for her to show what the value and condition of the other property in her possession may be, and for the Judge to consider by what means or by what arrangement such a disposal of different portions of her property can be made, as, if possible, to avoid the sale of the property now under attachment. There are circumstances in the case which make it specially desirable that some such arrangement should be come to. We cannot shut our eyes to the fact that the decree-holder holds a tenure subordinate to that of his judgment-debtor,

and that he may not improbably desire to get her out of the way with a view of course to get her tenure into his own hands. At any rate, I think it necessary that the Judge should have an opportunity of reconsidering this matter, and making such order as the justice of the case may require.

Markby, J.—I certainly must agree that it is not easy for us to deal with appeals from orders passed under Section 243. It is very difficult, it seems to me, for this Court to ascertain what the relative situation of the parties is. Under the circumstances of this case, I think the order proposed by Mr. Justice Jackson is the right one, namely, that the case should be sent back in order that a fresh application should be made, and that in the meantime the sale should be stayed.

The 21st June 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Distraint—Section 143, Act X., 1859.

Case No. 2623 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 15th August 1868, affirming a decision of the Deputy Collector of that District, dated the 30th April 1868.

Radha Mohun Lushkur and another (two of the Defendants), *Appellants,*

versus

Judoonath Doss (Plaintiff), *Respondent.*

Baboos Bungshee Dhur Sein and *Bhuggobutty Churn Ghose* for Appellants.

Baboos Chunder Madhub Ghose, Kalee Mohun Doss, and *Romesh Chunder Mitter* for Respondent.

Section 143, Act X. of 1859, contemplates the case not only of a person who professes to follow its provisions, though he has no power to distrain, but also of a person who distrains under color of the Act, but not according to its provisions.

Loch, J.—We think that the objection taken in this appeal is of no real force. The claim was to recover the value of crops which had been distrained under color of Act X. of 1859, and carried away by the defendant.

The first Court gave a decree for the plaintiff, and that order has been confirmed by the Lower Appellate Court. Before the Lower Appellate Court, the special appellant, defendant in this case, did not appeal on the facts, but on two grounds, *viz.*, that the Revenue Court had not jurisdiction in this case, and on the point of costs.

The Lower Appellate Court held that as the question of jurisdiction had been raised at so late a stage of the proceedings, it could not be enquired into. We think the Judge was wrong in refusing to dispose of the question. A special appeal has been preferred against his judgment, and though we think that the Judge should have disposed of the question, although advanced at so late a stage of the proceeding, we think the objection has not in itself any real weight. The case is one which must come either under Section 142 or Section 143, Act X. of 1859. Section 142 contemplates the case of persons having authority to distrain, but who distrain otherwise than according to the provisions of the Act. Section 143 contemplates the case of persons not empowered to distrain but who, under color of the Act, do distrain.

It has been urged before us that Section 143 contemplates the cases of those who, though they have not power to distrain, do so and proceed under the provisions of the Act, but does not embrace a case such as this, where persons not empowered to distrain do so under color of the Act, but do not follow the provisions of the Act, *i. e.*, where persons professing to distrain forcibly carry off the crops to which they have no right.

We think that is a wrong view of the cases contemplated under Section 143. It appears to us that that Section not only contemplates the case of a person who professes to follow the provisions of the law, though he has no power to distrain, but also comprises the case of a person who, under color of the Act, does distrain, but does not do so according to the provisions of the Act. Such persons are considered by the Section as trespassers, and are liable to the penalty of trespass in addition to damages which may be awarded against them by the Revenue Court.

Under this view of the case, we dismiss this appeal with costs.

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The 21st June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Inconsistent grounds—Objections—Written grounds of appeal—Grounds of plaint.

Case No. 3296 of 1868.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 31st August 1868, affirming a decision of the Sudder Ameen of that District, dated the 31st December 1867.

Nobin Chunder Mitter (one of the Defendants), *Appellant,*

versus

Mohesh Chunder Mitter (Plaintiff) and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Umbika Churn Banerjee for Respondents.

In a suit for the removal of a building erected by defendant upon a piece of ground which was alleged to belong to plaintiff exclusively, the land was found to be common property, and the Lower Appellate Court decreed the suit on the ground that the building had been erected without the consent of defendant's co-sharers.

HELD that, on failure of plaintiff's allegation, his suit should not have been decreed on a ground quite inconsistent with the case he made.

This objection to the Lower Court's decisions in the case, being held to be fair and reasonable, was allowed at the hearing, though not taken in the written grounds of appeal.

HELD that plaintiff was not entitled to an inquiry as towhether the building interfered with the joint enjoyment of the premises by the members of the family, as no allegation of the sort had been made in the plaint.

Jackson, J.—I THINK the decision of the Lower Appellate Court in this case must be set aside. The plaintiff in this case, who was a defendant in another suit out of which the two last special appeals heard to-day arose, sued the brother of the plaintiff in that other suit, alleging that he, the defendant, had erected a *challa* upon a piece of ground to which the plaintiff was separately entitled; and he prayed that this *challa* might be pulled down by order of the Court.

The Sudder Ameen found the plaintiff's allegation to be true, and ordered the demolition of the *challa.*

On appeal, the Second Subordinate Judge found that the land did not belong to the plaintiff, and, nevertheless, holding that the defendant was not at liberty to erect any building upon the land which was common property, without the consent of his co-sharers, he confirmed the order of the Court below.

It is contended in special appeal on the part of the defendant that the plaintiff was not entitled to a judgment of the Court upon a ground which was quite inconsistent with the case he made.

I think this was so. The plaintiff alleged the defendant to have done him wrong by erecting this *challa* upon ground which belonged to plaintiff exclusively. On failure of that allegation, his suit ought to have been dismissed. And it appears to me that, even if his allegation had been that the defendant had erected the *challa* upon common land, without the express permission of him, the plaintiff, he would not have been entitled to the decree be sought for.

The respondent has argued that this was not a ground taken in the written grounds of appeal. We thought, however, that it was a fair and reasonable ground to take; and if the fact of its not being contained in the petition of appeal had been brought to our notice, we certainly should have allowed it to be taken. I think this objection, therefore, has no weight whatever.

We are also asked to remand the case in order that it may be tried whether the *challa* of which the plaintiff complains interferes with the joint enjoyment of the premises by the members of the family. No allegation of this sort was made in the plaint, and I do not consider that the plaintiff is entitled to any enquiry of the sort, even if the result of such enquiry could entitle the plaintiff to a decree.

I think, therefore, that the appeal must be allowed, and the judgment reversed with costs.

Markby, J.—I am of the same opinion. Even if the allegation had been made in the plaint that the act complained of was an injury to the common enjoyment of the property, still I have some doubt whether we could have remanded the case for an enquiry on that point, because I have difficulty in seeing how far, and under what circumstances, if it all, a Court can, at the

instance of one member of the family, interfere in the mode of dealing with the family-property by one of the members of undivided family. But it is unnecessary to express any final opinion upon that point, because, the allegation not being contained in the plaint, there could be no enquiry upon it.

The 22nd June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Miscellaneous appeal—Splitting of causes—Misjoinder—Jurisdiction—Costs.

Case No. 98 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 8th December 1868, affirming an order of the Subordinate Judge of that District, dated the 16th September 1867.

Kossella Koer and another (Plaintiffs), *Appellants,*

versus

Beharee Patuck and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuff* for Respondents.

An appeal from an order rejecting a plaint for misjoinder is a miscellaneous appeal, and if it is rejected, an appeal from the order of rejection is also of the nature of a miscellaneous appeal.

The provision of Section 9, Code of Civil Procedure, under which a Court has power to order separate trials of different causes of action if they cannot be conveniently tried together, applies only to causes of action mentioned in Section 8, *i. e.*, by and against the same parties.

Where a plaint had been rejected as having been filed against several persons who had different defences, it was held to be within the discretion of the Judge, in appeal, to dismiss the suit and saddle the plaintiff with the costs of all the defendants, notwithstanding that all the latter, except one set, admitted the claim, and retired from the contest.

Glover, J.—THE plaintiff in this case sued as the heir of one Hunsraj, and the suit was against various sets of defendants for recovery of possession of certain different villages and certain different houses, and for confirmation of possession in certain other villages and certain other houses. Both the Lower Courts found that the plaintiff's claim was bad for misjoinder, and rejected it. The pleader for the special respondents in this case has taken a preliminary objection to the hearing of this appeal on two grounds: *first*, that the Judge had no jurisdiction to entertain the case as a miscellaneous appeal; and, *second*, that no miscellaneous appeal lies to this Court.

Neither of these objections appears to us tenable. Whether the Judge ought to have heard the case as a miscellaneous or as a regular appeal involved merely a question of stamp-duty, which had nothing to do with the Judge's power to hear the case; and with reference to this question, as no objection was taken on the point when the case came before the Judge on appeal, it cannot be entertained now.

With regard to the second objection, that the appeal to this Court should be on the full stamp for special appeals, the pleader for the respondent has not been able to show us any authority for his contention. Moreover, as the decision of the first Court amounted only to a rejection of the plaint, the appeal to the Judge was properly a miscellaneous appeal, and therefore, it appears to us, the appeal to this Court was of the nature of a miscellaneous appeal also. This objection is therefore overruled.

The appellant objects to the Judge's order on two grounds: first, because when the case was tried by him on appeal, all the defendants, with the exception of one set only, more or less admitted the plaintiff's claim, and retired from the contest, and therefore he contends that the Judge should have removed the names of all these defendants from the record, and have retained only the names of the one set of defendants who still held out against the plaintiff's claim, and that the suit thus eliminated, being no longer liable to the objection of misjoinder, should have been sent back to the Court of first instance for trial on the merits. We do not find that the Judge was requested to take this course, nor do we see that the Judge's not adopting it forms any error in law of which we can take cognizance in special appeal. We have been referred to Section 9 of the Code of Civil Procedure, where it is laid down that a Court has the power to order separate trials of different causes of action joined in one suit, when the Court shall be of opinion that they cannot be conveniently tried together; but this only applies to causes of action mentioned in Sec-

tion 8, that is to say, causes of action by and against the same parties. In this case the defendants were all of them different. Then it has been said that, granting the Judge's authority, he did not exercise a sound discretion in dismissing the appeal, and that, therefore, his decision is an illegal one. We think that it can hardly be said that the Judge exercised an improper discretion in this matter. The plaintiff rushed into Court making 10 or 12 people defendants in the suit, and he cannot, now that accident has so far favored him that a certain number of those defendants have admitted his claim, ask to be treated with special indulgence. We think that this was a matter entirely within the province of the Judge, and we see no reason to believe that, in exercising the power which the law gives him, he has done so without proper discretion.

The other objection taken is that the appellants ought not to have been saddled with the costs of all the defendants in the first Court. This also was a matter for the discretion of the Courts below, and it appears to us that that discretion was properly exercised. If the plaintiffs chose to bring into Court different parties who all have different defences, and if the result was the rejection of their claim, they have only themselves to thank, and we cannot see that they have any reason to claim exemption from payment of all the costs.

The appeal is dismissed with costs.

The 22nd June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Instalment-bond—Limitation—Special appeal—Objection.

Case No. 70 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 20th November 1868, affirming an order of the Subordinate Judge of that District, dated the 18th July 1867.

Mussamut Khedoo and others (Decree-holders), *Appellants,*

versus

Kalee Sahoo (Judgment-debtor), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Nil Madhub Sein for Respondent.

A decree-holder, after taking out execution, accepted from his judgment-debtor an instalment-bond covenanting to pay a fixed sum monthly for a certain period, and providing that, if within that period five consecutive instalments remained unpaid, the judgment-creditor should have power to call for payment of the whole amount due under the bond, and to proceed against any of the debtor's property in satisfaction.

HELD that, on the judgment-debtor's failure to pay five consecutive instalments, it was not imperative on the decree-holder to sell him up at once; but he might, if he chose, receive payment month by month; and that non-payment of instalments was a constantly recurring cause of action, operative within a limit of three years.

As the decree-holder's application for execution on the bond without a regular suit was not objected to in the Courts below, but assumed by judgment-debtor as a proper ground on which to apply for execution, the objection was not allowed in special appeal.

Glover, J.—THE appellant in this case got a decree against one Kalee Sahoo on the 31st of May 1859, and took out execution in October 1860, and in the same month came to an arrangement with his debtor by which a kistbundee was executed by the latter. This kistbundee covenanted to pay the decree-holder 11 rupees monthly from Assin 1268 to Kartick 1277, and there was a provision inserted in it that, if at any time within that period five consecutive monthly kists remained unpaid, the judgment-creditor should have the power to call upon the debtor to pay up the whole under the kistbundee, and to proceed against any of his property in satisfaction thereof.

On the 26th of March 1867, the decree-holder petitioned the Court, stating that of the whole sum due to him under the kistbundee he had only realized 55 rupees, and that he now prayed to take out execution against his judgment-debtor for the balance of the sum due, *minus* a sum of 451 rupees, which he admitted to be barred by limitation as representing instalments for a period anterior to three years before the institution of the suit. Both the Lower Courts held the decree-holder to be barred by limitation. The Judge says that the conditions of the kistbundee not having been complied with, the arrangement made between the parties came to an end; and that the decree then became an ordinary unconditional decree, execution of which, as such, should have been taken out within three years from the date of the last proceeding for its enforcement, that is to say, from the date of realization of the last kist; and as that had admittedly not been done, the Judge held the decree-holder to be barred by limitation.

We do not precisely understand how, if the Judge supposes that the arrangement made between the parties had come to an end, and if the original decree became the only instrument under which the decree-holder could proceed, the last proceeding could date from the last kist paid, as that kist was not paid under the original decree, but under the arrangement entered into under the kistbundee. With reference, however, to his finding, we do not think that the suit can be barred by limitation. The words of the kistbundee are not imperative but permissive; they do not say that, supposing five consecutive instalments not to be paid, the decree-holder should recover his money then and there from the judgment-debtor; it does not say that he is restricted to this particular remedy, and does not take away from him the right of receiving, if he chose so to receive it, the amount of his debt month by month.

It appears to us that, under the terms of this kistbundee, the decree-holder had a perfect right to elect which of the two courses he should pursue; that he might, if he had chosen, sold up his judgment-debtor at once or have kept to the terms of the deed and received payment month by month; and, if this be so, it is clear that the non-payment of the instalments under the kistbundee was a constantly recurring cause of action; that every month the decree-holder would have a fresh claim on his debtor for the instalment due, and that he can now in execution recover as many of these instalments as come within the period of three years preceding his application. The same principle is laid down in a judgment of this Court, in Miscellaneous Appeal No. 248 of 1865, decided on the 20th July, Girdharee Singh and others, appellants, *versus* Lalla Koonwar.

It is contended by the pleader for the respondent that the Courts below had no jurisdiction in this case, and that, before execution could have been taken out upon the kistbundee, it was necessary to bring a suit on the kistbundee, and that, without such a suit, the decree-holder had no right to recover. We do not feel inclined to allow this objection to be taken, inasmuch as it was never a part of the judgment-debtor's case at any stage of the proceedings in either of the Courts below. On the contrary, the judgment-debtor's case there was that, assuming the kistbundee to be a proper ground on which to bring an application for execution of decree, the decree-holder's remedy was barred, he not having brought it within proper time; and we are the less inclined to allow this objection now, inasmuch as all the equities in the case are in favor of the decree-holder. The judgment-debtor has had great indulgence shown him. Instead of having his property sold up at once in satisfaction of the debt, he has had time and opportunities given him for paying it off, and has, moreover, received this advantage in consequence of the neglect of the decree-holder in bringing his suit before, of being released from payment of a sum of 451 rupees which he was clearly bound to pay, but which he cannot now be made to pay under the Statute of Limitation.

The case reported in Volume 7 of the Weekly Reporter, page 21, Hurronath Roy and others *versus* Maheroollah Moollah, which has been brought to our notice by the pleader for the special respondent, appears to us to have nothing in common with this suit. In that case, there was no fresh agreement, and the suit was on the original instalment-bond, whilst in this case the kistbundee was a fresh arrangement making fresh terms, and creating fresh liabilities.

We think, therefore, that the decree of the Lower Court is erroneous, and should be reversed with costs, and that the decree-holder should be allowed to take out execution in the usual way.

The 24th June 1869.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Proceedings without jurisdiction.

Case No. 3171 of 1868.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 2nd September 1868, affirming a decision of the Subordinate Judge of that District, dated 20th August 1867.

Onungo Moonjuree Dassia and others (Plaintiffs), *Appellants,*

versus

Punchanun Bose and another (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Sreenath Doss and *Romanath Bose* for Respondents.

When, on a re-hearing, a Deputy Collector set aside his former judgment as passed without jurisdiction, it was held that his proceedings under that judgment were of themselves null and void, and that it did not require any order in words to set aside the sale which they involved.

Loch, J.—We think the judgments of the Lower Courts are wrong, and must be set aside. Indeed, the pleader for the respondents says that he must leave the judgments of the Lower Courts to take care of themselves, and he has admitted that he cannot support them.

It appears that the suit for arrears of rent was instituted before the Deputy Collector of the Sudder Station of Jessore, while the property in question is situated in the Nurrail Division. The Deputy Collector gave an *ex-parte* decree under which the tenure of the plaintiff was sold and purchased by the defendant. The plaintiff applied for a re-hearing, and the Deputy Collector, admitting that he had acted altogether without jurisdiction, granted the review and sent the case to the Assistant Collector of Nurrail to determine whether the rent claimed was due or not. The Assistant Collector gave an *ex-parte* decree to the then plaintiff for the amount of rent claimed, which was then paid up by the plaintiff in this case. The defendant, zemindar, then applied to have a certificate of sale of the tenure purchased by him in execution of his first decree given to him; and though that sale had actually been set aside, as the Deputy Collector's proceedings under which the sale had been held were without jurisdiction, the Assistant Collector gave a certificate, because the sale had not been cancelled in so many words; and under that certificate the defendant took possession of the plaintiff's tenure.

The present suit is brought to recover possession. Both the Lower Courts have held, for reasons which seem to us altogether insufficient, that they cannot interfere to set aside the sale and give possession to the plaintiff, as no order cancelling the sale has been recorded in so many words.

We think the judgments passed by the Lower Courts are altogether wrong; that, as the whole of the proceedings of the Deputy Collector by whose order the property of the plaintiff was sold were without jurisdiction, they were of themselves null and void, and it did not require any order in words to set aside the sale, as the Deputy Collector had admitted the case to a re-hearing, and set aside his former judgment as passed without jurisdiction.

We see no difficulty in complying with the prayer of the plaintiff in this case. We, therefore, reverse the orders of the Courts below, and decree the plaintiff's suit with costs in all the Courts.

Mitter, J.—I concur.

The 24th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Limitation—Decrees of the late Sudder Court.

Case No. 151 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 23rd November 1868, reversing an order of the Moonsiff of that District, dated the 4th September 1868.

Thakoor Doss Gossain (Judgment-debtor), *Appellant,*

versus

Kasheenath Mundul and others (Decree-holders), *Respondents.*

Baboos Bama Churn Banerjee and *Obhoy Churn Bo.e* for Appellant.

Baboo Prosunno Coomar Roy for Respondents.

The ruling in 8 Weekly Reporter, p. 470 (to wit, that a decree of the High Court falls under the 19th Section of Act XIV. of 1859, and is subject to 12 years' limitation), will not apply to a decree of the late Sudder Court, which was not a Court established by Royal Charter.

Jackson, J.—The decision of the Judge must be set aside, there being a manifest error on his part. He holds the execution to have been barred on the ground that the decree sought to be executed was a decree of the High Court in its appellate jurisdiction passed on the 30th of November 1858. It is manifest that this was a decree, not of the High Court in its appellate jurisdiction, but of the late Sudder Court, which was not a Court established by Royal Charter, and to which, therefore, the ruling in 8 Weekly Reporter, page 470, will not apply.

This, however, does not dispose of the case, because there were applications and proceedings in the course of the years 1861, 1864, and 1865, on which the decree-holder relies as being sufficient proceedings to keep his decree in force. The case must go back to the Lower Appellate Court in order that it may consider the effect of those proceedings, and dispose of the case accordingly.

Markby, J.—I am of the same opinion.

The 24th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

High Court's powers of interference—Section 15 of 24 and 25 Vic., Cap. 104.

Case No. 172 of 1869.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 5th February 1869, reversing an order of the Moonsiff of Mahomedpore, dated the 9th November 1868.

Sreemutty Dossee (Judgment-debtor), *Appellant,*

versus

Sreenibash Dey (Decree-holder), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Mohendro Lall Seal for Respondent.

It was not the intention of Section 15 of the High Courts Act to confer any rights upon litigant parties; its whole object being to give the High Court some control over the Courts subject to its appellate jurisdiction.

Quære.—Is a conflict between a Judge's order and a direction of law, ground for the High Court to exercise its powers of interference.

Jackson, J.—THIS is a case of execution of decree, and on the objection taken by the respondent it is admitted that the special appeal is taken away by Section 27, Act XXIII. of 1861; but the special appellant's vakeel in the same breath asks us to deal with the case under the extraordinary powers which the Court exercises by the 15th Clause of the High Courts Act. That is a power which, it seems to me, should be exercised with extreme caution, and also after notice to the parties to be affected by it. I do not think, as a general rule, that the practice should be encouraged for special appellants, when they fail on the appeal, to be allowed suddenly to turn round, and apply to the Court to put in force those extraordinary powers upon grounds especially which admit of discussion.

In the case before us, indeed, if we look only at the judgment of the Moonsiff, it does appear as if the execution had become extinguished by reason of the lapse of three years between the passing of the decree and the first application to execute. But that state of facts, so far from being assumed or found by the Judge, is not even adverted to, and therefore the decision of the Judge does not exhibit any express conflict between his order and the direction of law. Even if it did, I am not prepared to say at once that such a conflict would be a ground for exercising the powers of interference on this occasion; and, moreover, I am by no means satisfied that the special appellant is in the position of a party on whose behalf I should be inclined to exercise those powers.

On the whole, I do not think a case has been made out for our interfering in the unusual way proposed, and I think the special appeal must be dismissed with costs.

Markby, J.—I am of the same opinion. I think it should be borne in mind that Section 15 of the Act 24 and 25 Vic., Cap. 104, at any rate as I understand it, was not intended to confer any rights whatever upon litigant parties. I think the whole object of that Section was to give to this Court some control over the Courts subject to its appellate jurisdiction. It is true that we constantly allow parties to draw our attention to cases in which the Lower Courts have exceeded their jurisdiction, and, according to a very salutary practice, we then cause notice to be given to the other side who are interested in having the jurisdiction exercised, and we hear an argument upon the question; but it seems to me that, when we are acting under Section 15, we are controlled in no way by the rights of the parties. We act entirely and absolutely on our own discretion, and it seems to me that Section was never intended to be applied to cases of the kind now before us. I can fully understand its being applied to such a case as that reported in 9 Weekly Reporter, page 309, where the Judge had done a thing which a Court could never under any circumstances have power to do, and had gone against every principle upon which litigation is conducted. I do not think it was intended to be applied to setting aside the decrees of inferior Courts, except where a Court had altogether unmistakeably and clearly gone beyond the exercise of the powers conferred upon it.

The 24th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Mesne-profits—Section 196, Code of Civil Procedure.

Case No. 152 of 1868.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 15th January 1868, affirming an order of the Deputy Commissioner of Hazareebagh, dated the 30th July 1867.

Dhurm Narain Singh (Judgment-debtor), *Appellant,*

versus

Bundhoo Ram and others (Decree-holders), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

A decree for possession and mesne-profits must, with reference to Section 196, Civil Procedure Code, be held to mean mesne-profits down to the date of delivery of possession.

Where the amount of mesne-profits is not expressly admitted, the Court is bound to deal with it as if disputed, and either to determine the amount at the trial or to reserve it for assessment in execution.

Jackson, J.—Two points are raised in this appeal. The decree was one for possession of land with wassilat. The decree-holder has applied for execution both as to possession and as to wassilat, and asked for such wassilat from the period of dispossession down to the time of delivery of possession, and at the rate specified in the plaint. This prayer has been complied with, and the judgment-debtor complains that, in the first instance, the plaintiff was not entitled under the decree to anything more than wassilat down to the date of the institution of suit as stated in the plaint; and, secondly, wassilat could not be levied without being first ascertained.

On the first point, I think the appellant must fail. Section 196 of the Code of Civil Procedure distinctly enables the Court when the suit is for land or other property paying rent, "to provide in the decree for the payment of mesne-profits or rent on such land or other property from the date of the suit until the date of delivery of possession;" and when the Court in its decree ordered that the plaintiff should receive mesne-profits, I think it must be held to have meant that he should receive such mesne-profits down to the date of the delivery of possession.

On the other point, I think the Courts below are in error. By Section 197, "When the suit is for land and for mesne-profits which have accrued thereon during a period prior to the date of suit, and the amount of such profits is disputed, the Court may either determine the amount prior to passing a decree for the land, or may pass a decree for the land and reserve the enquiry into the amount of mesne-profits for the execution of the decree." It does not, indeed, appear that the defendant in express terms disputed the amount of mesne-profits as stated in the decree, but he certainly did not admit it. We are told that it was impossible for him to deny or question that amount, because the mesne-profits, under the name of usufruct, had been already defined in the deed between the parties under which the defendant was mortgagor, and the plaintiff was mortgagee, of the land. This may be true, but still I think that, if not expressly admitted, the Court was bound to deal with the amount as if it were disputed. That being so, he was bound either to determine the amount at the trial of the suit, or to reserve it for assessment in execution of the decree. It cannot be said that a mere order in the decree that the plaintiff was to have mesne-profits would be a determination that he was to have them at the amount specified in the plaint.

It was quite clear, also, that there could be no determination without evidence of some kind. I think, therefore, the case must go back to the Court below in order that the amount of mesne-profits should be assessed and ascertained in the execution-proceedings. If, as the plaintiff states, the defendant is concluded on that subject by any admission or act of his own, of course the ascertainment is an easy matter.

Markby, J.—I am of the same opinion.

The 24th June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Local inquiry—Discretion of Judge.

Case No. 716 of 1869.

Special Appeal from a decision passed by the Judge of Sarun, dated the 21st December 1868, affirming a decision of the Deputy Collector of that District, dated the 22nd August 1868.

Rash Beharee Singh (Plaintiff), *Appellant,*

versus

Saheb Roy and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Mohesh Chunder Chowdhry and *Bama Churn Banerjee* for Respondents.

It is within the discretion of a Judge to order or refuse a local inquiry. When in the exercise of a reasonable discretion he refuses such inquiry, his order should not be interfered with unless very strong grounds are shown for the necessity of the inquiry.

Glover, J.—We see no reason to interfere in this special appeal. Both Courts dismissed the plaintiff's claim; the Judge on the ground that the evidence filed by the landlord was worthless, whilst that adduced by the defendants conclusively showed that they held the lands at the rates alleged by them.

The first objection which is raised in special appeal is that the Judge ought not to have refused the application for a local inquiry, and that his decision that the plaintiff was bound by the result of a previous local inquiry is illegal. Another objection taken is that the jummabundee papers of 1251, filed by the defendants, ought not to have been taken as independent evidence of the rates of rent paid.

With regard to the first objection, we do not understand that the Judge holds that the plaintiff was altogether bound by the result of the first local inquiry, but rather that he thinks it unnecessary to hold a second inquiry, because the person whom the plaintiff now wishes to be appointed to conduct that inquiry was the very same person who conducted the first inquiry, the result of which was unfavorable to the plaintiff. In any case, it was within the discretion of the Judge to order or to refuse a local inquiry, and unless very strong grounds were shown for the necessity of such inquiry, which has not been done in this case, we should not feel justified in interfering with the order passed by the Judge in the exercise of a reasonable discretion.

With regard to the jummabundee papers, we find that the Judge has considered them along with other evidence, and has found proved what is, in fact, not disputed, that, whilst the estate was under the Court of Wards, these very papers were filed on behalf of the plaintiff, who was then a minor, and formed the basis of the collections on the plaintiff's estate. It seems to us, therefore, that the plaintiff cannot now raise any objections to these papers, inasmuch as they were filed in Court by his own putwaree, and were acted upon all along as showing the rents realized on the estate. The special appeal must, therefore, be dismissed with costs.

The 24th June 1869.

Present :

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

User—Prescription.

Case No. 445 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 9th December 1868, affirming a decision of the Moonsiff of Kusbah Noornuggur, dated the 22nd August 1868.

Kristo Chunder Chuckerbutty (one of the Defendants), *Appellant.*

versus

Kristo Chunder Burnick (Plaintiff), *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

An user for the period of 12 years gives a person a legally prescriptive right.

Bayley, J.—We are of opinion that the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded to that Court for re-trial.

The facts are these. The plaintiff sued for opening a road by the removal of a cow-shed built thereon by the defendant.

The plaintiff alleged that he and the inmates of his family had a right of user over the land in suit.

The defendant's case was that over the lands in suit the plaintiff never had any right; that the lands in suit were not of the character stated by the plaintiff, but were partly rent-paying and partly homestead lands, &c., of defendant.

Upon these pleadings, the first Court put issue "Whether the path in suit had been "in use from a long time through the land "in suit, and whether the defendants have "closed the same, and whether the path can "be opened by destroying the house raised "by the defendant."

The first Court found as a fact upon the evidence that the path was *formerly* used by the inmates of the plaintiff's house, and that the plaintiff's case was true, and the first Court accordingly decreed that the plaintiff had a right of user over the lands in suit.

On appeal to the Lower Appellate Court, that Court put in issue "Whether "the path in suit was *formerly* used by "the plaintiff, respondent, and whether the "appellant, by erecting a house upon the "path, has closed and obstructed it." The Lower Appellate Court proceeded upon the Ameen's report as showing that the plaintiff had a right to pass towards the south through the way in suit which was a short cut; and stating that it considered the decision of the Moonsiff correct, affirmed it.

From this decision, the defendant appeals specially. He abandons the first ground in his petition of special appeal, and does not press the second or the fourth ground.

On the third ground, however, he urges that the Lower Appellate Court has not found whether the plaintiff had such uninterrupted user as would entitle him to a decree, and that the Ameen's report does not prove a right of user to be with plaintiff.

I am of opinion that the mere use of the word "*formerly*" (সাবেক) as used by both the Courts below, without any expression to indicate the length of time for which the right had been exercised, is insufficient to prove legally a right of user. I see nothing in this term as used in the judgments below that may not be quite compatible with the fact of an user for the period of one month or one year, or any other period within 12 years.

The earlier rulings of this country on this point were to the effect that, although in this country the full and exact period of 20 years, as required by the English law, was not absolutely necessary to give a person the right of user by prescription, still the user for a period approximate to that was necessary to be shown.

In the more recent decisions, however, it has been held that an user for the period of 12 years gives a person a legally prescriptive right. It has been urged by the pleader for the special respondent as to this point that in a case reported at page 236, Volume XI., Weekly Reporter (*L. S. Jackson and Markby, JJ.*), it has been laid down that, under certain circumstances, an user for four or five years might be sufficient to create that right; but it appears to us that the remark was entirely an *obiter* in that case, for it was a case in which the evidence of user ranged from 10 to 20 years. In the present case, the real fact is that, although there was evidence taken by the Court of certain of plaintiff's witnesses who deposed that the right of user had been with the plaintiff for 10 or 12 years, the Lower Appellate Court has merely proceeded on the fact of there being a *former* user, but has never determined, as it ought to have done, whether that user was above or below 12 years, and whether the period of user shown was or was not long enough to create a prescriptive title in the plaintiff. That was a point on which the Lower Appellate Court ought to have arrived at a clear and distinct decision. As it did not do so, there is a defect in the investigation in law affecting the decision on the merits.

Stress has been laid on the fact that the word "*formerly*" is not inconsistent with the idea of a long user, but the meaning is plain as already observed, and there is nothing to show that the word is not quite compatible with an user for any period from one to twelve years. The case cited from page 285, Volume XI., Weekly Reporter, does not apply to this case, or in any way support the contention of the special respondent, as in that case the words were "long since," the essence of presumption arising in the *length* of time for which the user had been exercised.

We think, therefore, that the case must be remanded to the Lower Appellate Court to decide whether, on the evidence on the record, and bearing in mind the precedents cited in the margin, the plaintiff has proved a legal right of user by prescription. In deciding the issue thus put before the Lower Appellate Court, it should give clear and distinct reasons for its judgment, and should fully explain the grounds on which it bases its conclusions.

Volume VII., Weekly Reporter, page 1.
Volume IX., Weekly Reporter, page 91.
Volume XI., Weekly Reporter, pages 236 and 285.

The costs of this remand will follow the ultimate result.

The 24th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Suit on behalf of minor—Personal liability—Hindoo Law—A mother.

Case No. 171 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Midnapore, dated the 24th February 1869.

Sreemuttee Tara Soonduree (Decree-holder), *Appellant,*

versus

Sreemuttee Rash Munjoree (Judgment-debtor) *Respondent.*

Baboos Ashootosh Dhur and *Bhowanee Churn Dutt* for Appellant.

Baboo Nubo Kishen Mookerjee for Respondent.

HELD, by Jackson, J., that where costs are decreed against a party suing on behalf of her minor son and for his benefit, execution cannot, without special reason, be taken out against her personally or against her personal representative or estate.

By Hindoo Law, the mother is a possible heir under certain circumstances.

Jackson, J.—THIS is an execution-case. One Mungola Dayee sued Romanath Rukheet. She was plaintiff in the capacity of mother and guardian of her minor son. The suit failed, and the Court gave judgment that the plaintiff should pay the defendant his costs in the suit. Mungola died; and Romanath Rukheet took out execution under the decree against Rash Munjoree, who is the mother of Mungola, and the Subordinate Judge refused execution on the ground that, according to Hindoo Law, the mother is not the heir of her daughter, and also on the ground that the property against which execution was sought was the property of the husband of Rash Munjoree, and, as such, was not liable to be taken in satisfaction of this decree; and he also held that the decree-holder had failed to prove that Rash Munjoree was in possession of any property left by Mungola Dayee.

The party executing appeals against this decree, on the ground that Rash Munjoree is, according to Hindoo Law, heir of her daughter, and also urges that the property against which execution is applied for was part of the estate of Mungola.

The first question which suggests itself to me in this case is whether, regard being had to the character in which Mungola brought this suit, execution could be properly taken out against her personally at all. The suit was undoubtedly brought on behalf of her minor son and for his benefit. It is not even suggested that the Court for any special reason made Mungola personally liable for the costs. It is not contended that any effort has been made to satisfy the decree by proceeding against the estate of the minor son, and under those circumstances I see no reason why this execution should proceed against Mungola's personal representative or her estate.

However that may be, it seems to me that the appellant entirely fails to make out that Rash Munjoree is the heir of Mungola. His pleader read a passage from Macnaughten's Hindoo Law, page 38, in which it appeared that, under certain circumstances, the mother was a possible heir; but it was not shown that those circumstances existed, and that, consequently, in the present case, the mother was the heir.

Nor was anything suggested to us to induce us to believe that the Court below was wrong in saying that the property against which execution was applied for was not the property of Mungola. No doubt, if it appeared that Rash Munjoree was a person who might be heir of Mungola,

and if it were also clearly shown that Rash Munjoree had succeeded to, and was in the enjoyment of, Mungola's estate, the inference would be tolerably easy that she had taken as heir, and that execution might proceed against her. But no case of that sort has been made out at all. I think, therefore, that in all points this application fails, and that the appeal ought to be dismissed with costs.

Markby, J.—I am of the same opinion. The general question as to the liability of a guardian of an infant plaintiff for costs does not arise.

The 24th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution-sale—Lien on attached property.

Case No. 124 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 26th January 1869.

Bolakee Lall and another (Decree-holders), *Appellants,*

versus

Khuruckdharee Singh and others (Judgment-debtors), *Respondents.*

Mr. C. Gregory and *Moonshee Mahomed Yusuff* for Appellants.

No one for Respondents.

Where the holder of two decrees attaches property in execution of one of the decrees, he has a right to state in the notification of sale that he likewise claims the same property in satisfaction of his second decree.

Glover, J.—In this case the decree-holder obtained two decrees in the Bhaugulpore Court against Khuruckdharee Singh and others, dated respectively the 5th and 6th September 1865, on bonds. He applied for a certificate from the Bhaugulpore Court (which he obtained) to have certain property of his judgment-debtor situated at Patna attached and sold in satisfaction of his decree No. 1. After that property was attached, he made an application to the Judge that the sale-notification should state that this property had also been attached and was liable to sale in satisfaction of his decree No. 2; but the Judge refused to allow the sale to proceed, on the ground that, if anybody purchased the property, except the judgment-creditor himself, it would be a palpable fraud against that purchaser. There appears to us no reason for this order of the Judge. If the property was put up for sale in satisfaction of the decree No. 1, and if it was at the same time notified that that property was burdened with the decree-holder's lien on account of his decree No. 2, no purchaser would be in ignorance of what he was buying, and therefore no fraud could by any possibility be perpetrated against him. We think that the decree-holder had a right to carry out the sale of this property in satisfaction of his first decree, taking care in the notification of sale that intended purchasers should be made aware of the fact that he likewise claimed the same property in satisfaction of his second decree.

We, therefore, reverse the order of the Judge, and decree this appeal with costs.

The 25th June 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Res adjudicata—Section 7, Act VIII., 1859.

Case No. 237 of 1868.

Regular Appeal from a decision passed by the Judge of Patna, dated the 27th June 1868.

Radha Kishoree Debia and others (Plaintiffs), *Appellants,*

versus

Ram Coomar Chowdhry (Defendant), *Respondent.*

Baboos Unnoda Pershad Banerjee, Mohinee Mohun Roy, and *Grish Chunder Mookerjee* for Appellants.

Baboo Mohendro Lall Shome for Respondent.

Where plaintiffs had in a former suit claimed certain moneys alleged to have been misappropriated by defendant as manager for the joint family, the cause of action having been the latter's refusal to allow plaintiff's share at the time of separation, their present suit for a share of certain paddy, which defendant had refused to make over when the separation took place, was held to be barred by Section 7, Act VIII., 1859.

Mitter, J.—We are of opinion that this suit is barred by Section 7, Act VIII. of 1859. The test in all cases of this description is whether the cause of action upon which the new suit is brought is distinct from the cause of action upon which the former suit was instituted.

On referring to the former suit, we find that the claim then made was for certain moneys said to have been misappropriated by the present defendant during the time he was acting as the manager of the joint family, and his refusal to allow to the present plaintiffs their share of the said moneys at the time of separation was stated to be their cause of action in that suit.

The cause of action in the present suit, as stated by the plaintiffs, is the refusal of the defendant to make over to them their share of certain paddy when the separation of the family took place in the month of Assin 1269 B. S. It is clear, therefore, that the causes of action in both the cases originated in the refusal of the defendant to give to the plaintiffs their share of the properties realized by him as manager of the joint family.

The learned Judge of the Court below seems to be of opinion that the plaintiffs had by mistake omitted to include the present claim in the former suit, and he adds that the mistake was a *bond-fide* one. But whether the omission arose from a mistake or otherwise, it is not necessary for us to determine, in order to apply the provisions of Section 7, Act VIII. of 1859. This point was raised before the Privy Council in the case of Buzloor Ruheem *versus* Shumsoonissa Begum, reported in Volume VIII., Weekly Reporter, page 11, Privy Council Rulings; and it was distinctly held by their Lordships that whether a particular claim arising out of the same cause of action is voluntarily relinquished or otherwise, the result would be the same, and a second suit for that claim would be barred by Section 7, Act VIII. of 1859. It seems to us clear, therefore, that the present suit is governed by the Privy Council decision above referred to; and if we were to hold otherwise, the consequences would be grievous indeed.

The manager of a joint Hindoo family holds possession of various items of property, both real and personal, on behalf of the family. Can it be contended for a moment that each member of the family has a separate cause of action for his share in each item of those properties? If such were the case, the manager would be harassed by as many different suits as there were different items of property under his management during the time the family remained joint.

We are, therefore, of opinion that this suit is barred by Section 7, Act VIII. of 1859, and on this ground we dismiss it with costs.

It is unnecessary for us to enter into the other points upon which the Judge has decided this case.

The 25th June 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Special appeal—New pleas.

Case No. 536 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 8th December 1868, affirming a decision of the Moonsiff of Manickgunge, dated the 21st April 1868.

Soorjo Koomar (one of the Defendants), *Appellant,*

versus

Gungadhur Roy and others (Plaintiffs), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Bama Churn Banerjee for Respondents.

In a suit for possession of land after purchase, where defendant pleaded that he had long held under a *miras* pottah, which both the Courts below found to be false;

HELD that defendant could not be allowed in special appeal to come in for the first time with an allegation of a new and separate title, *viz.*, a right of occupancy under Section 6, Act X., 1859.

Bayley, J.—WE think that this appeal must be dismissed with costs.

The plaintiff sued for possession of certain lands under right acquired, as he said, by purchase.

The defendant pleaded that he had long held the lands under a *miras* pottah, and that plaintiff, therefore, could not take khas possession of the lands.

Both the Courts below have found that the *miras* pottah was false and not proved, and have decreed the plaintiff's suit.

The defendant appeals specially, and the only objection taken is one of which no trace is to be found in the records of the Courts below. That plea is that, although the defendant failed to prove the *miras* pottah, still, as he held long possession under that *miras* pottah, he had a right to the privileges of Section 6, Act X. of 1859, that is to say, a right of occupancy accorded to a ryot in possession for 12 years. Two cases—one reported at page 361, Volume X., Weekly Reporter, and another at page 374, Volume VIII., Weekly Reporter—have been cited in support of this contention; but in the first place it is not shown that in those cases the alternative right under Section 6 was not pleaded, which it was not here; and, *secondly*, I think that to give a decree on this new plea would be entirely opposed to the recent decision of their Lordships in the Judicial Committee, Moore's Indian Appeal cases, Volume XI., page 7, * for it would allow the defendant to change his pleadings and the real grounds of his answer. The whole contention in the Courts below turned on the genuineness or otherwise of the *miras* pottah, which is a totally different thing from the special right without any pottah under Act X. of 1859. It was found that the defendant's *miras* title was no title. Now, is defendant to be allowed in special appeal to come in for the first time with an allegation of a new and separate title, and call on the plaintiff to meet this new case, to do which no opportunity was given him in the Courts below?

* Eshan Chunder Singh *versus* Shama Churn Bhutto and others.

* 6 W. R. 57.

On the whole, we are of opinion that the special appellant should not be allowed now to take his stand on an altogether new case, and we, therefore, dismiss this appeal with costs.

The 25th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervention—Section 77, Act X., 1859.

Case No. 3232 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th September 1868, reversing a decision of the Assistant Collector of that District, dated the 3rd August 1867.

Dhurm Lall Chowdhry and others (Intervenors), *Appellants,*

versus

Shumbhoo Chowdhry and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein and *Tarucknath Sein* for Appellants.

Mr. C. Gregory and *Baboo Kishen Succa Mookerjee* for Respondents.

Section 77, Act X. of 1859, refers to cases in which two parties claim to receive the rent from the same ryot; not to cases in which the intervenor claims the rent from a ryot other than the ryot sued by the plaintiff.

Kemp, J.—THIS was a suit for rent. The plaintiff sued on the allegation that the defendant held 8 beegahs 15 cottahs of land out of 34 beegahs, of which the plaintiff was the mâlik, and that the rent due for 1272 was 16 rupees. The defendant admitted the plaintiff's claim, but averred that he had paid 8 rupees, and that

7 rupees only were due. The special appellants before us intervened. They did not claim the right to receive or enjoy the rent from the ryot, the defendant in the suit, but averred that the land was theirs, and not the plaintiff's, that the defendants in the suit were not their ryots, and that they received and enjoyed the rent from another ryot.

The first Court improperly admitted the intervention, and found that the intervenor had been in the receipt and enjoyment of the rent, and therefore dismissed the suit with costs.

On appeal, the Judge reversed the decision of the Deputy Collector, and held that the Intervenor's intervention was improperly admitted under Section 77 of Act X. of 1859; the appeal was, therefore, decreed with costs.

In special appeal it is contended, first, that the suit being for arrears of rent of an amount less than 100 rupees, the Judge had no jurisdiction to entertain an appeal, and a Full Bench decision of this Court, published in Volume II., Weekly Reporter, Act X. rulings, page 31, has been quoted by the pleader for the special appellant in support of his argument.

The second ground taken is that the Judge has misunderstood Section 77 of Act X. of 1859 in holding that the intervention was inadmissible.

On the first ground, we find that this objection was not taken before the Judge. The decision of the Full Bench referred to is in a case where the intervention of a third party under Section 77 of Act X. of 1859 was admissible, and the Judges held that, as the suit was one under Clause 4, Section 23 of Act X. of 1859, and for a sum less than 100 rupees in value, no appeal would lie to the Judge.

In this case the intervention was clearly inadmissible, and ought not to have been allowed by the first Court. Section 77 refers to cases where in any suit two parties claim to receive the rent of the land from "the same ryot," and not to cases where the intervenor, as in the present case, claims the rent of the land from a ryot other than the ryot sued by the plaintiff. This has been ruled in the decisions dated 5th December 1861, Prannath Roy Chowdhry, appellant, and 12th December 1864, Syud Munsoor Ali Khan, appellant.* Section 77 enacts that, when a right to receive the rent of the land or tenure cultivated by the ryot is disputed, then the enjoyment of the rent ought to be inquired into. It is, therefore, clear that the law contemplates a case in which two parties claim rent from the same ryot, which is not the case in the present instance. We think, therefore, that the Judge is right in holding that the intervention of the special appellants was inadmissible, and that the decision of the first Court was properly reversed.

We think also that, as the first Court did not come to any finding as between the plaintiffs and their tenants, the Judge was wrong—when he decided the case on the ground that the intervention of the third party, the special appellants, was inadmissible—in not remanding the case for trial as between the plaintiffs and their tenants, the defendants; but as there was no appeal on this point by the plaintiffs, and as the defendants admitted liability to the plaintiffs, we do not think it necessary to remand the case.

The decision of the Judge is affirmed, and the special appeal dismissed with costs.

The 25th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Suit for confirmation of possession—Cause of action.

Case No. 209 of 1868.

Regular Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 25th June 1868.

Poorun Chand Galeecha (Defendant), *Appellant,*

versus

Pareshnath Singh (Plaintiff), *Respondent.*

Mr. Branson for Appellant.

Mr. Peterson for Respondent.

In a suit for confirmation of possession of a hill with the places of worship appertaining thereto and the idols set up thereon, the alleged cause of action being that defendant intended to lay claim to the offerings made and purposed to call in question plaintiff's possessory right:

* 1 W. R. 308.

HELD that the plaint disclosed no cause of action whatever.

Markby, J.—IN this case, the plaintiff asks that, "after coming to a decision as to his title to the hill of Parisnath, the places of worship, the idols appertaining thereto, and to the revenue derived from the places, the profits arising from the offerings made to the idols, his possession to the said hill of Parisnath, the places of worship appertaining thereto, and the idols which are set up, may be confirmed." He goes on to state that the ground on which he bases his claim are that the hill Parisnath and the places of worship are plaintiff's ancestral property; that Thakoor Parisnath is plaintiff's family-idol; and that plaintiff's ancestors, from time immemorial, by virtue of proprietary right in the said hill and places of worship, as also on the score of possession of the image of Thakoor Parisnath, granted leave to the devotees to visit those places of worship, and received the offerings made in those places.

The plaintiff then states that the defendant, relying on some expression of opinion by the Judicial Commissioner in a dispute of a different character which took place between the defendant and the plaintiff's guardian during the plaintiff's minority, "intends to lay claim to the offerings made "to the idols and at the places of worship, "and purposes to call into question your "petitioner's possessory right to the hill "and places of worship. Under these cir-"cumstances, the cause of action arose "from the date of the decree, as from that "time the defendant had made up his mind "to interfere with your petitioner's right in "the hill and places of worship, as also in "his right in general in respect to offer-"ings."

The defendant, in his written statement, took some formal objections to the plaint which are not very material. He also asserted that the hill Parisnath and the places of worship appertaining thereto belonged to the Setumbury sect of Jains, of which he was a member; and that that sect for a very long time had held, and still holds, exclusive possession of it, making pilgrimages thither, building shrines there, and so forth. Further, he asserts, as I understand him, in a roundabout way, that all the offerings made to the idol Thakoorjee and at the places of worship belong to, and are used in the service of, the idol Thakoorjee, any surplus of cash which remains being applied to charitable purposes.

The plaint was filed on the 30th April 1867. The defendant's written statement was filed on the 19th June following. Commissions to take evidence in Calcutta and Bombay were issued, and witnesses were also examined on the spot by Mr. DaCosta and by the present Deputy Commissioner. On the 25th June 1868, the Deputy Commissioner proceeded to give his decision, and he states that fourteen issues were fixed for trial. Upon what materials these issues were fixed does not appear, whether upon the plaint and written statement, or upon the oral examination of the parties or their pleaders, or both; but presumably the latter, for these issues raise some questions which are in no way suggested by the written allegations on either side. The 5th, 6th, 7th, and 8th issues are—

Whether plaintiff is in possession of the Parisnath hill and shrines, &c., thereon, or not?

If the plaintiff is not in possession of the Parisnath hill and its appurtenances, in whom does the possession vest?

If plaintiff is not in possession, whether the suit is barred by limitation?

Who is entitled to receive the offerings made by the pilgrims at the shrines and temples on the Parisnath hill?

The other issues appear to raise either preliminary objections of a purely formal character, or matters of evidence only subordinate to the three just stated.

The Deputy Commissioner, after finding upon all the issues, gave a decree in favor of the plaintiff as to part of his claim.

The defendant appealed, and the first ground taken on appeal is that the plaint is bad in two particulars; *first*, in not stating the nature of the relief sought for; and, *secondly*, as not showing any cause of action.

As regards the first objection, there can be no doubt that the relief sought for is vaguely and obscurely stated. The plaintiff asks for an enquiry into his title as to five things—the hill, the places of worship, the idols, the revenue of the place, and the offerings. But he only asks that his possession may be confirmed as to the three last. The actual enquiry appears to have taken place as to all except the fourth.

Upon the whole, however, we think that this objection ought not to prevail. We think the plaintiff intended to ask, and that

the defendant understood that he intended to ask, that his right to hold and enjoy all the five things specified in this paragraph should be enquired into, and his possession thereof confirmed.

With regard to the objection that the plaintiff has stated no cause of action in his plaint, we think that it is perfectly plain that he has not done so. All that is stated is a vague intention on the part of the defendant to set up a claim. So far from stating any act done by the defendant which could affect the plaintiff's right, it is not even stated that the defendant intends committing any such act. We think it requires no argument to show that the plaint discloses no cause of action whatever.

But it is contended by Mr. Peterson that this matter is not to be considered now in the same light as if the objection had been taken in the Court below; that the defendant has by his answer challenged the plaintiff's right, has set up a right in opposition thereto, and has virtually asked the Court below to decide between them; and that, having done so, he cannot now turn round and say that the suit will not lie.

We are not at all prepared to say that there is not some force in this argument, and we should certainly not feel inclined to favor this mode of getting rid of an adverse decision by the defendant. But at the same time, we must take care that the time of the Courts and the money of the parties is not wasted in prolonging a litigation which will be in the end fruitless. We think it is obvious that this will be the case here. The judgment of the Deputy Commissioner has been referred to for the purpose of ascertaining, if possible, on what points the contest below really turned. It is obvious that he has expressed an opinion on some subjects which in no way came within the scope of his inquiry. Upon other points, he has expressed himself so vaguely that it is not easy to discover what he really meant; nor do we think it would be possible to try the appeal on the issues as they stand. We should, in fact, if this appeal were to proceed, have to try the case pretty nearly *de novo*. But even if this were done, and an ultimate decision were come to as to the points in dispute between the plaintiff and defendant, it would be of no avail. The defendant sets up no claim whatever in his own person. In a vague sort of way he seems to have stated in the course of the case that he was acting on behalf of the Setumbury sect of Jains; but the assertion seems to be altogether groundless. He has on a previous occasion claimed, and probably does still claim, to be sebait of one of the temples, but that would not give him any power to represent the whole body of persons who claim rights and privileges in reference to this property, which the plaintiff is unwilling to recognize.

It was urged by Mr. Peterson that a great deal of quarrelling and litigation might be prevented if we would hear and determine the question in this appeal. We are assured that the defendant is setting up pretensions which the Rajah will resist, and one day or other all these questions will have to be settled. That may be so. But it would be an entirely false security if the plaintiff were to repose upon any decision which we might give in this case. So far as it was in favor of the plaintiff, it would certainly be contested by some other member of the Jain religion, and in this new contest the present decision would be altogether useless.

It was also contended that, though the plaint only stated an intention on the part of the defendant to claim the rights, yet there was evidence that he really had already gone a great deal further. To show this, two sets of proceedings were relied on. One was in the Criminal Court, in which certain persons in the employ of the Rajah were prosecuted for taking away building-materials which were in the hands of the defendant's servants. The complaint was dismissed, but the Rajah was ordered to find sureties for his good behaviour. The end, as far as we can gather the view of the Magistrate, was that the defendant had only exercised his strict right in repairing an old temple, but that he had exceeded his rights in attempting, without the permission of the Rajah, to build a new one.

In the other case, the dispute was as to the right to some offerings made at one of the shrines. The present defendant was plaintiff in that case, and he succeeded in establishing his right to the offerings which he claimed.

We cannot gather from these proceedings any intention on the part of the defendant to set up the claims which the plaintiff seems to apprehend. It could hardly be supposed that, when challenged in this suit, he would admit the plaintiff's claim; but prior to this suit, he seems to have confined his claims within very moderate limits.

Even, therefore, admitting that we are at liberty, when considering this question, to turn our attention from the allegations in the plaint to the evidence which has been adduced, we think that the plaintiff had no cause of action. Judging from the language of the plaint and the general form in which it is drawn, we are very much disposed to think that the vague and sweeping way in which the Rajah's claims have been put forward is not the result of the carelessness or ignorance of his advisers. We are very much disposed to think that this is an attempt to create, or at least to revive, rights over this hill and the temples upon it, as to the exact nature of which the plaintiff is very uncertain; and that he is desirous to avoid the obligation under which he found himself in the last suit, namely, of stating and establishing with precision the right which he claimed, and of showing that he had acted within it. The plaintiff is not an inexperienced litigant, and we have no reason whatever to suppose that he is *inops comitii* in these matters.

Upon the whole, we think that the suit, as framed, will not lie; and without going into the merits of the case, we consider that on that ground it ought to be dismissed. The decree of the Lower Court will therefore be reversed, but under the circumstances we think that we ought not to give costs.

The 26th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Arbitration-award—Appeal.

Case No. 3285 of 1868.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 11th September 1868, modifying a decision of the Moonsiff of Salikha, dated the 18th March 1868.

Modhoo Soodun Dass (Defendant), *Appellant,*

versus

Odoito Churn Dass (Plaintiff), *Respondent.*

Baboo Prosunno Coomar Roy for Appellant.

Baboo Tarucknath Dutt for Respondent.

Where plaintiff applied that a private award by arbitrators might be enforced, and the first Court gave judgment in exact accordance with the award, it was held that that judgment was final, and that the Lower Appellate Court acted without jurisdiction in entertaining an appeal therefrom.

Jackson, J.—I THINK it is quite clear that the Subordinate Judge was wrong in entertaining this appeal. The plaintiff, or petitioner in the Moonsiff's Court, made an application, not precisely under the terms of Section 327, but asking that the private award by the arbitrators be enforced, and that he get possession of the lands and other things thereby awarded to him.

The Moonsiff, it seems to me quite clear, intended to give judgment for the plaintiff in exact accordance with that award; and in so far as he refused anything to the plaintiff, it was where the plaintiff had sought, under cover of this application, to get possession of something not given him by the award. I think, therefore, that the judgment of the Moonsiff was intended to be, and was, in accordance with the award, and, being so, was final, and that the Subordinate Judge, in entertaining the appeal and going into evidence as to what the arbitrators really meant to give, acted without jurisdiction. The plaintiff will doubtless be entitled to retain possession of the land standing beneath and covered by the premises awarded to him; but as I do not understand that the defendant would have offered any opposition to his retaining that land, I think that the plaintiff must bear the costs of this Court and of the Lower Appellate Court.

Markby, J.—I am of the same opinion.

The 26th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Execution—Section 11, Act XXIII., 1861.

Case No. 313 of 1869.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 10th November 1868, reversing a decision of the Subordinate Judge of that District, dated the 8th February 1868.

Shurut Soonduree Dabee (Plaintiff), *Appellant,*

versus

Puresh Narain Roy (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

Where, under color of a decree, in course of execution, the decree-holder gets possession of land not included in the decree, otherwise than through the officer of the Court, this possession and the questions relating to it are separate from the questions *relating to the execution of the decree*, and may be made the subject of a separate suit.

Macpherson, J.—THIS case must be remanded for re-trial.

The plaintiff's case is that, "under color" of a decree for certain lands which was being executed against her, the defendant got possession of 25 beegahs and some cottahs of land which were not included in that decree.

The Judge has dismissed the suit upon the ground that it will not lie, inasmuch as, upon the plaintiff's own case, the matter is one which ought to have been disposed of under Section 11, Act XXIII. of 1861. The Judge further holds that, as an application as to this matter was once made to the Court under that Section, the plaintiff's only remedy was by appeal from the order of the Sudder Ameen dismissing that application, if the plaintiff was dissatisfied with that order.

It appears to me that, upon the case stated in the plaint, the question between the parties is not necessarily one "relating to the execution of the decree" within the meaning of Section 11 of Act XXIII. of 1861. If the taking possession by the defendant of the 25 beegahs was a transaction entirely distinct from the getting possession through the officer of Court of the other lands, then the possession which the defendant obtained of the 25 beegahs, and the questions arising between the parties relating to that possession, are separate and distinct from the questions arising between the parties, and *relating to the execution of decree*, and being separate may be properly made the subject of a separate suit.

The Judge, before he can say whether the suit will or will not lie, must go fully into the case, and find distinctly the facts as to the mode in which the dispossession of the plaintiff was effected. The facts being clearly found, the Court will then be in a position to form an opinion as to whether Section 11 of Act XXIII. of 1861 bars the present suit, or not. As it is, the facts not being found, it is impossible to say whether the law has been correctly applied.

The case is remanded for trial *de novo*.

Jackson, J.—I concur.

The 26th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Special appeal—Execution—Section 27, Act XXIII., 1861.

Case No. 11 of 1869.

Application for review of judgment passed by the Hon'ble Justices Kemp and Glover, on the 6th March 1869, in Miscellaneous Appeal No. 513 of 1868.

Debee Pershad Singh, Objector (Respondent), *Petitioner,*

versus

Syud Delawar Ali, Decree-holder (Appellant), *Opposite Party.*

Mr. R. E. Twidale and *Baboo Kalee Kishen Sein* for Petitioner.

No one for Opposite Party.

Under Section 27, Act XXIII. of 1861, no special appeal lies in execution-proceedings where the original decree was for a sum less than 500 rupees and in a suit cognizable by a Court of Small Causes.

Kemp, J.—AFTER hearing the pleader for the applicant, we think that our former decision was wrong. The pleader has referred to a decision published in Volume VIII. of the Weekly Reporter, page 113, which, we think, applies to the case before the Court. The original suit was for a sum under 500 rupees, and was cognizable by the Court of Small Causes. It is very clear that, under Section 27 of Act XXIII. of 1861, no appeal would lie. We therefore, under the precedent quoted, hold that the special appeal is also taken away by that Section in the execution-proceedings arising out of the original decree, which was for a sum less than 500 rupees and in a suit cognizable by the Court of Small Causes. Our former decision will be reversed, the special appeal dismissed, and the decision of the Judge restored with costs. * * *

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The 26th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Substitution of a new plaintiff—Issues—Findings—Evidence—Consent.

Case No. 3275 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Cuttack, dated the 14th September 1868, reversing a decision of the Moonsiff of that District, dated the 31st January 1868.

Beer Chunder Roy (Plaintiff), *Appellant,*

versus

Shaikh Tumeezooddeen and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Mohendro Lall Mitter for Respondents.

Where the purchaser of a plaintiff's rights was substituted for the plaintiff, the irregularity was held to be cured by the consent of the defendant, implied in his offering no opposition, but appealing from the judgment on the merits, making the substituted plaintiff one of the respondents.

The finding of a Civil Court as to the execution of a will is not conclusive evidence on the point, if the question of its execution was not a material issue in the suit.

Where plaintiff and defendant respectively put in as evidence different portions of the proceedings in a former suit, and found arguments thereon, the Court is bound to use them all as evidence.

Jackson, J.—THIS was a suit originally brought by Juggessur Roy Mohapattur against Damoodur Doss, and also against Bungshee Dhur Roy and others; his allegation being that he (the plaintiff) and Bungshee Dhur being jointly entitled to certain immoveable property, that property had been attached in execution of a decree against Bungshee Dhur alone, and purchased by the defendant Damoodur, who, after his purchase, had dispossessed the plaintiff, the plaintiff up to that time having been in joint possession and enjoyment with Bungshee Dhur.

The defendant denied that Juggessur had any interest in the property, and alleged that it belonged to Bungshee Dhur solely.

During the progress of the suit Juggessur sold his rights to Beer Chunder Roy; and upon their joint application, Juggessur was taken off the record, and Beer Chunder substituted for him as plaintiff.

The Moonsiff found in favor of the plaintiff, and decreed him possession of the disputed kismut, inclusive of buildings, tanks, trees, &c., and decreed also that the auction-sale made by the brother of Juggessur be reversed, and the plaintiff do get his costs.

Against this decision, the defendant Damoodur appealed. On his appeal, the Subordinate Judge set aside the judgment of the Moonsiff. He decreed the appeal, and dismissed the plaintiff's suit with costs.

The plaintiff now appeals specially, and contends that the judgment of the Lower Appellate Court is defective, inasmuch as that Court summarily rejects as inadmissible between these parties evidence which was not merely admissible, but also conclusive; and because that Court has entirely omitted to advert to other evidence and circumstances, which, taken together with the evidence which, was rejected, would entitle the plaintiff to a decree.

It was contended by the respondent before us that the special appellant had no *locus standi*, and that, in fact, the suit ought to abate by reason of the original plaintiff having withdrawn from the suit, and the Court having no power to substitute another plaintiff in his room; and in support of this argument he referred to the case in 9 Weekly Reporter, p. 487. It is sufficient to say on that point that, although what the Court did in respect of substituting the plaintiff was probably irregular, it was an irregularity which was capable of being cured by the consent of the defendant, and that the defendant in this case did consent in the most emphatic manner. He not merely offered no opposition to what took place in the first Court, but he actually appealed against the judgment on the merits, making the substituted plaintiff one of the respondents.

The evidence which the Subordinate Judge declared to be inadmissible was a judgment of the Principal Sudder Ameen, dated 24th August 1865, in a suit between Bungshee Dhur as plaintiff, and his eldest brother Hureehur as defendant, the other brothers, as I understand, having also been made defendants, but, as I suppose, *pro-formâ* defendants merely. The object of that suit was to establish on behalf of Bungshee Dhur his right as member of a joint

undivided Hindoo family, to one-fourth of the whole estate left by their father.

To Bungshee Dhur's plaint, the eldest brother answered that the property of their father was not regulated, as to its descent, by the common Hindoo law, but by a *koolachar*, or family-custom, whereby the eldest brother took the entire property and the younger brothers were entitled only to maintenance; and he further alleged that, in conformity with that custom, the father had in his lifetime executed a will, whereby the bulk of the family-property being given to the eldest brother, certain property, including the property now in dispute, was assigned to Bungshee Dhur and his uterine brother Juggessur.

In that suit, the will to which the defendant referred was not produced. He alleged that he could not produce it, because it was in the custody of the plaintiff Bungshee Dhur himself, who, with a view to support his own pretensions in that suit, concealed the will, and kept it out of the way.

The Principal Sudder Ameen appears to have found in that case that the facts were as alleged by the defendant. He found the family-custom, and he also found that the father had executed the will as stated.

Now, in the suit before us, the plaintiff put in the judgment of the Principal Sudder Ameen in that case, and the defendant put in the decree and the evidence which Bungshee Dhur himself had given in that suit, and it is the judgment which the Subordinate Judge has now held to be inadmissible in evidence, and not binding in any shape on the defendant.

It was in the first instance argued before us that this evidence was not merely admissible, but conclusive. Conclusive it manifestly was not for this simple reason, that the issue regarding the will was not really a material issue in the first suit. The material issue in that case was whether the property of Bungshee Dhur's father devolved upon his sons according to the Hindoo law prevalent in that district, or was governed by a peculiar family-custom. The circumstance of a will made by the father and acquiesced in by the sons, in furtherance of that custom, making provision by way of maintenance for the younger sons, was, no doubt, a circumstance in favor of the existence of the custom; but it was not a separate material issue, the determination of which would dispose at all of that suit as a whole.

The question then remains whether this was admissible. On this point it is sufficient, I think, to say that the question does not really arise here as a question of law. No doubt, if this judgment alone had been tendered on behalf of the plaintiff, and had been then objected to by the defendant as inadmissible, and if no other proceedings in the case had been produced, it would be a question for the Lower Appellate Court and for us to determine whether or not it was admissible; and the question arising in that way, I think we should have been bound, in accordance with previous decisions of this Court, to hold that it was not admissible.

But the question does not come before us in that way, because it was not objected to. So far from its being objected to, other parts of the proceedings in the very same suit were put in by the defendant himself. That being so, the plaintiff and the defendant having respectively put in different portions of the proceedings in that suit, and having referred to and having built up arguments upon those different proceedings, I think the Subordinate Judge was bound to look at them all as evidence, and to make use of them for whatever light they could throw upon the facts of the case. That being so, it is clear that there was also other evidence. There was the evidence on which the Moonsiff had found in favor of the plaintiff that up to the period when the defendant, Damoodur, made his purchase, the plaintiff had been in joint possession of this land with his brother Bungshee Dhur; and if that were so found, I think that that would be not only a circumstance of itself in the plaintiff's favor, but it would also assist the Court materially in coming to the conclusion that this property had descended by will; because otherwise it seems to me, it would be impossible to account for a joint possession over that property by only two out of four brothers, members of a joint Hindoo family. That being the case, I think we must say that the Principal Sudder Ameen has not fully adverted to all the evidence in this case, and that consequently the case must be remanded to him for further consideration.

Markby, J.—I am entirely of the same opinion. I base my judgment as to the remand to the Subordinate Judge to consider the evidence entirely on the same grounds as Mr. Justice Jackson. I fully agree that, according to the decisions of this Court, which sitting here we are bound to follow, we

should have been bound to hold that this document was not admissible. If this judgment, or any part of those proceedings, had been objected to in the first instance by the parties, they must have been rejected; but the parties, each having put in portions of those proceedings, and each having founded arguments in their own favor on those different portions of the proceedings, they made those proceedings evidence in this case. I think that the parties had by their own conduct made these proceedings evidence, and that the Judge was, therefore, wrong in not so considering them. I think, therefore, that we ought to remand this case in order that those proceedings may be considered with the other evidence in the case.

The 26th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Damages—Malicious prosecution.

Case No. 393 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 27th November 1868, reversing a decision of the Moonsiff of Serajgunge, dated the 28th July 1868.

Huro Lall Biswas (Plaintiff), *Appellant,*

versus

Huro Chunder Roy and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

In estimating damages for a malicious prosecution, a Civil Court is not necessarily wrong in taking into consideration the plaintiff's feelings.

Macpherson, J.—In this case the plaintiff sues to recover damages for a malicious prosecution instituted against him by the respondent and others not now before us. The Moonsiff gave him a decree for 10 rupees with costs.

The judgment of the Moonsiff is clear and apparently sound. On appeal, the Subordinate Judge reversed the decision of the Moonsiff for various reasons, many of which are unsound. The Subordinate Judge says that, because the charge made against the appellant was not a charge of theft, or dacoity, or criminal breach of trust, but was a charge under Section 144 of the Penal Code, for being a member of an unlawful assembly being armed with deadly weapons—and (under Section 324) of voluntarily causing hurt by using deadly weapons—and (under Section 447) of committing criminal trespass—the plaintiff *could not* have been injured by it in any way, and therefore has no cause of action. It is simply absurd to say that, because the charge is laid under one Section of the Penal Code rather than under another, the plaintiff *cannot* have been injured in his reputation by the charge being made. The offences charged against the plaintiff are very grave and serious offences, and might well do great injury to his reputation. It was quite competent to the Subordinate Judge to have found (if he considered on the evidence that such was the case) that, as a matter of fact, the appellant had not sustained any injury. But the reasons he gives for reversing the decision of the Moonsiff cannot for a moment be supported.

The decision of the first Court must be restored, and that of the Lower Appellate Court must be reversed.

Certain objections to the decision of the Lower Appellate Court were taken under Section 348 of the Civil Procedure Code by the respondent; but it appears to me that there is nothing in any of them.

As regards the question of limitation, I think the decision in the case of Abdul Hossein *versus* Goluck Chunder, 8 Weekly Reporter, page 433, is in point, and that the latter decision in Huree Narain Mytee *versus* Ojoodhya Ram Sen, 10 Weekly Reporter, page 308, is not.

As regards the other question of the Court having taken the *feelings* of the appellant into account in awarding damages, there is nothing to show that the Court of first instance considered the plaintiff's mere feelings in estimating the damages. If he had considered them, however, the Moonsiff would not have been necessarily wrong. In the case of Komul Chunder Bose *versus* Nobin Chunder Ghose, 10 Weekly Reporter, page 184, which has been referred to, the facts are quite different. No doubt, I then said (and said rightly) that the injury to the feelings of the plaintiff could not be taken into consideration; but in that case there had been no real

publication of the libel, the libel being contained in a letter which was put into the hands of the plaintiff himself and not otherwise published.

This present suit is, in my opinion, altogether a most trifling one, and no costs of the appeal should be allowed.

Jackson, J.—I concur.

The 26th June 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

"Sudder khajana"—Construction—Documents—Sworn testimony—Thakbust papers.

Cases Nos. 542 and 543 of 1869.

Special Appeals from a decision passed by the Additional Subordinate Judge of Dacca, dated the 5th December 1868, reversing a decision of the Moonsiff of that District, dated the 27th March 1868.

Kalee Tara Debia and another (Defendants), *Appellants,*

versus

Nittianund Shaha and another (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellants.

Baboos Ashootosh Dhur and *Kalee Mohun Doss* for Respondents.

The words *sudder khajana* do not necessarily mean a rental payable to Government, but may imply a rental payable to the zemindar.

In accordance with former rulings (1 W. R., page 331; 6 W. R., page 82), it was held that, before a document, of whatever age it may be, can be put in as legal evidence, there must be sworn testimony as to the custody from which it has come.

Thakbust papers are *primâ-facie* evidence against the proprietors of estates comprehended in them.

Hobhouse, J.—In these cases, which are admittedly, in fact, one case, the plaintiffs sued to recover possession of some 6 beegahs of land on the following allegations. They said that the lands were situated partly in talook 1024, and partly in talook 1062; that one Ram Kant Shaha had purchased the lands before the Decennial Settlement at a *sudder khajana* of 11½ annas; that subsequently in 1259, the proprietors of the talooks named had confirmed this settlement of the lands, and that they, plaintiffs, had in that year purchased the from the heirs of Ram Kant Shaha, that so they had held them up to a certain time when they sued the ryots of the land for the rents of them, and that, on this occasion, the proprietor of talook 1062 successfully intervened under the provisions of Section 77, Act X. of 1859, and they were, therefore, now compelled to institute this suit. They, the plaintiffs, professed to hold the lands as shikmeedars.

The defendant, the proprietor of the talook 1062, who is the special appellant before us, denied the plaintiff's shikmee rights, and alleged that the lands belonged entirely to her talook.

The first Court found that the plaintiffs had not proved their shikmee rights, and dismissed their suits.

The Lower Appellate Court has reversed that decision, and has given the plaintiffs decrees, and thereupon the defendant Kalee Tara appeals specially before us.

There are but two grounds taken in special appeal, and they are these. It is contended, first of all, that upon the plaintiffs' own setting forth of their rights, as shown by their main documents, the tenure that they hold is shown not to be a shikmee tenure, and so it is not a tenure which is protected against the defendant, the auction-purchaser, by the provisions of Act XI. of 1859. On this point the argument of the pleader for the special appellant is that the transaction set forth in the plaintiff's documents amounts to an out-and-out sale of the lands, and that this is shown, first of all, by the fact that the transaction is called a "*sale;*" and, secondly, by the fact that the rental spoken of is called a *sudder khajana*, and so is not a rental as of an under-tenant to the zemindar, but as of a shareholder to the Government.

We have considered the document of 1190 B. S., on which the special appellant relies, and we think that the terms used in that document do not necessarily comprehend such a transaction as the pleader for the special appellant contends for, and that, on the other hand, the expressions used in that document are of such a nature that we cannot say that the Lower Appellate Court was wrong in law in interpreting that document to be declaratory of a shikmee tenure. The words *sudder khajana* in our

judgment and to our experience, do not necessarily mean a rental payable to Government: and, on the contrary, had such a rental been meant by the words, we should have expected that to those words there would have been added other words expressly declaring that the rents were payable to the Government or its officers; and certainly the words *sudder khajana* may, we think, be meant to imply a rental payable to the zemindar, and there is evidence—direct evidence—in this case that such a rental was paid by the plaintiff to the zemindar.

On the other hand, the contention between the parties was not taken in the shape at which it is now presented to us in special appeal, and it is not shown on the record that the rental was in this case intended to be paid, or was actually paid, to the Government. The pleader for the special appellant relies on a case to be found at page 217, Volume VI., Weekly Reporter; but it is clear to us that the facts in that case were quite different from the facts in this, for there the Judges say that the agreement was "that the vendees should "pay Rupees 13 as their proportion of the "Government revenue direct to the Govern-"ment," and it was clearly on the strength of this agreement—an agreement not shown to exist in this case—that the Judges held that there was no shikmee under-tenure, but that the tenure of the defendants before them was the tenure as of a proprietary shareholder. We think, therefore, that the first objection is not tenable.

The *second* objection is that there is no legal evidence on the record to prove that the tenure set up by the plaintiffs was a tenure in existence before the time of the Perpetual Settlement. In support of this plea, the pleader for the special appellant takes the evidence piecemeal, and endeavours to show, either that that evidence is no evidence at all, or else that it is no evidence of the particular tenure set up. That evidence consists, first of all, of certain receipts of the year 1190; secondly, of two attested bundobusts granted by the zemindars of the two talooks respectively in the year 1259; thirdly, of attested dakhillas ranging from 1259 to 1270; fourthly, of thakbust papers of 1265; and lastly, of oral testimony of witnesses. As regards the receipts of 1190, it is contended that they are not at all proved, and that, therefore, they are no evidence in the case. On the other hand, it is said that, although those receipts are not directly proved, yet that when the Lower Appellate Court has found that the plaintiffs have been holding under a tenure of the nature spoken of in those receipts, the Court was justified in holding the documents to be genuine, even though they might not have been directly attested; and the pleader for the special respondent relies upon a passage in Taylor on Evidence, to be found in the 3rd Edition, Chapter X., Section 601, page 549. Whether or not there is laid down in that passage the doctrine that, under certain circumstances, a document put in evidence need not be directly attested, that is, by the oath of some person showing from what custody the document came, is not, we think, material here, because we think that the doctrine is not applicable to this country, and because not only is it not applicable in our judgment, but it is not shown to have been ever applied, and a contrary doctrine has, we think, in the precedents relied on by the pleader for the special appellant been more than once held. We think that in the precedents to be found at page 331 of Volume I., Weekly Reporter; page 82 of Volume VI., Weekly Reporter; and pages 1 and 238 of Volume X., Weekly Reporter, it has been definitively held that there must be sworn testimony as to the custody from which a document, of whatever age it may be, has come. Now, in this case, there is no such evidence, and when, therefore, the Judge has held that the document in this case is genuine, he has, in our judgment, come to that finding upon no legal evidence. It is then contended by the pleader for the special appellant that, if this document be taken out of consideration, there is then no legal evidence to prove that the plaintiff's tenure was created before the Decennial Settlement. The thakbust of 1265 is affirmed to be no evidence at all, and the bundobust and dakhillas and the oral evidence are said not to take the plaintiff's case sufficiently far back. We do not agree that the thakbust is no evidence at all. We understand that maps of this description are prepared by Government authority; that they were prepared in this case when no dispute was current; that notice is given to all proprietors of mouzahs and mehals before such documents are prepared and executed, so that they may come in and make objections, if they have any, on the spot; and that the very purpose of these documents is to set forth the boundaries of mehals and mouzahs on the basis of possession, and that every one in the neighbourhood has

thorough knowledge of the proceedings in the preparation of these maps. This being so, we think that it cannot be said that they are not *primâ-facie* evidence for or against the proprietors of the estates which may be comprehended in them, and in this case we understand that the thakbust in question did set forth this particular shikmee as held by the plaintiffs and as situated in the special appellant's mehal. We think, therefore, that this thakbust was rightly used as some evidence by the Lower Appellate Court.

We think, too, and indeed it is not contested but that the bundobusts and dakhillas and oral testimony were evidence also, but still we are of opinion that all this evidence taken together does not carry the plaintiff's case far enough. The thakbust, the bundobusts, the dakhillas, and the evidence of witnesses do undoubtedly contain legal evidence to the effect that at least from the year 1259 downwards, the tenure held by the plaintiff was a shikmee tenure, but we do not think that this evidence, standing alone, will take the plaintiff's case any further back in proof of the shikmee; for, when we come to consider the evidence of Gooroo Prosaud Mozoomdar and Kally Nath Gangolee—the only evidence which takes the case back any number of years —we find that, although it does distinctly prove that the descendants of Ram Kant held these lands from a period that we may safely take as the year 1818, and that those descendants took as heirs, still that evidence does not show the exact tenure that was taken; and although the witness Brojo Soondur Dutt does directly speak to the tenure, still this witness was comparatively a young man, and cannot be said to have taken the case much farther back than 20 years before suit. There is no doubt, however, in our minds that, if the receipts of 1190 had been legally established, they would have supplied the missing links in the plaintiff's chain of evidence; and it is contended by the pleader for the special respondent that, if his case has failed of proof by reason that he has not established, so far as he could establish, these receipts, the fault was not his; and he asks, therefore, that in justice he may be permitted to have the opportunity of proving, to what extent he can, these receipts. On the other hand, the pleader for the special appellant contends that his client always denied that the receipts in question were genuine, and that, therefore, he did put the plaintiffs to the proof of those receipts, and give them the opportunity of adducing whatever evidence th had in support of them. We have had so difficulty in arriving at an opinion as to course which we ought to pursue in this ca On the whole, we think that the plaintiffs entitled to have the opportunity they ask f We find upon the issue in the first Court th there was no direct contention as to the gen ineness of the receipts, and so far from th we find that that Court does not even me tion those receipts except indirectly; and w cannot shut our eyes to the fact that, among the pleaders and the parties in the Mofussil Court, it is, and has been for some time, the practice to consider that documents of a very old date, such as the present, do not need to be supported by any direct evidence. We think, therefore, that the plaintiffs ought to have the opportunity of establishing the receipts of 1190 to whatever extent they can do so.

We may here mention that, in the course of the argument, it was contended by the pleader for the special respondents that Clause 4, Section 37, Act XI. of 1859, protected his clients' tenure from the auction-purchaser; but in this matter we have simply to remark that there is no legal evidence on the record that the lease in question was such a lease of lands whereon gardens and tanks were made, as contended by the special respondents. We think, therefore, that this argument is not valid.

On the whole, we think it proper to refer the case to the Lower Appellate Court with instructions that it do give the plaintiffs an opportunity of establishing the receipts of 1190 and the dakhillas of 1195 to 1205, and the defendants of rebutting the same, and that that Court do then return the records to this Court within two months from the date of the receipt of this order, together with the additional evidence taken, for the final determination of the case. No delay should take place in executing this order.

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The 28th June 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Arbitration-award—Appeal—Sections 320 and 325, Act VIII., 1859.

Case No. 3217 of 1868.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 3rd September 1868, reversing a decision of the Moonsiff of Khoolneah, dated the 23rd March 1867.

Pureshnath Dey and another (Defendants), *Appellants,*

versus

Nobin Chunder Dutt (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

A Court has every power to look into the proceedings, depositions, and exhibits submitted by arbitrators under Section 320, Act VIII. of 1859, and, if satisfied that the award is of such a character as to raise a reasonable presumption of misconduct on the part of the arbitrators, it may set aside the award.

Where a Court's order declining to pass sentence according to an arbitration-award is reversed in appeal, the Lower Appellate Court's order is open to special appeal. Section 325 applies only to the Court which refers a case to arbitrators.

Mitter, J.—We are of opinion that the decision of the Lower Appellate Court ought to be reversed. The Moonsiff, who tried this suit in the first instance, referred it to arbitration under the provisions of Section 315, Act VIII. of 1859. The arbitrators came to the conclusion that the transaction relied upon by the plaintiff was altogether fictitious, but they nevertheless held that the plaintiff was entitled to a decree, inasmuch as the defendant had affixed his signature to the *byna-puttro* upon which the suit was brought.

The Moonsiff declined to uphold this award upon the ground that the arbitrators were guilty of misconduct in deciding contrary to the evidence which they themselves had accepted and believed.

On appeal, the Judge has reversed the Moonsiff's decision, holding that the Moonsiff had no jurisdiction to refer to the evidence taken by the arbitrators for the purpose of determining whether they were guilty of misconduct or not.

It has been contended before us that, the Judge having disposed of the case according to the award of the arbitrators, the decision is final under the provisions of Section 325 of the Code. But we are clearly of opinion that this contention is not sound. The provisions of Section 325 apply to that Court only by which the case is referred to arbitration, and to no other Court. In the present case, the Court which made the reference declined to pass judgment according to the award; and the Judge having on appeal reversed the decision of that Court, we have every power to see whether the Judge's decision is correct or otherwise. There is nothing in the provisions of Section 325 which goes to show that those provisions were intended by the Legislature to be applicable to a case like the present, and we are bound to entertain this special appeal, there being no express provision to the contrary.

Upon the merits, we are of opinion that the Judge's decision is wrong. The Moonsiff had every power to refer to the whole of the arbitration-record, for the purpose of determining whether the arbitrators were guilty of misconduct or not. Section 320 says: "When an award in a suit shall be made "either by the arbitrator or arbitrators, or "by the umpire, it shall be submitted to the "Court under the signature of the person or "persons by whom it is made, *together with* "*all the proceedings, depositions, and exhibits* "*in the suit.*" If, therefore, the arbitrators are bound to submit to the Court all the proceedings, depositions, and exhibits in the suit, the Court to which they are submitted has every power to look into them; and if, on the perusal of those proceedings, depositions, and exhibits, the Court is satisfied that the award is of such a perverse character as to raise a reasonable presumption of misconduct on the part of the arbitrators, it has every power to set it aside.

Charges like partiality and misconduct are seldom capable of direct proof, and if the proceedings of the arbitrators, which contain the best available evidence of their conduct, are not to be referred to for the purpose of determining whether that conduct was good or bad, gross failure of justice might ensue in many cases. In the present case, there can be no doubt that the award of the arbitrators is highly improper on the very face of it, and the Moonsiff was fully justified in holding them guilty of misconduct in having decided the case contrary to all the evidence which they had themselves recorded and believed.

We reverse the decision of the Judge, and restore that of the Moonsiff with the costs of this Court and of the Lower Appellate Court.

The 28th June 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Application for review — Cause of delay — Appeal.

Case No. 3195 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 8th September 1868, reversing a decision of the Moonsiff of Kooshtea, dated the 22nd July 1867.

Kristo Gobind Joardar and others (Plaintiffs), *Appellants,*

versus

Jugobundhoo Sircar and others (Defendants), *Respondents.*

Baboo Ashootosh Chatterjee for Appellants.

Baboos Bhuggobutty Churn Ghose and *Bhowanee Churn Dutt* for Respondents.

A suit for possession having been decreed in the absence of the defendants, they applied for a re-hearing, and their application was rejected. They then, after the time allowed by law, applied for a review of judgment which was granted without any determination as to the goodness and sufficiency of the cause of delay.

HELD that the order granting the review was illegal, and that an appeal lay as to the sufficiency of the cause for the delay.

Loch, J.—THE history of this litigation shows how much litigation may be caused and continued by the neglect of judicial officers to conform to the requisition of the law.

The suit was to recover possession of 2 beegahs of land which the plaintiff claimed as part of his permanently settled estate, and which the defendants claimed as their lakheraj land under a valid title. The case, after being instituted in the Civil Court, was sent to the Collector for report under the provisions of Section 30, Regulation II. of 1819, and the defendants appeared before that officer and put in their documents with a written statement. The Collector submitted his report to the Civil Court, when the defendants did not appear, and the case was disposed of *ex parte* and a decree recorded for the plaintiff on 25th August 1862. An application for a re-hearing under the provisions of Section 119 of Act VIII. of 1859 was put in by the defendants, which was rejected on 9th September 1865. About two years after, on the 30th April 1867, an application for review of judgment under the provisions of Section 276, Act VIII. of 1859, was filed and admitted by the then Moonsiff on 15th June 1867, for reasons assigned in his proceeding of that date. He then proceeded to try the case, and on 22nd July 1867 rejected the review, *i. e.*, he considered that defendants had failed to prove their case, and the effect of his order was that the plaintiff's decree obtained in 1862 was upheld. An appeal from his judgment was preferred, and the Subordinate Judge reversed the order of the Lower Court, and after admitting a review, did, on 8th September 1868, dismiss the plaintiff's claim for reasons stated in his proceeding.

A special appeal has been preferred against this judgment, and an objection has been taken to the proceedings of the first Court admitting a review after the expiry of so long a period from the date of the original judgment without any sufficient cause having been assigned for the delay, thus re-opening litigation unnecessarily. It is urged, on the other side, that an order passed admitting or rejecting a review is final. It is so, no doubt, if the application be made within 90 days, but it has been held by a Full Bench of this Court (see 9 Weekly Reporter, page 181) that, where the application has been made after time, an appeal does lie in regard to the sufficiency of the cause of delay in making the application. Now, this case was originally disposed of in 1862, after the defendants had received due notice, and entered appearance before the Collector, and had filed their documents. The case was decided in their absence, but it cannot be treated as an *ex-parte* case to which the provisions of Section 119 of Act VIII. of 1859 were applicable. However, application for a re-hearing was made under that Section, and rejected in 1865. The defendants for two years more lay by, and then applied for a review of judgment under the provisions of Section 276 of the Code, without assigning cause for the delay, and the Moonsiff, without determining whether good and sufficient cause for the delay in making the application for review had been made

out, at once admitted the review. We think the Moonsiff acted erroneously in admitting the review after so long a period had expired, not only from the first order giving the plaintiff a decree, but also from the second order rejecting the defendants' application for a re-hearing. The Moonsiff's order admitting the review is illegal, because he was not competent to admit it unless sufficient cause for the delay in making the application had first been made out to the satisfaction of the Court. As this has not been done, we set aside all the proceedings of the Lower Courts subsequent to 1862, and decree this special appeal with costs in this and the Lower Appellate Court.

The 28th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Attachment—Rights of ownership.

Case No. 3319 of 1868.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 30th July 1868, affirming a decision of the Moonsiff of that District, dated the 5th March 1868.

Soolochuna Dayee (Plaintiff), *Appellant,*

versus

Durp Narain Bose and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Ashootosh Dhur and *Mohinee Mohun Roy* for Respondents.

A Collector in taking charge of property which came under attachment by an order of the Civil Court under Section 6, Regulation V. of 1812, as modified by Section 3, Regulation V. of 1827, was held to have taken and retained charge on behalf of the parties entitled, and unless and until any thing could be shown to have changed the state of things during such attachment. Purchasers subsequently put into possession by the Civil Court, who took from the Collectorate rents relating to an antecedent period, did not thereby exercise rights of ownership for such period.

Jackson, J.—It appears to me that the decision of the Judge in this case is erroneous. The plaintiff, it seems, represents certain parties who acquired the whole of the property in dispute from seven brothers who were joint owners. From some cause, which has not been made very clear to us, this property came under attachment by order of the Civil Court under Regulation V. of 1812, Section 26, as modified by Regulation V. of 1827, Section 3. This attachment took place on the 30th of May 1855. At that same period, it seems, some person had got a decree against three of the seven brothers, who are named Abhiram, Gyaram, and Ghonesham, who were together entitled to 6 annas 17 gundas and a small fraction of this property. The decree-holder had attached their alleged share, and consequent on this attachment their share was put up and sold in December 1855, and was purchased by the defendants who were put in possession thereof by the Court on the 29th January 1856. The possession which the defendants at that time obtained was merely what is called symbolical, that is to say, proclamation was made of the fact of purchase. But it is admitted that from the time of such purchase, the plaintiff's vendors never got into possession again, and that rents and profits of the estate, at any rate from that time, were paid by the Collector to the defendants, and not to the plaintiff's vendors. The plaintiff's own purchase is of quite recent date, being only a month or two previous to the commencement of this suit.

The defendants pleaded limitation, and they also denied the title of the plaintiff. The Moonsiff who tried this suit gave judgment against the plaintiff on both points. She having appealed to the Zillah Court, the Judge enquired only into the point of limitation, and holding the plaintiff's suit to be barred, dismissed the appeal on that ground.

The reasoning on which the Judge proceeds in holding the suit to be barred by limitation is this, that the plaintiff actually lost possession by the attachment in May 1855; that she had done nothing since, as the Judge calls it, to assert her rights of ownership; and that this being so, it was immaterial whether, as the plaintiff alleged, her vendors had been in possession immediately before and up to the time of the attachment, or not. The Judge observes: "The property came under attachment on "account of the quarrels of the share-"holders on the 30th of May 1855 and the "plaintiff, appellant, admitting that since "that date she has not exercised any acts of "ownership, argues that, as she was in pos-"session on the date of attachment, she was

"not ousted until the defendant, respondent, "obtained possession from the Court on the "29th January 1856. This may be so "if the plaintiff, appellant, can show that "she was really in possession up to the "29th January 1856. But this I think she "has failed to do. She has filed receipts and "collection papers up to May 1855: and, "even if these be admitted to be genuine, I do "not think they serve her case, for from May "1855 to the date of institution is more "than twelve years, and from May 1855 "the plaintiff, appellant, admittedly has "done nothing, and all the profits which "came into the Collector's hands from that "date and on account of the time after "that date, were paid to the defendants, re-"spondents." He goes on to say that "the "defendants (respondents) by the very fact "of taking and using those profits, have "exercised rights of ownership for more "than 12 years."

This last observation is, in the first place, a mistake. It does not follow that the defendants, by taking within 12 years before the suit rents which were lying in the Collectorate, which related to a period antecedent to 12 years, have thereby been exercising rights of ownership for more than 12 years. It appears to me that the Collector, in taking charge of this property under an order of the Civil Court, took and retained charge on behalf of the parties entitled to it, and that, unless and until anything be shown to have changed this state of things during such attachment, the parties in possession at the time when it commenced, must be held to have continued in possession throughout the attachment.

Now, the first circumstance that occurred to indicate any change in the ownership, was the giving of symbolical possession to the defendants on the 29th January 1856.

It therefore becomes, as it seems to me, of the greatest importance to the plaintiff to ascertain who were the parties in possession at the time when the Collector attached the property.

The plaintiff, I observe, gave evidence, which might have led the Judge to the conclusion, if he believed it, that her vendors had been in such possession. I think that if the Judge believed that evidence, and considered that at the time when the Collector took charge, plaintiff's vendors had been in possession of the property and had been taking rents and profits of it, he ought to have held that the Collector's possession down to January 1856 was a possession on behalf of the plaintiff's vendors, and that, consequently, there had been a possession within 12 years immediately before the commencement of the suit, and that consequently the suit was not barred. I think, therefore, the case must go back to the Zillah Judge in order that he may consider the evidence and come to a conclusion on this point.

Of course, if on the enquiry on this point the Judge should consider that there was possession on the part of the plaintiff at the period stated, that is, within 12 years, it would follow that the plaintiff had a cause of action which arose at the time stated, namely, 29th January 1856, that she had not been previously dispossessed, and therefore properly laid her cause of action at that time, and then it will be in the power of the Court to go into the remainder of the evidence, and determine whether or not the plaintiff had made out a title.

Markby, J.—I am of the same opinion. I think the Judge was wrong in holding that it was immaterial for him to ascertain whether or not the plaintiff's vendors were in possession down to the 30th of May 1855. It seems to me that the proper test to ascertain whether or not that was a material question, is to see what the result would be if it were determined in favor of the plaintiff. Now, although, as pointed out, we have very slight information of the circumstances under which the Collector took possession on that date, I think there is sufficient for us to presume that he took and held possession on behalf of the persons who were in possession at the time when he took it. If, therefore, the plaintiff's vendors were some of those persons, the Collector, when he took possession on the 30th May 1855, took possession on behalf of the plaintiff's vendors together with certain other persons. That being so, inasmuch as the act of the Collector done under the orders of the Civil Court could be no cause of action, it seems to me clear that there could be no cause of action at all, until, at least, something had been done by the Collector, showing unequivocally that he ceased to hold possession on behalf of the plaintiff's vendors, and held it exclusively on behalf of some other persons.

It is not denied by the plaintiff that an act of this kind did take place in January 1856; but that is within 12 years of the time when this action was brought, and therefore,

if that is the true cause of action, the plaintiff is within time. The question is whether any such act as would form a cause of action took place between the 30th May 1855 and the 3rd December 1855, which is 12 years from the date when this action was brought.

It seems to me that the Collector, having taken possession on behalf of the plaintiff's vendors as well as other persons, must be presumed to have held it on behalf of those same persons, until it appears or is shown that something has been done by him which makes his possession cease to be a possession on behalf of the original persons, and to commence to be a possession on behalf of some one else. Therefore, if the Judge should come to the conclusion that the plaintiff's vendors were in possession down to the 30th of May 1855, I think he would be bound to presume that the Collector continued to hold on her behalf down to January 1856, when, as I have said, it is admitted that he ceased to hold possession on behalf of the plaintiff's vendors, and by a clear and unequivocal act commenced to hold on behalf of some other persons.

For the purposes of this case, I have considered—and I think rightly considered—the Collector very much in the same position as a private person holding as an agent or manager on behalf of others.

The 29th June 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Limitation—Cause of action—Reversioners.

Case No. 173 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 10th November 1868, affirming a decision of the Sudder Ameen of that District, dated the 13th February 1868.

Gunga Churn Roy Chowdhry and another (two of the Defendants), *Appellants,*

versus

Juggurnath Dutt (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

B died leaving two daughters, *C* and *G*, with a life-interest in his estate. *C* died first, and *G* 18 years afterwards. Eight years after *G's* death, her son sued to recover half of the lands which originally belonged to *B* and which he alleged had been alienated by *C*. Defendants pleaded limitation.

HELD that the possession held by defendants from the death of *C* was adverse to *G*, who then became direct heir to all the property, and that plaintiff's cause of action was not the new cause of action which accrued to the reversioners on the death of *G*, but that which had accrued to *G* herself on the death of *C*.

Hobhouse, J.—IN this case, the plaintiff sued for a certain share in certain lands on the following allegations. He said that the lands in question belonged as a whole originally to one Bejoy Narain Chowdhry. This Bejoy Narain died leaving two daughters, *viz.*, Chunder Monee and Gunga Monee. Chunder Monee died in 1242. Gunga Monee died in 1266. We are not told what became of this property during the eight years from 1266 to 1274 (and this in itself is rather a suspicious circumstance), but in the year 1274 the plaintiff, the son of Gunga Monee, sued to recover one-half of the lands that had originally belonged to Bejoy Narain, and which had, it is now alleged, been alienated by Chunder Monee.

The defendants pleaded the Statute of Limitation, alleging that the plaintiff's cause of action arose on the death of Chunder Monee in 1242, and that, as he had not sued within 12 years of that date, he was out of Court.

The Lower Appellate Court has held that limitation does not bar the suit.

The defendants appeal specially before us on the ground that this judgment is bad in law.

It seems to us that this contention in special appeal is good. On the death of Bejoy Narain, his two daughters admittedly succeeded to the estate. Admittedly also they had, subject to certain contingencies, each of them only a life-interest in that estate; and, had the estate remained *in statu quo*, it is not denied that the survivor of the two daughters would have taken the whole of it. But it is contended that, when one of the two daughters alienated her share of the estate, there was no right of action existing in the other daughter to recover that portion of the estate which was alienated. Now, it is not contended that Gunga Monee joined in the alienation made by Chunder Monee. Neither is it denied that ordinarily on the

death of Chunder Monee, Gunga Monee would, as survivor, have taken the whole estate. Neither is it denied that ordinarily Chunder Monee had only a life-interest in that estate. Clearly, therefore, it seems to us that, on the death of Chunder Monee, Gunga Monee, the survivor, would have a right of action to recover any portion of the joint life-estate which had been alienated without her consent.

It is, however, contended by the pleader for the special respondent that he had no cause of action during the life of Gunga Monee, and that his cause of action did not accrue to him until her death. The case, therefore, really turns upon what is in this particular case the construction of the words "cause of action" in the Statute of Limitation as regards reversioners. On that point, we think that there is a dictum at least, if not a ruling, of the Full Bench to be found at page 505, Volume IX., Weekly Reporter, which is decisive. The learned Chief Justice there says: "It is said that the reversionary "heirs could not sue during the lifetime of "the widow '(here it is the aunt),' and that, "therefore, they ought not to be barred by any "adverse holding against the widow at a time "when they could not sue. But when we "look at the widow '(here the aunt)' as a re-"presentative, and see that the reversionary "heirs are bound by decrees relating to her "husband's estates which are obtained against "her without fraud or collusion, we are of "opinion that they are also bound by limita-"tion by which she, without fraud or col-"lusion, is barred;" and then the Chief Justice goes on to say: "When, therefore, we "construe the words 'cause of action' in the "Statute of Limitation, we must consider "them as referring, not to a new cause of "action accruing to the reversionary heirs "personally and individually, but to the "cause of action which accrued to the heir "or representative, for the time being, of the "deceased."

Now, in this case, at least from the death of Chunder Monee in 1242, there has been possession held by the defendants adverse to somebody, if the plaintiff's case be right. The question, therefore, is as to whom it was adverse, and we think that it was adverse to Gunga Monee who was direct heir to all the property on the death of Chunder Monee, and therefore we find that, under the Full Bench ruling we have just quoted, the words "cause of action" refer, not to the new cause of action which accrued to the reversioners on the death of Gunga Monee, but to the cause of action that accrued to Gunga Monee herself on the death of Chunder Monee in 1242.

This being so, we think that the plaintiff's claim is barred by the Statute of Limitation. We accordingly reverse the judgments of the Lower Courts, and direct that the plaintiff's suit be dismissed with all costs of this Court and of the Courts below.

The 29th June 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Remand—Chittahs—Sections 226 and 227, Act VIII., 1859.

Case No. 139 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 31st December 1868.

Shadhoo Suran (Objector), *Appellant,*

versus

Bhuggoo Lall (Decree-holder), *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Kishen Sein* for Respondent.

Where the order of remand directed the Lower Court to ascertain from the settlement-chittahs the situation of the lands in dispute, and the chittahs were found not to give the expected information:

HELD that the Judge should, when the Ameen's investigation was objected to, have proceeded under Sections 226 and 227 of Act VIII. of 1859, and allowed both parties to adduce proofs of their claims.

Loch, J.—By the order of remand the Lower Court was directed to ascertain from the measurement-papers of the settlement-proceedings where the lands decreed to the plaintiff were situated. The Court, by that order, merely intended to indicate by what means the situation of the lands could be ascertained. The Court not having the settlement-chittahs before it at the time, was under the impression, as were also the pleaders, that, on a reference to those chittahs, the lands which were settled with the judgment-debtors could be clearly identified. It appears, however, now that those chittahs do not show, as we expected, what

were the exact lands which were settled with the judgment-debtors in this case. We think, therefore, that, when the appellant objected to the investigation of the Ameen, and claimed the lands marked out by the Ameen as belonging to the judgment-debtor, the Subordinate Judge should not have been satisfied with merely looking at the Collector's chittahs, which give scarcely any indication of the rights of the judgment-debtors, but he should have proceeded under Sections 226 and 227 of Act VIII. of 1859, and have allowed both parties to adduce proofs of their various claims to these lands.

The case will, therefore, go back to the Subordinate Judge with directions to him to take up the case at once out of its turn, and to give opportunity to both parties to adduce evidence. He must dispose of the case without delay.

The 29th June 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Decrees—Execution-department.

Case No. 197 of 1869.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 20th February 1869, reversing an order of the Sudder Moonsiff of that District, dated the 12th November 1868.

Dwarkanath Haldar (Judgment-debtor), *Appellant,*

versus

Kumola Kant Haldar (Decree-holder), *Respondent.*

Baboos Kedarnath Chatterjee and *Bhowanee Churn Dutt* for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondent.

In executing a decree for possession, all that a Court has to do is to put the decree-holder in possession of that which is described in the decree; and if the description is so uncertain that it is impossible to ascertain what is decreed, execution cannot be given. Evidence cannot be taken in the execution-department to ascertain what is decreed.

Peacock, C. J.—In this case, the plaintiff sued to recover a yearly palla, or turn of worship, in the month of Bhadro immediately following that of Mohesh Chunder and others. His claim was founded on a mortgage of that palla which he alleged had been foreclosed; and he obtained a decree to recover the palla claimed in his plaint. It appears that the claim in the plaint following the deed of mortgage entitled the plaintiff to recover a yearly palla in the month of Bhadro following that of Mohesh Chunder and others. The Moonsiff, on an application for execution, in which the decree-holder asked to be put into possession of a palla falling in a different month from that of Bhadro, considered that he could not put the plaintiff into possession of such a palla; and that, as Mohesh Chunder had several pallas in the month of Bhadro, it was impossible for him, as the case stood, to ascertain which of the pallas of Mohesh Chunder's, the palla which the plaintiff had recovered, was to be immediately following. He says: "When the decree-holder's vakeel admits "that Mohesh Chunder and others had more "than one palla in that month, it is difficult "to ascertain in the execution-department "the date of the palla of Mohesh Chunder "and others, which was immediately follow-"ed by the palla in question."

The plaintiff appealed to the Judge, who stated that the "palla was on the 1st of Bhadro 1263, and on the last day of Joist or the 1st Assar in 1275."

It is said on the part of the plaintiff that the palla which he recovered was not a palla necessarily falling in the month of Bhadro, but that it was a shifting one, and sometimes fell in Bhadro and sometimes in other months. But that was not the palla such as was mortgaged, nor was it a palla such as was decreed. All that the Court has to do in the execution-department is to put the plaintiff into possession of the palla which was described in the decree, and if the palla which was described in the decree was so uncertainly described that it was impossible to decide what was decreed, execution could not be given; and if execution cannot be given of a decree so uncertain that it is impossible to ascertain what is decreed, it seems clear that a plaintiff cannot be put into possession by execution of any other thing than that which the decree describes.

It has been contended that evidence was admissible in the execution-department to make that clear which the decree left uncertain, or to show that the decree intended to give the plaintiff something different from

that for which the plaintiff sued, and which was awarded to him by the decree. According to that contention, if a plaintiff were to sue for a lakh of rupees, and the Judge were to say he could not ascertain what was due to the plaintiff, whether it was a lakh of rupees or one rupee, and he, therefore, decreed to the plaintiff as much as the defendant owed him, if the amount could be ascertained in the execution-department, you would be deputing to the execution-department that which the Judge should himself have determined; and if the contention is allowed, it goes further; it would allow the execution-department to decide that the Judge intended to give to the plaintiff something different from that described in the decree, upon the ground that the Judge must have intended to give it.

If the Judge were to say, "I award to the plaintiff a piece of land bounded on the west by the land of *A. B.*," the execution-department could not go into evidence to show that the Judge meant a piece of land bounded on the east by the land of *A. B.*; or if the Judge should award to plaintiff 50 beegahs of land abutting on the land of *A. B.* in a certain village, and it should be shown that *A. B.* had five different pieces of land in the same village, you could not go into evidence in the execution-department for the purpose of ascertaining to which of the pieces of land of *A. B.* the decree referred. The law has allowed certain matter to be ascertained in execution; but beyond those, it is the duty of the Judge to take care that his decree is so precise that it is capable of execution without leaving it to the Court of execution to decide what the Judge intended to decree.

It appears to us that in this case, if we were to allow the plaintiff to go into evidence to show that the palla which he recovered, instead of being a yearly palla in the month of Bhadro, was a palla shifting year by year to be exercised sometimes in one month and sometimes in another, we should be allowing evidence for the purpose of contradicting the decree; and if we were to allow evidence to be given in the execution-department to show which of the pallas of Mohesh Chunder, the palla intended to be decreed to the plaintiff, was immediately following, we should be allowing the execution-department to do the duty of the Judge, and to ascertain that which the Judge ought to have ascertained.

If by reason of an uncertainty in the mortgage, or an uncertainty in the plaint, or an uncertainty in the evidence, the Judge could not ascertain what particular right the plaintiff was entitled to recover, he ought not on any of those grounds to give a decree for plaintiff so uncertain that the Court of execution could not know what he intended to award.

I have made these remarks at length, because I have frequently noticed that in execution-cases the duty falls on the execution-department to ascertain the details which ought to have been ascertained by the Judge and specified in his decree.

It was further contended that the defendant had no right to appeal in this case, upon the ground that the property about to be seized was that of his son; but that is not the only ground on which this appeal is preferred. One of the grounds of appeal is that the palla recovered being a yearly palla to be exercised in the month of Bhadro, a palla to be exercised in any other month could not be delivered. It appears to me that the defendant had a right to take that objection, for, if he had not, the decree might be executed by giving the plaintiff something which was never included in the mortgage.

For these reasons, I am of opinion that this appeal ought to be allowed, and the order of the Judge reversed with costs.

The 29th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Applications under Act XL., 1858—Appeals under Section 28—Summary inquiry under Section 6.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31st December 1868.

Case No. 136 of 1869.

Meltoon Bibee, *Petitioner,*

versus

Mr. T. M. Gibbon and others, *Opposite Party.*

Mr. R. T. Allan for Petitioner.

Mr. G. C. Paul and *Moonshee Mahomed Yusuff* for Opposite Party.

Only persons who claim a right to have charge of property in trust for a minor under a will or deed have a right to make applications under Act XL. of 1858, and they alone have a right of appeal under Section 28; a mere creditor has no *locus standi* in the proceedings before the Judge, and no right to have his objections gone into.

The summary inquiry provided by Section 6 refers to the grant of the certificate to the parties claiming it, but no part of the Act allows third parties to demand an inquiry into matters which have nothing to do with the genuineness of the trust.

Glover, J.—THE appellant in this case objects to the Judge's decision on two grounds, *first*, because Act XL. of 1858 was never intended to apply to cases of this description; and, *secondly*, because the Judge, before granting the certificate, was bound to make enquiry into the circumstances, and to take into consideration the appellant's plea that the transfer by the Rajah was a mere colorable transaction in fraud of creditors.

It appears that the Rajah of Bettiah executed a trust-deed in favor of his minor son of all his estate, and the trustees, the Rajah of Benares and Mr. Gibbon, applied to the Judge for a certificate under Act XL. of 1858. The Judge, after rejecting what he considered to be a fictitious application on the part of the Bettiah Rajah to withdraw the trust, granted the certificate to the trustees named in the deed.

We think that no appeal lies in this case.

Section 28 of the Act, no doubt, provides for appeals, but such appeals must be appeals under the Act, and must, therefore, be instituted by a person competent to petition under the Act. Now, Section 3 restricts applicants to persons "who shall claim a right to have charge of property in trust for a minor under a will or deed;" and it is only such claimants who have the right to make application under the Act, and consequently these only have a right of appeal under Section 28. The petitioner in this case is a creditor of the Rajah's, who had no *locus standi* in the proceedings before the Judge, and no claim to have his objections gone into.

His pleader (Mr. Allan) has quoted the words of Section 6 of the Act as ordering a summary enquiry into the circumstances of each case. But this enquiry refers to the grant of the certificate to the party or parties claiming it; if there were rival candidates, for instance, the Judge would enquire summarily as to the party best fitted to hold the certificate. But there is nothing in this Section, nor in any Section of the Act, which allows third parties, who do not claim the right to hold the property themselves, to demand an enquiry into matters which have nothing to do with the genuineness of the trust, but which are put forward in their own individual interest.

The decisions which have been quoted from Volumes IX. and XI. of the Weekly Reporter proceeded on a fraudulent misrepresentation of facts. Here there is no misrepresentation at all. It is clear that the Rajah did execute the trust-deed (his resiling from his appeal is strong corroboration of the Judge's opinion on this point), and that the applicants for the certificate were the parties appointed trustees.

As to its being against the policy of the law to allow persons in desperately involved circumstances to make over their property in this way, so as to defeat their creditors, we observe in the first place that, admitting the Rajah's condition for the sake of argument to be such, the creditors are not defeated at all. They are exactly in the same position as they were before, for the trust-deed makes special provision for the payment of debts. In any case, if the appellant wishes to set aside the trust-deed on the ground of fraud, he must do so in a regular suit.

And, secondly, we think that the applicants for the certificate were clearly justified under Act XL. of 1858 in asking for that certificate. The proceedings under that Act are summary only, and do not prevent further enquiry; and if the appellant considers that the policy of the law is in his favor, the Courts are open to him, and he can have the question decided. To allow the present appeal to succeed would be to get round the plain meaning of the Act by a side wind.

The appeal must be dismissed with costs.

It will be convenient to notice here appeal No. 135 on the part of the Rajah of Bettiah, which has been withdrawn by his vakeel, Moonshee Mahomed Yusuff. Mr. Allan was first appointed the Rajah's vakeel, and as such filed the appeal. He afterwards received instructions from the Rajah to withdraw it; but not being satisfied with the genuineness of the order, he mentioned the subject to the Court, and wrote to his principal for instructions. These have since come in the shape of two letters (one in English, the other in Persian) from the Rajah, and one from the manager, Mr. Gibbon. As Mr. Allan, however, still hesitates to act, we relieve him of the responsibility, and allow the appeal to be withdrawn at the application of the Rajah's vakeel, Moonshee Mahomed Yusuff.

The 30th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Minor's right of action—Section 73, Act VIII., 1859—Guardian—Act XL. of 1858.

Case No. 376 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 18th November 1868, affirming a decision of the Deputy Collector of Bograh, dated the 30th July 1868.

Madhub Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Buktessuree Debia and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Gopal Lall Mitter* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A suit, having been instituted by a guardian in the name of an infant without a certificate under Act XL. of 1858, was dismissed by the Lower Appellate Court. The minor, on coming of age, applied to have his name substituted on the record. The High Court, under Section 73, Act VIII. of 1859, ordered that his name should be added as plaintiff, and that the suit should be proceeded with. But as the dismissal by the Lower Court was correct, so far as the materials before the Court enabled it to deal with the suit, the order of remand was not to take effect until all the costs of the defendant had been paid by the plaintiffs.

Norman, J.—THIS is a suit which has been instituted by Madhub Chunder Chowdhry as guardian and manager on behalf of Saroda Pershad Sookul. It appears that Saroda Pershad Sookul arrived at majority on the 31st of Bysack 1276, or, in other words, on the 14th of May last past. The infant Saroda Pershad now applies by petition that his name may be substituted on the record as plaintiff in lieu of that of Madhub Chunder Chowdhry.

It appears clear upon the authorities that, if a suit is brought in the name of an infant, on coming of age he may elect whether he will proceed with it or not; and under Section 73 of Act VIII. of 1859, we think that, on this hearing, we have the power to order, and we do order, that the name of Saroda Pershad Sookul be added as plaintiff on the record without prejudice to any rights of the defendant in respect of what may have taken place in the Lower Courts.

The suit was originally instituted by Madhub Chunder Chowdhry in the name of the infant, without having obtained a certificate of administration under Act XL. of 1858, and the defendants objected, and very properly objected, that Madhub Chunder Chowdhry was not entitled to maintain the suit against them under Section 3 of Act XL. of 1858.

On these grounds, the Lower Appellate Court dismissed the suit. So far as the materials before that Court enabled it to deal with the suit, it appears that that decision is correct.

It appears to us, however, on the statements of the vakeels, that it is for the benefit of the minor, who has just come of age, that the suit should proceed in his name; as a portion of the claim may otherwise be barred by limitation, and as there is now on the record a plaintiff capable of carrying on the suit, we think that the suit must be remanded to be carried on and tried as between the defendants and Saroda Pershad Sookul on the merits.

As the decision of the Lower Appellate Court, as between the parties then before it and in the then stage of the proceedings, was perfectly correct, the suit can only be remanded on the infant and Madhub Chunder Chowdhry paying to the defendants all their costs in both the Lower Courts and of this appeal. Such costs to be paid into this Court within five weeks after they shall have been ascertained by the officer of Court, and in default of payment the appeal will stand dismissed with costs. The case will go back to the Lower Court, but will not proceed until after the costs shall have been paid into Court as directed.

The 30th June 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Ryots—Landlords.

Case No. 98 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 8th December 1868, reversing a decision of the Deputy Collector of that District, dated the 24th January 1868.

Goureenath Roy and another (Plaintiffs), *Appellants,*

versus

Ramgutty Chunder (Defendant), *Respondent.*

Baboo Ashootosh Dhur for Appellants.

Baboo Anund Chunder Ghossal for Respondent.

Ryots are not necessarily ryots of the same class because they hold under a similar class of landlords.

Peacock, C. J.—It appears to us that the Judge was not right in holding that the plaintiff could not enhance unless he could prove that he was entitled to enhance up to the specific amount which he claimed in his notice and in his plaint. If, therefore, there were any evidence on the record which would justify the Judge in decreeing for the plaintiff, we should remand the case to him in order that he might do so. If we were to remand the case, we should remand it to be decided on the evidence, as the parties left it in the Lower Court; and if that evidence alone be looked to, without remanding the case to admit further evidence on the part of the plaintiff, there is nothing which would justify the Judge in giving a decree for the plaintiff. It is useless, or worse than useless, for us to remand the case to the Judge to be tried on the evidence which has been given, if we are satisfied that, if the Judge, acting on that evidence, were to decide for the plaintiff, we should be obliged, on a fresh special appeal, to reverse that decision.

The suit was to recover arrears of rent at an enhanced rate pursuant to a notice of enhancement, and the grounds of enhancement were that defendant was paying at a lower rate than was paid by ryots of the same class for land of a similar description in the neighbourhood.

The evidence in the suit was confined to lands held by ryots under ganteedars, the defendant being a ryot holding under ganteedars. They merely proved the rates at which they held, and not the prevailing rates at which lands of a similar description were held by ryots of the same class as the defendant. Ryots are not necessarily ryots of the same class, because they hold under a similar class of landlords. The case put by my learned colleague during the discussion shows very clearly that is the case. He put the case of ten ryots holding under ganteedars paying 2 rupees a beegah, and 90 ryots under zemindars paying one rupee a beegah, for lands of a similar description in the neighbourhood; and he asked whether, because defendant was a ryot holding under a ganteedar, you would enhance his rent to 2 rupees, being the rate of the 10 ryots under ganteedars, or to one rupee, being the rate of the 90 ryots holding under zemindars. The answer to the question is obvious. If the point contended for on behalf of the plaintiff, that ryots are of the same class because they hold under a similar class of landlords, be correct, we might have to enhance ryots because they held under a class of landlords called harsh instead of a class of landlords called liberal.

It appears to me that there is no evidence and no finding of the Ameen to show that the defendant was holding at a lower rate than ryots of a similar class.

But it is said that another ground of enhancement was that defendant held lands in excess of those for which he has been paying, and that the Lower Court found that point in favor of the plaintiff. But as to those lands, the rates of rent could not be raised higher than the rate payable by the same class of ryots for lands of a similar description and with similar advantages in the places adjacent; and upon that point there was no evidence given by the plaintiff.

Under these circumstances, it appears to us that the Judge came to a right conclusion, though for erroneous reasons. His decree ought, therefore, to be affirmed with costs of this appeal.

The 30th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Payment to insolvent creditors — Official Assignee's remedy — Section 15 of the High Court Charter Act.

In the Matter of Mr. A. B. Miller, Official Assignee, *Petitioner.*

Mr. R. E. Twidale for Petitioner.

Where money due to an insolvent is deposited in Court, and the Court orders it to be paid to creditors who had attached the money instead of the Official Assignee, the remedy open to the latter is a suit for an injunction to restrain the creditors and an application for an order under Section 92 of Act VIII. of 1859.

Where, as in such a case, there is a remedy by a regular suit, the High Court cannot exercise its extraordinary powers under Section 15 of the Charter Act.

Norman, J.—ONE Sheoburt Ram presented his petition to the Calcutta Court for the relief of Insolvent Debtors, and was adjudged an insolvent on the 29th of June 1868. On the 23rd June 1867, Ramanund and Zuhoor Alum, under a decree against Sheoburt Ram, had attached a certain decree obtained by Sheoburt Ram against one Ram Churn Ram. After adjudication of insolvency, Ram Churn Ram deposited in the Court of the Principal Sudder Ameen of Shahabad the sum of Rupees 3,497, being the amount of the decree which had been obtained by Sheoburt Ram against himself. Upon this Ramanund and Zuhoor Alum applied to the Principal Sudder Ameen for payment to them, in satisfaction of their decree, of this sum of Rupees 3,497, which was paid into Court in satisfaction of the decree obtained by Sheoburt Ram against Ram Churn Ram. Their application was opposed by Mr. Miller, the Official Assignee, the present petitioner, who contended that, notwithstanding the attachment, the decree against Ram Churn Ram passed to him as Assignee of Sheoburt Ram, and that, on the payment of the money into Court, it became, and was, the money of the insolvent, and consequently Ramanund and Zuhoor Alum should not be allowed to take it out.

After hearing both parties, the Principal Sudder Ameen ordered that the money should be paid to Ramanund and Zuhoor Alum.

From that order there is, of course, no appeal, but Mr. Twidale for Mr. Miller now applies to us to exercise some extraordinary powers which he supposes us to possess in order to prevent the payment of that money to Ramanund and Zuhoor Alum as ordered by the Principal Sudder Ameen.

It appears to us quite plain that, where there is a remedy by a regular suit, this Court cannot interfere by the exercise of its extraordinary powers under Section 15 of the Charter Act. Now, it is quite clear that Mr. Miller can bring a suit for an injunction to restrain Ramanund and Zuhoor Alum from taking that money out of Court; and in that suit, an order might be obtained before judgment under Section 92 of Act VIII., that the money should remain in Court until the right and title to it should have been adjudicated.

On these grounds, we are of opinion that we ought not to interfere, and Mr. Twidale will, therefore, take no order upon his petition.

The 30th June 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ejectment—Damages.

Case No. 846 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 5th January 1869, affirming a decision of the Subordinate Judge of that District, dated the 3rd December 1867.

Mahomed Azmul (one of the Defendants), *Appellant,*

versus

Chadee Lall Pandey and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusuff* for Appellant.

Mr. C. Gregory for Respondents.

A landlord who ejects his tenant illegally, and holds possession as a wrong-doer, although he settles another tenant on the land, is liable, not only for the rent he receives during such possession, but also for the damages incurred by the tenant whom he has ejected, in consequence of the ejectment.

Glover, J.—THE plaintiff in this case was dispossessed by the zemindar of his holding, and was obliged to resort to the Revenue Courts for redress. He obtained that redress in the shape of a decree restoring him to possession, and he now sues for the amount of what the land produced during the two years he was kept out of possession by the tortious act of his landlord. The landlord apparently settled a tenant, one Mussamut Gangoo, upon the land; she, however, made no defence in the Lower Court.

Both the Courts below have found for the plaintiff to the extent of 616 rupees, or something less than half of what he claimed.

The landlord now appeals specially, on the ground that the Lower Court was wrong in holding him jointly liable for the amount claimed as damages, and that, in any case, he should only be liable for the amount of rent he had received. It appears to us that the Lower Court was perfectly right. The special appellant has been in possession as a wrong-doer from the first. He ejected the special respondent from his land, and forced him into Court to recover possession. Strictly speaking, it seems to us that he, and he alone, should be responsible to the tenant for the damages incurred by him in consequence of that illegal ejection, and that the plaintiff might have elected to sue him alone for those damages without making Mussamut Gangoo a defendant in the suit, as she was placed on the land as a tenant to mask the defendant's possession. It has been found as a fact by both the Lower Courts that the woman Gangoo was a mere person of straw, a nominal tenant only, and that the zemindar was the person who for the two years in question appropriated the profits of these lands.

Under these circumstances, it appears to us that he is the proper person against whom the decree should have been made. As, however, Mussamut Gangoo was made a defendant in the suit, and has been made jointly liable in the decree of the Lower Courts, and has not appealed, there is no necessity for interfering with the Lower Appellate Court's decision in this respect.

The decision of the Lower Appellate Court is affirmed, and this appeal dismissed with costs.

The 30th June 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgagor and mortgagee—Notice of foreclosure—Transfer of rights—Notice of transfer.

Cases Nos. 772 and 773 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 5th January 1869, reversing a decision of the Subordinate Judge of that District, dated the 13th June 1868.

Madhub Thakoor and another (Defendants), *Appellants,*

versus

Jhoonuck Lall Doss (Plaintiff), and another (Defendant), *Respondents.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellants.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondents.

A purchaser from a mortgagor, as one of his legal representatives, is entitled to notice of foreclosure.

A mortgagor is not bound to give notice to his mortgagee of a transfer of his rights.

Glover, J.—This was a suit to recover possession of 201 beegahs of land which had been mortgaged to the plaintiff by Purmessuree Misser and Gridharee Misser, the father and uncle, respectively, of the defendant Shib Dutt Misser, and the usual notice of foreclosure was issued upon Shib Dutt Misser. This defendant (Shib Dutt Misser) admitted the fact of the mortgage; but the plaintiff was opposed in the first Court by four parties (intervenors) who claimed to hold an interest in portions of the land mortgaged, and contended that notice of foreclosure ought to have been served upon them; and not having been so served, the plaintiff could not recover possession.

With two only of the intervening defendants have we to do in this case; the one Madhub Thakoor, who is the special appellant in No. 772, and claims to be in possession of 15 beegahs of that disputed land by purchase from Shib Dutt Misser under a registered kobalah, dated the 29th May 1865; and the other, Mussamut Kukkroo, who claims to be the widow and heir of one of the mortgagors, Purmessuree Misser, and, as such, claims the right to have a notice of foreclosure served upon her as his legal representative.

The first Court considered that the mortgage-deed propounded by the plaintiff was spurious, and dismissed the suit without going into the questions raised by the various defendants, although issues on these points were fixed and evidence taken.

The Judge, on appeal, for various reasons given at length in his judgment, held that the mortgage-deed of the plaintiff was genuine, and that he was entitled to recover under it. His reason for giving the plaintiff a decree as against Madhub Thakoor was that that person's deed of sale was only notified subsequent to the plaintiff's petition for foreclosure; and with regard to Mussamut Kukkroo's rights he passed no decision.

Both these defendants appeal. Madhub Thakoor on the ground, *first*, that the Judge has not met the reasons assigned by the Court of first instance for disbelieving the evidence as to the genuineness of the plaintiff's deed; and, *secondly*, that the Judge has fallen into an error of fact which has considerably influenced his decision, in stating that the special appellant's deed of sale was notified subsequent to the plaintiff's petition of foreclosure. Mussamut Kukkroo makes the same objection with regard to the Judge's finding on the plaintiff's deed of mortgage, and a further objection to the effect that the Judge ought to have sent back the case for an adjudication by the first Court on her plea that she was one of the legal representatives of one of the mortgagors, and therefore entitled to notice of foreclosure.

It will be convenient to take up Mussamut Kukkroo's objection first in order. With regard to the first part of that objection, we find that the Judge has taken notice of the reasons given by the Subordinate Judge for considering the deed of mortgage spurious, and has also given his own reasons for believing the evidence of the witnesses who attested that document, and for considering that the reasons given by the Court below were not sufficient to invalidate it. This, then, is a finding of fact on the evidence on reasonable and sufficient grounds, with which we cannot interfere in special appeal.

With regard to the second objection, we think that the Judge was bound to send back the case as regards Mussamut Kukkroo for adjudication of her plea to the first Court. Her case was that the family of her husband was separate, and that, therefore, on her husband's death, she became his heir, and, as such, succeeded to the equity of redemption on the mortgaged property. If this were proved, it is quite clear that, as one of the mortgagor's legal representatives, she was entitled to notice of foreclosure, and that the plaintiff could not succeed in a suit for possession of the mortgaged property, without giving her such notice, and an opportunity, if she wished to avail herself of it, of redeeming the property, and paying off the mortgage-debt. There was an issue fixed on this point by the Court of first instance, and evidence is said to have been taken. We think that the appeal of the special appellant must be allowed, and that her case must be remanded to the Subordinate Judge for trial on this issue.

With regard to the appeal of Madhub Thakoor, his first objection is the same as the first objection taken by Mussamut Kukkroo—an objection which we have already disposed of. His second objection, however, we think, is well founded. The Judge, in regard to his claim, has decided the case adversely, solely on the ground that his purchase was not notified until after the petition for foreclosure was filed by the plaintiff; but we find, on turning to the record, that, although there was a nominal petition for foreclosure in the year 1862, this petition was altogether infructuous, no notice having been served under it; and the reason given was that the mortgagors were dead, and that the mortgagee had no means of knowing on whom to serve notice. The next petition of foreclosure, which was followed by the service of notice on the defendant, Shib Lall Misser, is dated the 31st July 1866, so that, as Madhub Thakoor's deed of sale is dated the 29th May 1865, and was registered immediately after its execution, it is clear that the sale was notified—meaning by the word notified, published to the world—before there had been any valid application for service of notice on the mortgagors.

But it has been contended by the pleader for the special respondent that the mortgagor, before alienating his interest by private sale to a third party, was bound to give notice to the mortgagee, and also that the mortgagee was not bound to serve any notice upon the purchaser from the mortgagor.

Neither of these objections was urged before the Judge in the Court below, and they are now taken in the nature of a cross-appeal. The Court gave the special respondent's pleader leave to take them as the

pleader for the opposite party made no objection that he was taken by surprise. So we now proceed to dispose of them.

With regard to the contention that the mortgagee was not bound to give notice to a purchaser from the mortgagor, we think that the rulings of this Court in almost every case are opposed to the contention. No doubt, in a judgment quoted, in the case of Kishen Bullub Mahta *versus* Mussamut Balassoo Koer and others, published in Volume III. of the Weekly Reporter, page 231, Mr. Justice Bayley does give a somewhat guarded opinion to the contrary; but this is opposed to several other and later rulings of this Court, and the learned Judge himself admits the point to be one of some doubt and conflict. We have been shown no other ruling in which the law is distinctly laid down that the mortgagee is not bound to give notice to the representative of the mortgagor of his intention to foreclose; whilst in the very same decision Mr. Justice Phear expresses a very clear opinion that he is so bound, except in cases of transfer after the year of grace has commenced. The case of Gobind Mundul *versus* Madhub Ghose lays down much the same rule. And with regard to the other point, that the mortgagor is bound to give notice of a transfer of his rights to his mortgagee, no rulings have been shown to us in support of the contention.

And, further, with regard to the mortgagor's representative being bound to give notice to the mortgagee, in this particular case it is not easy to see how he could have done so, for it was the defendant's case that the plaintiff's deed of mortgage was a colorable transaction executed in fraud of creditors; and moreover, in this case, how was the mortgagor's legal representative to know that a mortgage had been made at all? The mortgage-deed was not registered, nor was there any reason that the defendant should become aware that there was any burthen on the property of which he had purchased a part; whilst, on the other hand, it was a matter of no difficulty for the mortgagee to find out the legal representatives of the mortgagors and to serve notice upon all who, by purchase or otherwise, were then entitled to the equity of redemption, for the deed of purchase was registered, and it has been shown that the purchaser has been in possession of what he bought ever since the date of that purchase.

We think, therefore, that this appeal also must be allowed, and that the case must go back to the Court of first instance, in order that the genuineness or otherwise of the deed of sale under which Madhub Thakoor claims may be established. If the genuineness of that deed be established to the satisfaction of the Court, it will then follow that the mortgagee was bound to give Madhub Thakoor notice of foreclosure, and that, not having done so, his claim to recover possession of the land in suit must fail.

Costs will follow the result.

The 30th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Allegations—Issues.

Case No. 2762 of 1868.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 4th August 1868, reversing a decision of the Moonsiff of Jehanabad, dated the 31st January 1868.

Fukeer Dass Pooroheet (one of the Defendants), *Appellant,*

versus

Gopal Mookerjee (Plaintiff) and others (Defendants), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Anund Gopal Paleet for Respondents.

In a suit to recover a quantity of land alleged to have formed a part of a joint estate which had descended to plaintiff and his brothers, but which was subsequently divided into separate shares:—

HELD that, upon failure of proof of the allegation of partition, plaintiff might obtain relief upon the first allegation, and the Court below was not debarred by law from framing an issue as to whether plaintiff was entitled to recover to the extent of the interest which he had in the land if found to be joint property.

Jackson, J.—THE plaintiff in this case sued to recover possession of 3 beegahs of land. He alleged that the land in question had formed part of about 40 beegahs of land which belonged to the plaintiff's father, and had descended from the father to the plaintiff and his three brothers, though, after the father's death, three brothers disagreed and came to a partition, and divided all the land by metes and bounds into four separate shares; that the 3 beegahs in question formed part of the plaintiff's share, but had been put up to sale in execution of a decree against the widow of one of the plaintiff's brothers, and had been sold as her exclusive property, and purchased by one of the defendants, who got possession, and so ousted the plaintiff. He prayed the Court to enquire into his title, and put him into possession.

The Moonsiff, who tried the suit, found that the allegation of partition was untrue. He held that the plaintiff could not recover except on proof of partition as alleged, and therefore dismissed his suit.

On appeal, the Subordinate Judge framed two issues: *first*, whether the alleged partition had been proved; and, *secondly*, whether, if it appeared, irrespective of the allegations of either party, that the land was, in truth, joint property, the plaintiff might not have a decree to the extent of his share in such property. He found, concurring with the Court below, that the partition was not proved, but he also found that the property was joint. He held that the plaintiff could recover a decree for a one-fourth share therein; and he gave him a decree accordingly.

The objection taken in special appeal before us, which is certainly specious, is that plaintiff has in this way got a decree passed on a state of facts at variance with the allegations, *viz.*, whereas he sued for this land, alleging it to be his separate property, he has got a decree for a portion of it, the land being found to be joint.

I entirely agree so far with the pleader of the special appellant as that, if the plaintiff had described this property as separate and self-acquired, in which no one else had had any interest but himself, he could not recover upon proof that the property was ancestral joint property, and that he was entitled to a share therein. But when the plaintiff discloses that the property was originally joint, and then goes beyond that, and alleges that, by an arrangement between the parties, this particular portion of the land became his own separate share, I think the Court below was not debarred by law from framing an issue as to whether the plaintiff was entitled to recover to the extent of the interest which he had in the land if found to be joint property.

It seems to me that the plaintiff made two allegations: first, that the property had been joint, and in that case he would be entitled to a one-fourth share; and, secondly, that this particular portion had been separate, and that he was entitled to it exclusively. Upon failure of proof of the latter allegation, he might well obtain relief under the first. I think, therefore, there was no error in law in the decision of the Lower Appellate Court, and that the appeal ought to be dismissed with costs.

Markby, J.—I am of the same opinion. I think it is clear from the form given in Section 26 of the Code of Civil Procedure that a plaintiff suing for possession is not bound to set out his title in his plaint. I think there would be considerable hardship if a plaintiff was bound to do so. How far, when a plaintiff does choose to set out his title, the Court, in raising the issues, may allow him to depart from that allegation, is not a question which directly arises in this case. I think it is quite clear that, where the plaintiff seeks to prove facts which, although not consisten

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with the allegations, are consistent with a part of them, the Lower Court cannot be said to have committed an error in law in allowing him to do so, and upon those facts adjudicating in favor of his title.

The 14th May 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Suit for rent—Eviction—Abatement.

Case No. 2815 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 27th June 1868, modifying a decision of the Deputy Collector of that District, dated the 25th April 1867.

Gopanund Jha and others (Defendants), *Appellants*,

versus

Lalla Gobind Pershad (Plaintiff), *Respondent*.

Baboo Khettur Mohun Bose for Appellants.

Baboos Anund Gopal Paleet and *Kalee Kishen Sein* for Respondent.

When a tenant is sued for rent, he can set up eviction by title paramount to that of his lessor, as an answer; and if evicted from part of the land, an apportionment of the rent may take place. The *onus* is on the lessor, who claims to be entitled to an apportionment, to show what is the fair rate of the lands out of which the tenant was not evicted.

Substance of the judgment delivered by the Chief Justice.

In this case there is nothing to show that the two defendants who did not execute the lease were liable for the rent. The decree of the Subordinate Judge in the other suit is not sufficient in this suit to show that they were liable. In the other suit, the plaintiff sued to declare that the lease had never been granted. The defendant, who is now said to have executed the lease, declared that it was granted to him, and that he was the sole person interested in the lands. The other two defendants said that they had nothing to do with the lease, and therefore ought not to have been made defendants. So that everybody agreed in that suit that these two defendants had no interest in the land; and yet it was decided by the Subordinate Judge that they had an interest, and that decision, which was contrary to the contention of all parties to the suit, is now said to be evidence against the two defendants that they had an interest, and to prove that they were jointly interested with the defendant who executed and jointly liable for the rent.

As to the other part of the case, it appears that the defendant who executed was evicted from two mouzahs under a decree by a person claiming from the lessor's brother, in a suit in which the lessor as well as the lessee were made parties. Having been evicted in a suit in which the lessor was a party, and in which it was decided that he had no title, it is said that the tenant is to pay just the same rent as if he had not been evicted at all. If that doctrine were carried out to its full extent, if the tenant had been evicted from the whole of the lands comprised in the pottah, he would still be liable to pay the whole rent without getting anything for it. This shows that the doctrine is not tenable.

It is said that the tenant ought to have sued for abatement of rent under Section 18 of Act X. of 1859; but what would have been the case if he had been evicted from the whole of the lands? He could not have sued for an abatement of rent then. It is clear that, when he was sued for rent, he could set up the eviction by title paramount as an answer.

According to English law, "If the lands "demised be evicted from the tenant, or re-"covered by a title paramount, the lessee "is discharged from the payment of the "rent from the time of such eviction," and if he is evicted from part, the rent is to be diminished in proportion to the land evicted. It is laid down in Bacon's Abridgment, Tit. Rent (M): "Where a lessor enters "forcibly into part of the land, there are "variety of opinions whether the entire "rent shall not be suspended during the "continuance of such tortious entry, and "it seems to be the better opinion and the "settled law at this day that the tenant "is discharged from the payment of the "whole rent till he be restored to the whole "possession, that no man may be encour-"aged to injure or disturb his tenant in "his possession, whom, by the policy of "the law, he ought to protect and defend;"

and it has been held that, when a lessee is evicted by title paramount to that of his lessor, an apportionment of rent may take place in an action brought for the rent.

It appears to me that the *onus* is on the lessor, who claims to be entitled to an apportionment to show what is the fair rate of the lands out of which the tenant was not evicted. But the Additional Judge held that, as the defendant did not show what was the rent in respect of the lands left in the possession of the tenant, a decree should be given against him for the whole rent. That does not appear to me to be consistent with justice.

It is unnecessary, however, in this case to decide whether, in a case of eviction of part of the lands demised, the *onus* lies on the lessor or upon the tenant to show what is the fair rent to be paid for the portion remaining in the tenant's occupation, inasmuch as there is evidence in this case from which the amount which ought fairly to be deducted from the full amount of rent in consequence of the eviction of the two mouzahs can be ascertained. The *dowl* under which the lease was granted appears to have been put in evidence, and from that it appears that, after paying all the out-goings, there was a profit of 636 rupees to be divided between the landlord and the tenant. Of that sum, 500 rupees were to go to the landlord for rent, and 136 rupees were to go to the tenant. In arriving at the sum of 636 rupees as the amount of profit of the whole of the lands, the amount derived from the two mouzahs from which the tenant was evicted was specified, and therefore it is a mere matter of calculation to ascertain what portion of the whole rent ought to be deducted, having reference to the proportion which 136 rupees bore to the whole amount of 636 rupees.

The decree of the Lower Courts is reversed, and we declare that the two defendants who did not sign the lease are not liable at all, and that the suit be dismissed as against them with costs in both the Lower Courts and the costs of this appeal; and we declare that the plaintiff, who collected rents from the ryots for 1271 and 1272, on the ground that the lease to the defendant was not binding upon him, is not entitled to recover any rent in respect of those years. As regards the rent for 1273, after defendant had been restored to possession, we think that the plaintiff is entitled to recover, deducting a fair proportion of the total amount in respect of the two mouzahs from which the defendants were evicted by title paramount. Instead of remanding the case for the purpose of ascertaining the amount to be deducted, this Court has, with the consent of the pleaders for both parties, taken the account itself, and declares that the plaintiff is entitled to a decree for 172 rupees in respect of the rent for 1273.

The plaintiff will restore the defendant Gridharee Jha to the lands and all things which he has lost by reason of the execution of the decree of the Deputy Collector and that of the Appellate Court, if the same have been executed. The amount, if any, which may be found due to the last-named defendant and the amount found due to the plaintiff from the defendant Gridharee Jha under this decree to be set off against each other, and execution to issue for the balance which upon such set-off may be found due to either party.

The plaintiff and the defendant who executed the pottah will have costs in all the Courts in proportion to the amounts decreed and disallowed.

The 10th June 1869.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Lease—Ryots with rights of occupancy—Zemindar's rights.

Case No. 2252 of 1868.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 23rd May 1868, reversing a decision of the Sudder Moonsiff of that District, dated the 9th April 1867.

Jumeer Gazee and another (Plaintiffs), *Appellants,*

versus

Goneye Mundul and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

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Baboo Obhoy Churn Bose for Respondents.

A tenant having a right of occupancy can create a lease, and the lessee from him is entitled to hold the lands under the terms of the lease, the zemindar being entitled to nothing but the rent which the ryot who holds from him immediately has agreed to pay.

Even if the zemindar thinks the ryot has absconded, he has no right to enter on the land without the assistance of the law.

Loch, J.—We think the judgment of the Lower Court must be reversed. The plaintiffs state that they obtained a lease from Jaker Gazee and Bazee Bewah, who are ryots having a right of occupancy; that they have been ousted by the defendants; and that they now seek to recover possession under the terms of their lease.

The Judge has reversed the order of the first Court apparently on the ground that the lessors of the plaintiffs were not entitled to grant them a lease; that such a lease would be a transfer of their rights; that it has been held by a Full Bench* of this Court that a right of occupancy does not make a jote transferable, if otherwise not so. He further held that, as the former ryots, lessors of the plaintiffs, had left the land, the defendants zemindars were entitled to enter upon it as ruled by a Division Bench of this Court in the case of Joykishto Mookerjee, 5 Weekly Reporter, page 147.

We think the Full Bench ruling quoted by the Judge is quite inapplicable to this case. That related to the sale of a tenure in which the tenant had merely acquired a right of occupancy, and the Court then held that a mere fact of occupation for 12 years would not alter the nature of that jote, and would not make transferable what was not so in its origin. But it is evident from the terms of Section 9, Act X. of 1859, and from judgments of this Court (one of which, reported at page 351, Volume IX., Weekly Reporter, has been quoted to us by the respondent), that a tenant having a right of occupancy can create a lease, and that the lessee from him is entitled to hold the lands under the terms of the lease. If, therefore, the zemindar who is entitled to receive the rents of the land from the ryots having a right of occupancy do eject their lessees, there can be no doubt that such lessees have a right to recover possession under the terms of their lease, the zemindar being entitled to nothing but the amounts of rent which the ryots who hold from him immediately have agreed to pay.

But it is said that the tenant lessors in this case had absconded. Even supposing they did, that would not give the zemindar a right to take possession without the intervention of law. The mere fact of a man taking his house from one village and going to another is no proof of his having absconded and given up the land, nor would such an act on his part entitle the zemindar to treat this land as if deserted, and allow him to enter into possession of it. But it is clear in this case that there was no such abandonment. In the month of Pous, the lessors, after giving a lease to the plaintiffs in this case, left the village; and in the month of Falgoon following the zemindar ousted the plaintiffs, alleging that their lessors had absconded. If he thought that they had absconded, and arrears of rent were due to him, he should have brought a suit for arrears of rent, and so terminated the tenure of the lessors. But he has no right to enter into the land without the assistance of law.

The judgment quoted by the Judge from 5 Weekly Reporter is not applicable to this case.

On the whole, we think that the judgment of the Court below must be reversed, and a decree given to the special appellant with costs of all the Courts.

* 7 W. R. 528.

The 1st July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Enhancement of rent—Appellate Court's duty.

Case No. 52 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 10th September 1868, affirming a decision of the Assistant Collector of that District, dated the 9th September 1867.

Rungo Monee Dossee (Defendant), *Appellant,*

versus

Mr. W. Campbell (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Mr. R. T. Allan for Respondent.

In an appeal from a decree for enhancement of rent, where the Lower Court found that the defendant had failed to give evidence of non-liability: Held that it

should have inquired whether the rates assessed by the first Court were proper and such as plaintiff would be entitled to have under Section 17, Act X., 1859.

Loch, J.—THIS is one of a number of cases which we have found it necessary to remand for further investigation. It is perhaps doubtful whether, looking at this case by itself, we ought to remand it. But we do remand it as it is intimately connected with the other cases, and the point now taken in appeal is of vital importance to the appellant. It appears that the Lower Court held that the defendant, special appellant, had failed to give any evidence to support the allegation that the tenure which he held was one not liable to enhancement. But the Court, after disposing of this point, should have gone further and enquired whether the rates assessed by the first Court were proper, and were such as the plaintiff would be entitled to have under the provisions of Section 17, Act X. of 1859. We find that in the petition of appeal to the Judge the objection as to the rates was very clearly taken; but the case was disposed of by the Judge without reference to that ground of appeal. It is urged before us by the respondent that that ground was not pressed before the Judge, and that, if it had been, no doubt, in the application for review of his judgment, reference to the absence of any decision on the point of rates would have been made as one of the grounds for review.

We remand the case to the Judge for a finding with regard to the rates. We shall, however, make no order as to costs at present, excepting this that, if the special appellant fails to make out his case, he must pay the costs of the respondent in this special appeal.

The 1st July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Remand—New trial—Notice of enhancement—Section 51, Regulation VIII., 1793.

Case No. 3197 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 3rd September 1868, affirming a decision of the Assistant Collector of Jamalpore, dated the 30th April 1868.

Tarinee Kant Lahoree (Plaintiff), *Appellant,*

versus

Koonj Beharee Awustee and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Nuleet Chunder Sein* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

The effect of an order of remand for a new trial is entirely to nullify the first decision, and to re-open the whole case.

Section 51, Regulation VIII. of 1793 (looked at with Sections 13 and 15, Act X., 1859), does not require any notice, in the case of a dependant talookdar, preliminary to a claim for enhancement of rent; but in order to succeed in a suit under that Section, plaintiff must show that he is about to enhance on one of the three grounds therein mentioned.

Jackson, J.—THIS case has been before the Court once before, and the judgment given on the last occasion is to be found in 8 Weekly Reporter, p. 285. Upon the remand, the Assistant Collector was of opinion that the talook which the defendant held was one of which the enhancement could only take place under the circumstances stated in Section 51, Regulation VIII. of 1793. He therefore refused enhancement, and gave plaintiff a decree for rent at a rate which had been fixed by a previous decision between the parties in the year 1862.

Upon appeal to the Judge, he was of opinion that there had been no notice at all served upon the defendant in conformity with Section 51, or that such notice did not contain the particulars required by that Section. He, therefore, dismissed the entire suit of the plaintiff.

It is contended that the decision of the Judge is erroneous. Two points have been laid before us upon that question. The first is that, on the previous trial, the then Zillah Judge had held that the notice served on the defendants was sufficient; that the matter opened before us in the previous special appeal did not touch the question of notice; that the plaintiff, therefore, was entitled to the benefit of that decision of the Judge, and that, in fact, the question of notice had been finally disposed of.

This, it appears to me, is a mistake. The effect of our decision, that is, the decision of Mr. Justice Hobhouse and myself, on the former occasion, was to get rid entirely of

the first decision of the Zillah Judge. The case went back for a new trial between the plaintiff and all the defendants, and the whole case was re-opened.

It was next urged that the notice, in fact, was sufficient. I do not find, looking at Section 51, Regulation VIII. of 1793, and at Sections 13 and 15, Act X. of 1859, that any notice is required in the case of a dependant talookdar, preliminary to the claim for enhancement. However that may be, it would be obviously fair and just, in the interests of the talookdar, that there should be notice; and if the pleader for the special appellant had been able to make up his mind to-day as to which of the grounds specified in Section 51, plaintiff had intended to rely upon, or been able to find it in the notice, we would have been glad to give him the benefit of the discovery. But, on consideration, it is admitted, and, I think, very properly and candidly admitted, that there is no such ground specified in the notice or in the plaint.

Under these circumstances, I think we cannot but find that the Judge was right on the question of notice, and that, in point of fact, the plaintiff, no doubt, through a mistaken notion that Section 13 applied to the case, did not proceed under the provision of Section 51; and that, consequently, he could not succeed in this suit as a suit for enhancement. I think, therefore, that the decision of the Zillah Judge must be affirmed with costs.

Markby, J.—I am entirely of the same opinion. The plaintiff evidently commenced this suit under a misconception that he was proceeding under Section 13, Act X. of 1859, and he stated his desire to enhance this tenure upon certain grounds. It appears now that he cannot proceed under Act X., and in order to succeed in this suit, he must show that he was about to enhance under one of the three grounds mentioned in Section 51, Regulation VIII. of 1793. He has nowhere up to this point shown any one of these grounds, and there is nothing at all on which a Court can determine whether or no he is entitled to enhancement. I think, therefore, his claim to enhance under this notice was rightly dismissed.

The 2nd July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Indigo-advances—Re-payment—Debts and credits.

Case No. 526 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 14th December 1868, reversing a decision of the Subordinate Judge of that District, dated the 24th April 1868.

Mr. F. Perroux (one of the Defendants), *Appellant,*

versus

Rae Luchmeeput Singh and others (Plaintiffs), *Respondents.*

Baboos Ashootosh Chatterjee and *Nilmadhub Bose* for Appellant.

Baboos Rash Beharee Ghose and *Sreenath Doss* for Respondents.

In a suit to recover advances made to defendant to carry on an indigo-factory under a *karbar-namah*, in which it was agreed that the advances should first be repaid out of the profits realized from the manufacture —where it was found that the sale of the indigo had yielded more than the amount advanced, but had been credited by plaintiff to old debts owing him by defendant's father instead of to defendant's personal debt:

HELD that, as plaintiff had violated the terms of the agreement, and the attempt to make defendant personally liable seems not to have been made in good faith, the suit could not be allowed to proceed against defendant as the representative of his father.

Jackson, J.—THE plaintiff, Rae Luchmeeput Singh, has brought this suit against Mr. F. Perroux, son of the late Mr. C. Perroux, to recover the sum of Rupees 3,000, which he alleges that he advanced to Mr. F. Perroux.

The answer of the defendant is that the money was received by him in order to carry on a certain indigo-factory in which both Rae Luchmeeput Singh and Mr. C. Perroux had shares; and that the agreement, in accordance with which this money was taken, was that the advances should be repaid out of the profits realized from the manufactured indigo.

The defendant states that the plaintiff might and ought to have deducted his 3,000 rupees from the profits of that year, and

that he has no right to sue him personally for this money.

The Judge in the Lower Appellate Court seems to have held that this money was advanced to Mr. F. Perroux personally, and not under the terms of the *karbar-namah*, and he has accordingly held Mr. F. Perroux liable to repay that sum.

There seems to be, no doubt, that the Judge has taken an altogether wrong view of the case. The money was undoubtedly advanced on the terms of the *karbar-namah*. A copy of the letter asking for the advance is put in, and that letter distinctly refers to the *karbar-namah*, and asks that the advance should be made in accordance with the provisions contained in it.

There is no allegation that the money was given under any other arrangements or for any other reason, or for the personal purposes of the defendant; and, as we understand, there is no attempt to show that the money was not used for the manufacture of indigo. It is also admitted that a large quantity of indigo was turned out in that year, and that a sum much beyond Rupees 3,000 was obtained by the sale of it. The whole amount so realized was taken by the plaintiff Rae Luchmeeput Singh, and, without any deduction of the 3,000 rupees advanced to defendant, F. Perroux, credited to some old debts of the defendant's father, C. Perroux.

The respondent's vakeel has argued before us that, as the plaintiff has given this credit to the old debts due by the father, the suit may be allowed to proceed against F. Perroux as the representative of his father.

The suit, however, was not brought against F. Perroux as any such representative, and it seems not to have been brought in good faith, because it seeks to have F. Perroux declared personally liable for a sum of money for which he is in no way liable. It distinctly violates the terms of the *karbar-namah* under which the money was borrowed, and in which it is distinctly stated that the advances should first be paid out of the profits, and that only the balance of the money should be used to wipe off the old debts of Mr. C. Perroux.

Under these circumstances, we think the plaintiff's suit ought to be dismissed altogether. We, therefore, reverse the decision of the Judge, and dismiss the plaintiff's suit with all costs in all the Courts.

The 2nd July 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Misjoinder — Jurisdiction — Double mortgages —Marshalling of securities.

Case No. 247 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 31st July 1868.

Khetoosee Cherooria (Defendant). *Appellant,*

versus

Banee Madhub Doss (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Kalee Mohun Doss for Respondent.

In a suit to establish a claim against three properties mortgaged to plaintiff but situate in different districts, where one of the defendants (the appellant to the High Court) was interested in that only which lay in the district of Moorshedabad:

HELD that causes of action against different defendants had been mixed up in the same suit contrary to the provisions of Section 12, Act VIII., 1859; but as the cause of action against the appellant was one which the Subordinate Judge of Moorshedabad was legally competent to try without the permission of the High Court, the appellant could not object to that Judge having tried it.

The appellant having asked that plaintiff might be compelled to resort first to the two other properties for the satisfaction of his demand before touching the third, but having given no evidence to show that he was a *bond-fide* subsequent mortgagee without notice of the prior mortgage, the Court declined to accede to the prayer lest they should be prejudicing the plaintiff's rights, or improperly controlling his remedies.

Quære.—Should the doctrine of marshalling of securities be introduced into this country?

Mitter, J.—THE three following points have been urged before us in this appeal:—

1st.—That a portion of the properties in dispute being situated in the district of Beerbhoom, the Subordinate Judge of Moorshedabad had no jurisdiction to try the case without obtaining the permission of the High Court in the manner provided for in the 12th Section of the Code of Civil Procedure.

2ndly.—That the mortgage upon which the plaintiff's claim is based is a fraudulent and collusive transaction.

3rdly.—That the plaintiff having got a mortgage upon three different estates, and the mortgage held by the appellant extending to one of them only, the plaintiff ought to be compelled to resort to the two other properties for the satisfaction of his demand, before he can touch the third, which is the only property available to the appellant.

With reference to the first point, we are of opinion that the Section relied upon by the appellant is not applicable to the present case. It is admitted that the appellant is interested in one only of the three properties included in the suit; and it is also admitted that that particular property is situated in the district of Moorshedabad. The appellant has nothing whatever to do with the two other properties which are situated in the district of Beerbhoom, and the only party interested in them was the defendant Huree Mohun Ghose, who is satisfied with the decree of the Lower Court as it stands. The plaintiff, therefore, had no cause of action against the appellant in respect of those two properties, and it is consequently clear that two different causes of action against two different defendants have been mixed up together in one and the same suit, which the plaintiff had no right to do under the provisions of the Code.

Section 12 is not applicable to a suit of this description. That Section is applicable to cases which are properly brought under the Code, *i. e.*, to cases in which the same defendant or the same set of defendants are sued upon one or different causes of action, in which they are all concerned. But as the cause of action against the appellant was one which the Subordinate Judge of Moorshedabad was legally competent to try without asking for the permission of the High Court, the appellant can have no reasonable objection against the suit having been tried by that Officer so far as he himself is concerned. Whether a suit for the enforcement of a mortgage-lien is a "*suit for land*" within the meaning of Section 5, and whether, therefore, the Subordinate Judge of Moorshedabad had jurisdiction to try this suit so far as it relates to the properties situated in the district of Beerbhoom, are questions which it is not necessary for us to decide, as the only party interested in that part of the suit, and the only one, therefore, who could raise those questions, has preferred no complaint against the proceedings held in the Court below.

It has been contended that the suit ought to be dismissed for misjoinder of parties; but as this objection was not taken in the Court below, and as it is one which does not affect the merits of the case, or the jurisdiction of the Court, so far as the cause of action against the appellant is concerned, we decline to entertain it at this late stage of the proceedings.

With reference to the second point, we are of opinion that the conclusion arrived at by the Subordinate Judge is correct. We have gone through the evidence on the record, and we are clearly of opinion that the mortgage-deed relied upon by the plaintiff is a genuine and *bonâ-fide* instrument. No counter-evidence of any kind has been produced by the appellant, and the very khatta-books of Rajah Protap Chunder Singh, upon which so much stress was laid before us by the learned Counsel who appeared on his behalf, clearly go to show that the objection is utterly devoid of any foundation.

With reference to the third point, we observe in the first place that it was never mooted in the Court below. The mortgage-deed of the plaintiff was duly registered under the law, and the appellant has given no evidence to show that he is a *bonâ-fide* subsequent mortgagee without notice of the prior mortgage held by the plaintiff. We are not quite sure as to how far we should be justified in introducing into this country the doctrine of marshalling of securities administered by an English Court of Equity, and thereby to interfere with the legal rights of parties. But it is clear that even an English Court of Equity would not apply the principle contended for by the appellant without being satisfied "that it "will not trench upon the rights, or operate "to the prejudice, of the party entitled to "the double fund."—*See* Story's Equity Jurisprudence, Section 633.

The objection, as already observed, was not taken in the Court below, and consequently we have no materials before us from which we can judge whether, by acceding to the prayer of the appellant, we should be prejudicing the rights of the plaintiff, or improperly controlling his remedies. We know nothing about the value of any of the properties covered by the plaintiff's deed, and we are equally ignorant as to whether any person is interested in any of them by virtue of a prior or subsequent mortgage. Suppose that a third person is interested in the two properties not covered by the appellant's deed, by virtue of a mortgage subsequent in date to that of plaintiff—by compelling the plaintiff to resort to those two properties in the first instance, and thereby throwing upon them the whole burden of his demand, we might be doing a serious injury to such third person for the benefit of the appellant. Suppose, also, that those two properties are held in mortgage by another

creditor whose deed is of a prior date to that of the plaintiff, and suppose, further, that their total value is barely sufficient to cover the amount due to such other creditor; if the plaintiff were driven to the necessity of following those properties in the first instance, he might be plunged into a long, tedious, and expensive litigation without there being the slightest chance of his ultimately deriving any benefit from such litigation. As matters stand at present, we are completely in the dark, and we cannot, under such circumstances, allow an objection which is now taken before us for the first time.

We dismiss this appeal with costs.

The 3rd July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent—Accounts—Limitation—Section 33, Act X., 1859.

Case No. 385 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 20th November 1868, affirming a decision of the Deputy Collector of that District, dated the 18th May 1868.

Mr. William Biddell (Plaintiff), *Appellant,*

versus

Chutterdharee Lall and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Mr. R. E. Twidale and *Baboos Mohesh Chunder Chowdhry* and *Hem Chunder Banerjee* for Respondents.

In a suit by the manager of a factory to recover from a surety certain sums collected as rents by a deceased putwaree, in which suit the defendant pleaded limitation:

HELD that plaintiff was not entitled to reckon the year which the law gave him to bring the suit, from the date on which he acquired from the surety information of the state of his accounts. If a person's ignorance of the state of his accounts is owing to his own negligence, he can claim no benefit under Section 33, Act X., 1859.

Glover, J.—THIS was a suit by the manager of the Bikrampore Indigo Factory to recover certain sums collected as rent during the years 1271 and 1272 F. S. He sued the defendant Chutterdharee in two capacities: in one as security for Dabee Churn, a former putwaree of the factory (who died in the year 1272), for collections of the year 1271; and, secondly, for collections which he (Chutterdharee) himself had made as putwaree in the year 1272. Both the Lower Courts considered that, with regard to the sum claimed for the year 1271, Section 33 of Act X. of 1859 barred the plaintiff's suit, and with regard to the amount claimed for the year 1272, that the defendant Chutterdharee has not been proved to have acted as the plaintiff's putwaree.

The points taken in special appeal are, *first*, that the plaintiff only got information of the state of his accounts as left by the putwaree Dabee Churn, when his surety, the present defendant, made up his accounts and gave them to him, and that consequently he is entitled to count the year which the law gives him to bring his suit from the date on which he acquired the information; *secondly*, that the finding of the Lower Appellate Court as to Chutterdharee not being putwaree in the year 1272 is founded on a defective consideration of the evidence, and ought to be set aside.

With regard to the first point, we have been referred to a case published in the 3rd Volume, Weekly Reporter, page 121, and to another case to be found in Volume VI., Weekly Reporter, page 30. Neither of these cases appears to us to be in point. In the first case, there was a question of fraud involved, and the Judges held that the party suing was bound to bring his suit within a year from the time at which he first became aware that a fraud had been committed. In this case, there was no fraud; it is not alleged that the accounts are made up in a fraudulent manner, nor is it said that Chutterdharee from fraudulent motives kept back the accounts from the plaintiff's knowledge until the plaintiff became aware of the omission. In the other case, reported in Volume VI., the accounts were called for by an order from the Court, and it was held that the filing of those accounts under that order was the first intimation that the plaintiff had of these accounts, and that his time for suing counted from that period. That is a very different case from the present one, and we do not see how the judgment in that case can apply to this case. What must be shown, in order to give the plaintiff the time which he wants

in order to save his claim from the bar of limitation, is that the accounts on which he now sues were kept back from his knowledge by fraud. The words of the Section are clear. They say that, if a person having a right to sue shall, by *means of fraud*, have been kept from the knowledge of the receipt of any money by the agent, or if any *fraudulent account* shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person. As we before remarked, there is no allegation of fraud in this case, and if the plaintiff had chosen to have the accounts of his late putwaree made up sooner, there was nothing to prevent him from having them so made up. Instead of doing that, he waits until the surety, who, we may remark, has not been shown to have been obliged to render any accounts at all, makes up these accounts for a different purpose, that is, to show that he was not liable to make good any deficit; and he then dates his cause of action from the date on which these accounts are rendered to him. The law provides for no such case. If a person chose, through his own negligence, to remain in ignorance for an indefinite period of the state of his accounts with his putwaree, or even through some accident or misfortune, such as his leaving the country, or such like, he can claim no benefit under this Section. Under the circumstances, therefore, we think that the Judge was right in holding that the cause of action arose when the agency ceased, that is to say, from Dabee Churn's death.

With regard to the second objection, we find that the Judge disposed of this question on the evidence. There was evidence taken both for the plaintiff and defendant; and the defendant's evidence was to the effect that Chutterdharee was a proprietor himself holding lands in various mouzahs, which lands he at various times leased out to the factory, and the Judge held that it was not, therefore, probable that he would have accepted the subordinate position of putwaree to the factory. Both the Lower Courts, taking this evidence into consideration, together with the other evidence in the case, found that the defendant was not liable; and as this is a finding on a question of fact on the evidence, there is no interference possible in special appeal.

The special appeal is, therefore, dismissed with costs.

The 3rd July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Suit by Receiver—Error of form—Estoppel—Section 2, Act VIII., 1859—Benamee possession—Cause of action.

Case No. 238 of 1868.

Regular Appeal from a decision passed by the Additional Judge of Hooghly, dated the 24th June 1858.

Juggunnath Pershad Dutt (one of the Defendants), *Appellant,*

versus

Mr. C. S. Hogg and others (Plaintiffs), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboo Ashootosh Dhur for Respondents.

Where the Receiver of an estate appointed by the High Court in its original side received permission to bring a suit on behalf of the parties interested in the estate, and brought the suit in his own name, it was held that, though the frame of the suit was erroneous, yet the error being one of form only, and no objection on the ground of that error having been taken in the Court below, such objection could not be allowed to prevail in the Court of appeal, which might amend the proceedings without consent of the parties interested or further notice of appeal.

A previous decision against one member of a family suing to recover his own share of certain property is no bar, under Section 2, Act VIII., 1859, to a suit by the Receiver in the name of the whole family to recover the whole property.

Where the property belonging to one family is conveyed to another by a deed of such a nature as secures the continuance of the profits to the former, the possession by the latter must be held to be on behalf of the former until by some unequivocal act they show a distinct intention to hold on their own behalf.

Markby, J.—This was a suit to recover possession of a putnee talook, Turruf Newa Bellia. The suit was brought in the name of Charles Swinton Hogg, as Receiver of the estate of the late Juggut Doollub Bose on behalf of Bhoobunessuree Dassee, widow of the late Tarinee Churn Bose, the first son of the aforesaid Juggut Doollub Bose, and of Radhanath Bose and Gopeenath Bose, sons of Mothoor Mohun Bose, a dumb idiot, the second son of the said Juggut Doollub.

When the appeal came on before us, an objection was at once taken that Mr. Hogg could not sue to recover this property at all, and certainly not in his own name. The result of our own search into the matter (for Mr. Hogg's representatives seemed quite ignorant of the powers under which he was acting), is that we find Mr. Hogg

was appointed Receiver of the moveable and immoveable estate of the late Juggut Doollub under a decree of this Court in its original jurisdiction of the 19th May 1865, in a suit brought by Bhoobunessuree Dassee to establish her claim to a share of Juggut Doollub's property, and for a partition thereof, and the parties to that suit were ordered to give up possession to the Receiver of all the property, moveable and immoveable, belonging to the estate of the late Juggut Doollub. One Ram Narain Dutt was also made a defendant in this suit, and he was ordered to account to the Receiver for all the property belonging to the late Juggut Doollub, which had come to his hands. Shortly after, the Receiver, considering that the family of Juggut Doollub had a claim to the property now in dispute, which was claimed by the representatives of Ram Narain Dutt, and was in the hands of their tenant, applied to this Court on the original side for permission to bring this suit, which was granted, and it was directed that he should be at liberty to use the names of all necessary parties for that purpose.

As soon as these very simple facts were discovered, it was clear that, though the frame of the suit was incorrect, as being in Mr. Hogg's own name, yet, inasmuch as the Receiver had full power to institute this suit, the error was one of form only; and no objection on this ground having been taken in the Court below, we think we ought not to allow it to prevail in the Court of appeal. We, therefore, amend the proceedings by substituting Bhoobunessuree Dassee, Radhanath Ghose, and Gopeenath Bose as plaintiffs. We do not consider that we require any consent from those persons, or that any further notice of appeal is necessary. The Receiver is before us, and by the order of this Court on its original side, he fully represents those persons, and they are bound to allow the Receiver to use their names for the purposes of this suit.

Another objection was taken below, and has been taken here, that Radhanath Bose was debarred from recovering in this suit by reason of a decision of the Principal Sudder Ameen of Hooghly in 1862, by which Radhanath's claim to this very same property was dismissed on the ground that his father, Mothoor Mohun, was alive, and was not excluded from inheritance by any physical defect. It is contended that this decision is final under Section 2 of the Code of Civil Procedure, but we do not think so. It certainly could not be conclusive as against any of the other parties, plaintiffs in this suit, and, in fact, the issue there raised was not technically the same as in this suit. There Radhanath was suing to recover his own share. Here the Receiver is suing in the name of the whole family to recover the whole property. As to the actual fact of Mothoor Mohun's incapacity, of which no evidence either way was given in this case, we think we ought not, after the decree of this Court of 1865, by which Mothoor Mohun is expressly excluded from a share, and is declared entitled to maintenance only, to question the title of his sons to the share which would have otherwise belonged to their father.

Upon the merits we think we ought not to disturb the decision of the Court below. The facts are these. The plaintiffs belong to a family of the name of Bose, and the defendant, who is respondent in this appeal, to a family of Dutts. These two families were on intimate terms, and had intermarried. The putnee in question was granted by one Ram Mohun Dutt to Juggut Doollub Bose nearly sixty years ago. It is admitted that from the year 1237 the property has been in the possession of the Dutts, *i. e.*, Kali Pershad Dutt, Chundee Churn Dutt, and the defendant-respondent Juggunnath Pershad Dutt; and the defendant having set up a defence under the Statute of Limitations, the Judge of the Zillah Court has very rightly said that the question to be tried is whether this was a possession by the Dutts on their own behalf, or, as the plaintiffs say, a possession by the Dutts as representatives of the family of Bose. Upon this point, a witness, whose evidence is, in the Judge's opinion, unquestionable, Ramsagur Mitter, has stated that the property was conveyed by Juggut Doollub Bose to Kali Pershad Dutt in 1237, upon the occasion of the failure of the house of Palmer and Co. of Calcutta in that year. Juggut Doollub Bose was an assistant to the Cashier of that firm, and seemed to be under same vague apprehension that he would be made liable for the debts of his employers. But this witness proves that the profits still continued to go into the hands of Ramnarain Dutt, who applied them on behalf of the Boses. It is not very clearly stated what the nature of the transactions between Ramnarain and the Boses was, nor is it very important to ascertain them. The decree for an account which the Boses obtained against Ramnarain shows that there were such transactions, and supports this witness's statement. The possession of the Dutts was,

therefore, as the plaintiffs state, *originally* on behalf of the Bose family, and it would so continue until by some unequivocal act they had shown a distinct intention to hold the property on their own behalf. When this was done, and not until this was done, the plaintiffs would have a cause of action against them. Since 1860, the Dutts have undoubtedly claimed to hold this property as their own, but there is general evidence, wholly uncontradicted by the defendants, that the same state of things which Ramsagur Mitter speaks to positively as existing at an early period, continued up to that date, that is to say, that the profits of the talook went into the hands of Ramnarain, and were applied for the benefit of the Boses. The Judge of the Court below has considered this evidence sufficient; and adverting to the circumstances under which the defendants came into possession, we think that he was quite justified in coming to the conclusion that the plaintiffs were not dispossessed, and therefore that the cause of action did not arise until 1860.

This disposes of the question of limitation, and, in reality, of the whole case. The defendants produced no evidence of an actual conveyance to themselves for their own benefit, which would bear comparison with that of the witnesses for the plaintiff, that the transaction was what is called a benamee one, and that the Boses continued to be the real owners.

It was argued that the plaintiffs, having admitted a nominal conveyance to Kali Pershad, could not now contend that that was a conveyance intended to defeat creditors. We are not sure that, as between Juggut Doollub and Kali Pershad's heirs, this argument would prevail, even if it were well founded in point of fact. But we do not think we should be justified on the materials before us in treating the conveyance by Juggut Doollub to Kali Pershad as a fraud.

Upon all points, we think the appeal fails, and that it should be dismissed with costs.

The 3rd July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Certificates under Acts XL. of 1858 and XXVII. of 1860.

Cases Nos. 198 and 199 of 1869.

Miscellaneous Appeals from an order passed by the Judge of Patna, dated the 17th February 1868.

Mussamut Oomrao Doolhaen, *Appellant,*

versus

Syud Aga Meer, *Respondent.*

Mr. C. Gregory and *Moonshee Mahomed Yusuff* for Appellant.

No one for Respondent.

Where the grandmother of minors applied for certificates under Acts XL. of 1858 and XXVII. of 1860, the father consenting and approving, it was held that there was nothing in the law to prevent the certificates being granted, if the applicant was competent and willing to take them.

Glover, J.—These are applications by one Mussamut Oomrao Doolhaen, the grandmother of three children, aged respectively 12, 10, and 8 years, for certificates under Act XL. of 1858 and Act XXVII. of 1860, on the ground that the father of these children is unable and unwilling to take proper care either of them or of their property; that the children have been brought up all along in her house; and that their mother has left certain property which the children have inherited, and which it is necessary to secure and to place under proper care.

The father of the children appeared in Court and raised no objection to the grant of a certificate to the grandmother. On the contrary, he rather favored her application, by stating that the nature of his duties and occupations prevented him from being stationary in one place for any length of time, and that he had neither the means nor the opportunity of looking after his children properly.

The Judge refused the application, on the ground that the father, while alive, was the natural guardian of his children, and could not be relieved of his duties by the Court, and that no certificate could be given to any one else so long as the father was alive.

It appears to us that there is nothing in the law to prevent the granting of a certificate during the lifetime of the father of the minors, to any other person competent and willing to take it.

Section 3 of Act XL. of 1858 lays it down distinctly that any person who may have a right to take charge of property in trust for a minor under a will or deed, or by reason of nearness of kin or otherwise, can make an application.

In this case, the applicant is the grandmother of the minor children, and the father objects to taking the responsibility of the children upon himself.

It is very true that the father cannot get rid of his responsibility to provide for his children, but there is nothing in the Act to prevent a certificate being given to any other person who, by nearness of kin or other sufficient cause, may be considered likely to make a proper guardian.

Under the circumstances, therefore, we see no objection to a certificate being granted to Mussamut Oomrao Doolhaen under Act XL. of 1858, and it follows almost as a matter of course that there can be none to the granting of a certificate under Act XXVII. of 1860. There appears to be some little property which has been left by the mother of the minors, which it is necessary to secure by the grant of a certificate, and in this case as in the other the father approves of the grandmother as the proper person to whom the certificate should be granted.

The Judge's order is reversed, but without costs, as no one appears for the other side.

The 5th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Plaint—Issues.

Case No. 849 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 9th January 1869, reversing a decision of the Subordinate Judge of that District, dated the 15th June 1868.

Chutturdharee Lall and others (Plaintiffs), *Appellants,*

versus

Mussamut Parbutty Kowar and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Chunder Madhub Ghose* for Appellants.

Baboos Romesh Chunder Mitter and *Khettur Mohun Mookerjee* for Respondents.

In a suit for recovery of possession of a share of an estate, on the ground that the property had belonged to a widow, and that plaintiffs were her adopted children:

HELD that there was no necessity for plaintiffs to explain how the property came to the widow, and that they were entitled to prove their own adoption and the widow's possession in her own right.

Glover, J.—THE plaintiffs in this case, Debee Pershad Singh and Chutturdharee Lall, sued to recover possession of a 15-dams share in Mouzah Burum, Munhar, by setting aside two deeds of sale, dated respectively the 10th and 21st of Phalgoon 1270, executed by Shumroop Kowar, the widow of Luchmee Pershad, in favor of the defendant Parbutty Kowar. The plaintiffs allege that they were dispossessed in the month of Bysack 1270, and that they have a right to the property which was Jusoda Chowdhrain's, on the ground of being that lady's adopted children. The defendants allege that the plaintiffs were not the adopted sons of Jusoda Chowdhrain, and that, if they were, that adoption would give them no claim to the property in suit; they denied also that the plaintiffs were ever in possession of the land in question, or were ever dispossessed, and said that the property belonged to Luchmee Pershad, the husband of Shumroop Kowar, from whom the defendants claim.

The Court of first instance decided the case in favor of the appellants, on the ground that all the estate of Doorga Pershad had descended by a will, dated the 24th Magh 1850, to his widow, Jusoda Chowdhrain, and that the plaintiffs, as the adopted sons of Jusoda, succeeded to the property, and on her death obtained possession, and were subsequently ousted by the defendants. The first Court also found that the property had never been purchased as stated by Luchmee Pershad.

The Judge, on appeal, held that the plaintiff's suit would not lie, which he explains in a later part of his decision to mean

that the plaintiffs came into Court upon a title which was bad on the face of it, and that, therefore, the suit could not be maintained. His reason for coming to this conclusion is that the plaintiffs in their plaint stated that the property which they claimed belonged to Chowdhry Doorga Pershad; that his widow succeeded to it; that they are her adopted sons, and that they claim under the general law of succession; that, on a question being put to the plaintiffs' pleader as to what was the cause of action on which the plaintiffs came into Court, the pleader stated that they claimed under the general law of inheritance. The Judge considered that, as there was not a single word either in the plaint or in vakeel's examination as to the will, that, therefore, the first Court was not justified in making a case for the plaintiffs which they had not themselves set up, and in deciding in their favor on a question which was never at issue between the parties. The Judge found that the plaintiffs' case was bad, because, by the Hindoo Law, the adopted sons of a widow could only succeed to property which belonged absolutely to the adopting mother, but had no claim to their adopting mother's husband's property; and as in this case the property in suit was not shown to be Jusoda Chowdhrain's *streedhun*, or peculiar property, that, therefore, the plaintiffs claiming it as the property of Doorga Pershad showed that they had no case at all.

It does not appear to us, on turning to the record, that the plaintiffs did claim this property as the heirs of Doorga Pershad. They claimed to hold it from their adopting mother Jusoda Chowdhrain, who, they said, had succeeded to that property. There is nothing in their plaint, nor in the statement made by their vakeel, antagonistic to the fact that Jusoda Chowdhrain got that property by a will from Doorga Pershad, and it does not seem to us that the plaintiffs were bound to do anything more than to state their immediate cause of action, and the person from whom they claimed immediately to derive their title to the property. There was no necessity for them to explain how the property came to Jusoda Chowdhrain, nor to produce nor rest their title upon the will. The will was filed by the plaintiffs, along with other documents, at a later stage in the case; and it was said that the petition which was filed with it showed that the plaintiffs never intended to put forward that will to show how the property came to Jusoda Chowdhrain, but merely to show that it belonged to Doorga Pershad. It is not very clear for what particular reason the plaintiffs filed the will, but as we remarked before, there was no necessity for the plaintiffs at that stage of the case either to put in or to prove the will at all. All they had to prove was that Jusoda Chowdhrain held possession of the property in her own right, and that, from the time of her death to the date of dispossession, they had held possession of the property. Had it come to a question as to how Jusoda had any right to the property, the will would then have had to be produced and proved; but, as it is, it does not appear that the plaint was bad on the face of it. We think that the plaintiffs claimed the property as the adopted sons of Jusoda Chowdhrain, and that in that position they were fully entitled to prove, if they could, their adoption by Jusoda Chowdhrain and the fact that Jusoda Chowdhrain had had possession in her own right of the property they claim.

We think, therefore, that the case must be sent back to the Judge to take it up *de novo*, and decide it on the merits. Costs to follow the result.

The 5th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Judgment-debtor—Adoptive mother—Bona-fide purchase.

Case No. 514 of 1869.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 4th December 1868, affirming a decision of the Officiating Sudder Ameen of Noacolly, dated the 2nd March 1868.

Nadirjan Bibee (one of the Defendants), *Appellant,*

versus

Kureemoonissa Chowdhrain (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Sreenath Banerjee for Respondent.

In a suit for certain property as belonging to plaintiff's judgment-debtor, in which the defendant (the adoptive mother of the judgment-debtor) claimed the property as purchased by her *bonâ fide* in the name of her son, but with her own funds:

HELD that this case could not be judged by the criterion laid down by the Privy Council in the case of Gossain *versus* Gossain, *viz.*, *whence came the purchase-money;* for the question in that case related to property acquired by a member of a joint Hindoo family, where the presumption would ordinarily be that all the property is joint.

Bayley, J.—THIS is a groundless appeal, and must be dismissed with costs.

The plaintiff sued for certain property as belonging to his judgment-debtor, Nuseerooddeen.

The defendant, Nyunissa, the adoptive mother of the said judgment-debtor, alleges that the property was purchased by her *bonâ fide*, in the name, indeed, of Nuseerooddeen, but with her own funds, and that he (Nuseerooddeen) subsequently made it over to her under a kobalah and an ikrar. She also alleges her possession of the property after the transfer had been effected.

There are findings of fact on the evidence by both the Courts below—*first*, that the above-mentioned kobalah is false; *second*, that the above-mentioned ikrar is false; *third*, that the transfer of the property set forth is *malâ fide* and false; and, *fourth*, that the allegation of possession after purchase is also false.

It is contended in special appeal that the Lower Appellate Court has omitted to try the most material point in the case, *viz.*, as to whence the money with which the property was purchased came; and, further, that the principle laid down by the Judge that a decree cannot be said to have been fraudulently obtained unless there was an appeal from that decree, was wrong in law.

On the first point, the case of Gopee Kristo Gossain *versus* Gunga Pershad Gossain,* Volume VI., Moore's Indian Appeals, page 53, has been cited to us to show that in benamee transactions the criterion to apply is to see whence the money came. But that case clearly does not apply to the present one. That was a case of a joint undivided Hindoo family where the presumption would ordinarily be that all the property is joint, and the real contest was as to whether a purchase was made *bonâ fide* by the father for himself, or by the father for the son; but, irrespective of that, even if the important criterion was to see as to whence the purchase-money came, still the special appellant cannot now derive any benefit from that argument, for the finding of the Judge is that Nuseerooddeen "*purchased*" the property; and in the common acceptation of the word "purchased," the signification would be that the party "purchased" it with his own money. The first plea, therefore, is untenable.

Equally untenable is the second objection. The judgment of the Judge does not lay down the principle of law stated by the special appellant. All that it says is that, as there was no objection to the decree when it was passed, its legal efficacy could not now be disputed as not being binding upon the special appellant who represents the judgment-debtor.

Under these circumstances, we dismiss this special appeal with costs.

* 4 W. R. 46.

The 5th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale of rights and interests—Right of suit.

Case No. 83 of 1869.

Regular Appeal from a decision passed by the Judge of West Burdwan, dated the 11th February 1869.

Mr. Wilson (Plaintiff), *Appellant,*

versus

The Government and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Tarucknath Sein* and *Bungshee Dhur Sein* for Appellant.

Baboos Juggadanund Mookerjee and *Petambur Chatterjee* for Respondents.

When a putneedar's rights and interests in a putnee are sold during the pendency of a suit brought by him against his tenants, the purchaser acquires the putneedar's privilege to carry on the suit.

Glover, J.—THIS was a suit by Mr. William Farquharson, representing the putneedar of an estate under the Rajah of Burdwan, for possession of certain lands which were said to be held by the defendants in excess of their ghatwalee-tenure. The suit was remanded by this Court on the 20th November 1868, in order that the plaintiff and all other parties to the suit, including Government, might be permitted to produce any evidence they might have in support or in contradiction of the issumnuvisee pa-

pers. While the appeal was pending, it appears that Farquharson's rights and interests in the estate were sold in execution of a decree obtained by Government for costs, and were purchased on the 15th June 1868 by Mr. Wilson. Mr. Wilson applied to be made a party to the suit in the place of the judgment-debtor, Mr. W. Farquharson, and put in various documents in support of his contention that the issumnuvisee papers contained a correct statement of the area of the ghatwalee lands. The Judge refused to allow Mr. Wilson to come in either the place of Mr. Farquharson or as a co-plaintiff with him, and against this decision Mr. Wilson now appeals.

It appears to us that the Judge's order was wrong. Mr. Wilson bought at an execution-sale all the rights and interests of Mr. Farquharson in the putnee estate, so that whatever rights Mr. Farquharson then held in the estate, those rights now belong to Mr. Wilson. Now, at the time the estate was sold, a part of those rights was undoubtedly the privilege of carrying on this suit, and there seems to be no reason whatever why the plaintiff who bought these interests should not be equally allowed to carry on the suit as well as the judgment-debtor could have carried it on himself. No ruling has been shown us contrary to this opinion, and it appears to us to be a right and proper one. We, therefore, remand the case to the Judge in order that Mr. Wilson may be made a co-plaintiff, or be substituted—it does not matter which—for Mr. Farquharson, with permission to adduce such evidence as he may have in support of his contention as to the correctness of the issumnuvisee papers. Costs to follow the result.

The 5th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Auction-purchaser—Under-tenants—Section 37, Act XI., 1859.

Case No. 852 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 25th January 1869, reversing a decision of the Moonsiff of that District, dated the 30th June 1868.

Sheo Purshun Singh (Defendant), *Appellant,*

versus

Maharajah Rajendro Kishore Singh and others (Defendants), *Respondents.*

Baboo Tarucknath Sein for Appellant.

Moonshee Mahomed Yusuff for Respondents.

The title of a purchaser at a sale for arrears of Government revenue, to avoid an under-tenure and eject the tenant, will depend upon whether the tenure is protected under any of the Clauses of Section 37 of Act XI. of 1859, and whether the tenant has a right of occupancy. If the tenant can prove such a right, he cannot be ejected under Section 37.

Kemp, J.—We think that this case must go back. It appears that the plaintiff, a ticcadar under the Rajah of Bettiah, brought a suit for khas-possession of 5 beegahs 5 biswas of land, with damages, being the value of mowa flowers, on the allegation that the lands were all along in the khas-possession of the Rajah, and that the defendant never had possession. The defendant claimed under a mokurruree. The first Court dismissed the plaintiff's suit, and the second Court has reversed that decision, and given the plaintiff a decree for khas-possession, ejecting the defendant, and has also given the plaintiff a decree for Rupees 32, the value of the produce of the garden for the year 1274. It is alleged that the plaintiff, the Maharajah of Bettiah, who was subsequently made a co-plaintiff with the ticcadar, has purchased the estate at an auction for arrears of Government revenue, and that he is entitled to eject the defendant, and to avoid the under-tenure created by his predecessor subsequent to the Permanent Settlement. This will depend upon whether the tenure is protected under any of the Clauses of Section 37, Act XI. of 1859, as also whether the defendant has a right of occupancy; for if the tenure be protected under Clause 4 of Section 37, the plaintiff's suit ought to be dismissed at once, or if the defendant can prove a right of occupancy, the plaintiff, who is a purchaser at an auction for arrears of Government revenue, is not entitled under the provisions of Section 37 of Act XI. of 1859 to eject summarily the defendant.

The case must, therefore, be remanded to the Subordinate Judge for re-trial with reference to the above remarks.

Costs to follow the result.

The 5th July 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo family—Separation and self-acquisition—Onus probandi.

Case No. 923 of 1869.

Special Appeal from a decision passed by the Judge of Gya, dated the 24th November 1868, affirming a decision of the Subordinate Judge of that District, dated the 20th December 1866.

Pearee Lall and others (Defendants), *Appellants,*

versus

Bukhoree Lall and another (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Mr. C. Gregory and *Baboo Juggadanund Mookerjee* for Respondents.

In a suit for possession of certain properties on the ground that they were joint, and that plaintiffs had been wrongfully kept out of their share after a separation between them, and in which defendants averred that the family had separated long prior to the time alleged by plaintiffs, and that the properties were acquired solely by their ancestor :

HELD that until the defendants gave proof of the separation alleged by them, the presumption was in favor of the family having been joint, and that the *onus* of proving self-acquisition was on the defendants.

Kemp, J.—THE plaintiffs, special respondents, sued for possession with mesne-profits of certain properties on the ground that they were joint, that there had been a separation between the plaintiffs and defendants in 1262 F. S., but that the plaintiffs had been wrongfully kept out of their share of the disputed properties by the defendants.

The defendants averred that the family separated long prior to 1262 F. S., that the properties in dispute were never at any time joint, but that they were acquired under a grant solely by the ancestor of the defendants. Limitation was pleaded in bar of the plaintiffs' claim.

Both the Lower Courts gave the plaintiffs a decree.

The grounds taken by the pleader for the defendants before the Judge were—

1st.—That the plaintiffs' ancestor, Deolee Chand, never had possession of any share in the property in dispute which was originally granted to Bechoo Lall, elder brother of Deolee Chand and the ancestor of the defendants, and was resumed from him alone.

2ndly.—That the decision of the Moonsiff of Behar, dated the 12th May 1852, on which the Court of first instance had laid much stress, was a forgery, and, even if proved to be genuine, contained no adjudication on the question of the rights of the parties.

3rdly.—That the case was decided in the absence of the defendants' witnesses, who had been summoned, but failed to appear.

After reciting the pleadings on both sides, the Judge observes that the first ground of appeal taken before him cannot be maintained. He was of opinion that the evidence adduced by the defendants was insufficient to prove that the original grant was made to Bechoo Lall alone for himself, and not as representing a joint family; that the defendants had offered no proof of a separation of interests between the two brothers, the ancestors of the plaintiffs and of the defendants; and that until such proof be given, the presumption is in favor of the family having been joint and represented by its eldest male member, *viz.*, Bechoo Lall; that this state of things would seem to be especially probable when it is considered that the younger brother was a lunatic; further, that in the absence of any proof of separation, the Court of first instance was right in finding that at the time when the estate was acquired the family was a joint one, and that the fact of the name of one member of that family only being mentioned in the papers relating to the property is not of itself sufficient to prove that the acquisition was by that member alone, and not for the benefit of the joint family; that the *onus* of proving self-acquisition was under the circumstances of the case on the defendants who had failed to discharge themselves of that *onus;* consequently, that Bechoo Lall, the ancestor of the defendants, in so far as he had possession of the disputed property, must be held to have represented the joint family of which the plaintiffs' ancestor Deolee Chand was a member.

On the second ground of appeal, the Judge held that the proceeding, dated the 15th May 1852, was not good evidence.

On the third ground, the Judge observes that the defendants having declared in the Court of first instance that their witnesses had absconded, they were ordered to produce proof of their having done so, and that no steps were taken by them for the production of the required evidence until after a delay of three months—a delay which was sufficient to justify the Court of first instance in proceeding to dispose of the case in the absence of those witnesses.

The decision of the Judge concludes by saying that, on a review of the whole case, he was of opinion that the Court of first instance arrived at a proper conclusion upon the evidence before it, and that the defendants had shown no good reason for interference with the order passed.

The first ground taken in special appeal is that the *onus* has been thrown on the wrong party; that the presumption of Hindoo Law cannot arise until the existence of joint property or joint funds has been shown; and that there being no such proof on the record, the suit should have been dismissed.

On this ground, we find that the Judge considered the evidence on both sides. The incidence of the burthen of proof has not, in our opinion, been misplaced. The Judge found on the whole evidence that the property in dispute was acquired by the family jointly, and not separately, although the name of the elder brother was used, the younger brother being a lunatic. We think that this fact, which the Judge also found to be proved by evidence, is one that reasonably accounts for the property standing in the name of the elder brother as trustee for his insane brother.

The second ground taken in special appeal is that the suit having been brought admittedly after 11 years from the alleged date of dispossession, it ought to have been dismissed under the provisions of Clause 13, Section 1, Act XIV. of 1859.

Both the Courts have found on the evidence that the defendants failed to prove separation before 1262. The family were found to be joint up to 1262, and it has also been held to be proved on the evidence that the ancestor of the defendants acted as the trustee for the ancestor of the plaintiffs, the property in dispute having been obtained for the joint benefit of the family. The claim was certainly brought after a long period from the alleged date of ouster, but it is nevertheless within time, and we may further observe that this argument was not taken by the pleaders for the appellants before the Judge.

The remaining grounds are simply argumentative. It is sufficient to observe, with reference to them, that a settlement may have been made with the defendants alone by the Revenue authorities, but that fact would be no index to the *status* of the family, whether joint or separate, at the time the property was acquired. Moreover, the present suit is brought to have the plaintiffs' right to a settlement declared. The proceeding of the Moonsiff was not admitted by the Judge as evidence; on the contrary, it was distinctly rejected; and, lastly, we cannot say that the Judge did not exercise a proper discretion in the matter of the witnesses for whose absence the defendants, special appellants, had themselves to blame.

The appeal is dismissed with costs.

The 6th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Discharge of judgment-debtor—Section 273, Act VIII. of 1859—Section 8, Act XXIII. of 1861.

Case No. 195 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 8th March 1869, affirming an order of the Officiating Subordinate Judge of that District, dated the 27th August 1868.

Abdool Ruhman (Judgment-debtor), *Appellant,*

versus

Abdool Sobhan (Decree-holder), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

Where a Lower Appellate Court, from the replies of a judgment-debtor whom it examined, and from the circumstances of the case as set forth in the evidence, came to the conclusion that the judgment-debtor had not proved that he was not possessed of property so as to be entitled to the benefit of Section 273, Act VIII. of 1859, and Section 8, Act XXIII. of 1861:

HELD that there was no error of law in this finding.

Bayley, J.—WE are of opinion that this appeal must be dismissed.

This is a case in which the first Court and the Lower Appellate Court have both held that the judgment-debtor is not entitled

proceed to judgment on the merits of the case.

The rules in all these three cases are, accordingly, made absolute with costs.

The 6th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Sub-tenures from before Decennial Settlement—Resumption.

Case No. 690 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 4th January 1869, reversing a decision of the Moonsiff of Futtickcherry, dated the 29th May 1868.

Abdool Ali and another (two of the Defendants), *Appellants,*

versus

Ram Gutty and another (Plaintiffs), *Respondents.*

Mr. G. A. Twidale for Appellants.

Baboo Greeja Sunkur Mojoomdar for Respondents.

A sub-tenure created before and in existence at the time of the Decennial Settlement, cannot be invalidated by any subsequent settlement of the mehal in which it is situated. Resumption of lakheraj land under the Revenue Laws does not destroy any such sub-tenure in the estate resumed.

Hobhouse, J.—THIS was a suit for a declaration of right on the part of the plaintiff to a certain *etmamee* tenure alleged to be within the defendant's mehal.

The defendant denied the existence of the tenure, and alleged, somewhat confusedly it seems to us, that even if it had existed at one time, yet that it had been got rid of by a settlement with him made on the part of Government.

The Lower Appellate Court has held that the plaintiff has established his right, and has given plaintiff a decree declaring that right.

In special appeal, the only contention before us is to the effect that as the settlement of the proprietary interest of the talook in which the *etmam* is found to be situated. was recently made, so, by the very fact of that settlement, the *etmamee* tenure had been got rid of. But this is entirely an untenable position, for under the Revenue Laws when the plaintiff had once proved that his was a sub-tenure created before and in existence at the time of the Decennial Settlement, then clearly no subsequent settlement of the mehal in which that under-tenure was in existence, could, under the Revenue Law, invalidate that tenure. This seems to us to be quite the element of the revenue system. Any resumption of lakheraj lands has simply the effect of declaring that such lands are liable to be assessed to the revenue of the State, but it does not go to the extent of destroying any sub-tenure existing in the estate settled before the time of the Decennial Settlement.

In this view of the case, we think that the special appellant has failed to maintain the objection on which he relied in special appeal, and we, therefore, dismiss this special appeal with costs.

The 6th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Contribution—Test of title to recover—Legal necessity.

Case No. 698 of 1869.

Special Appeal from a decision passed by the Judge of Dacca, dated the 19th December 1868, affirming a decision of the Sudder Ameen of that District, dated the 14th April 1868.

Kisto Kishore Poddar (Plaintiff), *Appellant,*

versus

Koylash Chunder Mookerjee (Defendant), *Respondent.*

Baboos Rash Beharee Ghose and *Kalee Mohun Doss* for Appellant.

Baboo Sreenath Banerjee for Respondent.

In a suit to recover as contribution a sum paid by plaintiff on account of arrears due on a farming lease, the test of plaintiff's title to recover was held to be

whether there was any legal necessity arising to him from reasonable probability of any injury resulting to him in case he did not make the payment.

Bayley, J.—I AM of opinion that this appeal should be dismissed with costs.

The facts, dates, and figures in this case have been so fully and admittedly correctly given in the judgments of the first and second Courts, that it is unnecessary for me to enter into any details as regards them.

The only point which requires our decision is, whether the plaintiff, who sued to recover a certain sum of money from the defendants in the nature of contribution, is entitled to recover the same from them.

Both the Lower Courts have found that there was no necessity for the plaintiff to make the payment.

It appears that there was an arrear of Rupees 1,011 due on account of a farming lease in a zemindaree which the plaintiff purchased on the 12th January 1867. Of that amount a certain sum was decreed by the Deputy Collector in favor of the plaintiff as being the amount due from the defendants for a period subsequent to the plaintiff's purchase of the zemindaree, and the plaintiff brings this suit for recovery of the balance of the amount paid by him.

Now, the proper test to determine whether or not the plaintiff is entitled to recover the money that he sues for, is to see whether there was any legal necessity arising to the plaintiff from reasonable probability of any injury resulting to him in case he did not make the payment. What he purchased was the *zemindaree* right. What was about to be sold for non-payment of arrears was the *farming* right. The sale of the *farming* right would not in any way affect the plaintiff's *zemindaree* right, which would remain uninjured by the sale.

Certain cases, reported at page 403, Volume VII.; page 453, Volume X., Weekly Reporter; and page 30, Volume X., Privy Council Rulings, have been cited to us in support of the special appellant's plea that the payment by the plaintiff was not a voluntary payment; but the first two were cases of payments made with reference to rights acquired in execution of Civil Court decrees, and in the Privy Council case at page 30, Volume X. it was clearly found by their Lordships that there was no payment at all. Thus, and also as to other facts, these cases do not apply to the present case. The only point, therefore, taken in special appeal that the payment by the plaintiff was not voluntary, being thus disposed of in respect to the period *previous* to the plaintiff's purchase, the pleader for the special appellant wishes to take another ground not taken in his petition of appeal, *viz.*, that there was a portion of arrears due *after* his purchase which made it necessary for him to make the payment. This fact, however, has not been shown to us, and I do not think that the special appellant ought now to be allowed to take the objection, for if the point, as has been alleged by the pleader, was one patent and obvious on the records, the better reason it is why that objection should have been taken in the petition of appeal.

On the whole, I see no error in law in the decision of the Lower Appellate Court, and I would therefore dismiss this appeal with costs.

Hobhouse, J.—The sole question before us in this case, as Mr. Justice Bayley has put it in other words, is whether the plaintiff, when he paid the money which he sues to recover from the defendants, paid it under compulsion, or whether he paid it voluntarily. The compulsion which he sets up is, firstly, that his zemindaree was in jeopardy; and, secondly, that a part at least of the money in question was due after he had purchased the zemindaree. Now, on both these questions, which are questions of fact, the Lower Appellate Court has found against the plaintiff; and as we are not shown that this is not a good decision upon the evidence—and indeed that objection is not taken in the grounds of special appeal—I think that this appeal must fail.

I may add that the cases on which the special appellant relies are all based on the fact that the plaintiffs were under a legal compulsion to pay.

The 6th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Jurisdiction—Limitation.

In the Matter of Kalee Persaud Chowdry,

Petitioner,

versus

Ram Soondur Sircar and another,

Opposite Party.

Baboo Obhoy Churn Bose for Petitioner.

Baboo Debendro Narain Bose for Opposite Party.

In proceeding, on an application for execution, to try the question of limitation by seeing whether under the law any effectual proceeding had been taken by the decree-holder to keep his decree alive, a Court was held to have exercised jurisdiction in the matter.

Bayley, J.—THE question in this case is whether the Deputy Collector has refused jurisdiction where he had it, and whether, therefore, in the exercise of the extraordinary power vested in us under Section 15 of the Charter, we should set aside his order which was passed in execution of a decree for arrears of rent. That order of the Deputy Collector was to the effect that years having elapsed without the decree-holder taking any effectual steps in furtherance of the execution of his decree, limitation barred the further execution thereof. The Deputy Collector states that there was no attachment of the sale proceeds which were taken away by the decree-holder, and that, therefore, in the absence of any attachment, there was no effectual proceeding on his part in furtherance of the decree.

The pleader for the petitioner argues that as the money was taken away by the decree-holder under the orders of the Deputy Collector and with the consent of the judgment-debtor, it was immaterial whether there was any attachment or not, and that an effectual proceeding on his part consisted in removing the money from Court, and that, therefore, the Deputy Collector has refused to exercise jurisdiction where he had it, *viz.*, in refusing to allow execution of the decree to be proceeded with.

We are of opinion that whether the Deputy Collector was right or wrong in holding that the taking away of money by the decree-holder under the circumstances set forth was no effectual proceeding on his part, he has not *refused* jurisdiction in the matter, and that in proceeding to try the question of limitation by seeing whether under the law there was any effectual proceeding taken by the decree-holder to keep his decree alive, he has exercised a jurisdiction in the matter. The case reported at page 386, Volume IX., Weekly Reporter, to a certain extent supports the view taken by us here. It was held in that case that when a Court has proceeded to try the question of limitation, it has exercised jurisdiction in the matter. The case cited by the petitioner at page 84, Volume VI., Weekly Reporter, does not seem to us to apply to this case. The circumstances are not similar, nor is the plea taken here as to the refusal to exercise jurisdiction by the Deputy Collector at all of the nature of the plea taken in that case.

The rule is accordingly discharged with costs.

The 7th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Ex-parte evidence—Re-trial—Agency—Powers (general and special).

Case No. 392 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 18th December 1868, reversing a decision of the Subordinate Judge of that District, dated the 30th June 1868.

Ram Buksh Lall (Plaintiff) *Appellant,*

versus

Kishoree Mohun Shaha and others (Defendants) *Respondents.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

Evidence taken in the absence of a defendant at an *ex-parte* hearing, cannot be used against him on a re-trial.

The extent and nature of the powers vested in an agent are not so much a matter of law as a matter of fact to be decided in each case in which a question of agency arises.

Loch, J.—I THINK this case must go back to the first Court. It appears that when the case was first tried, the defendants, the respondents before us, were not present, and the case was decided *ex-parte.* The respondents subsequently prayed for a re-hearing. Their prayer was granted, and the Subordinate Judge after taking evidence found that Gyanath was the *gomashtah* of the defendants, respondents, and that the cotton had been made over to them through Gyanath, and that part payments had been made by defendants by means of hoondees, and therefore the plaintiff was entitled to recover the balance from the defendants, respondents.

On appeal, the Judge rejected, and very properly, the evidence taken in the absence of the defendants, respondents; and with regard to Gyanath, he held that, even if the evidence were sufficient to prove that Gyanath was the *mooktear-gomashtah* of the defendants, yet it would be necessary for him to have a special power from his principals to enable him to purchase goods, such as cotton, &c., on their account; that there was no proof taken after the order for rehearing as to the delivery of the cotton and part-payment by the defendants, respondents; and that the furthest the evidence on which the Lower Court rested its judgment went to prove was, that Gyanath acted as agent for the defendants for the transaction of a business in *hoondees*, and that the plaintiff failed to make out that Gyanath had general power to act for the defendants.

I think the case must go back, because, when it was re-tried, the evidence which was taken in the absence of the defendants should not have been used against them, but the Court should have allowed the plaintiff an opportunity to produce those or other witnesses, and have permitted the defendants to cross-examine them.

With regard to the position of the gomashtah, I think the Judge has taken a wrong view, in considering that it was necessary for the agent to have special powers from his principals to purchase certain kinds of goods; and the view he has taken appears to have had some effect on his judgment. If the evidence goes to show that the party said to be the agent was really a general agent, and did transact business of various kinds for his principal, no special power was required for him to transact this particular business.

This case will go back to the first Court, who will send for the witnesses who were first examined, and allow the respondents to cross-examine them; and the Court will allow both parties to adduce further evidence, if they think proper to do so; and the Judge, after hearing the evidence, will dispose of the case.

By consent of the plaintiff's pleader, the suit remains dismissed as against Gyanath, and the suit will be proceeded with only against the other defendants, respondents.

The costs of this appeal will follow the final result of the case.

Macpherson, J—I concur. I wish to add that, even if the Courts shall be of opinion that Gyanath Shah was, as he was found to be by the Subordinate Judge, a *mooktear-gomashtah* of the defendants, still there will remain to be decided upon the evidence the question what his powers as such *mooktear-gomashtah* were. Whether he was *mooktear-gomashtah* or not, it must be proved as a fact that he had authority to bind the defendants so as to make them liable for contracts entered into by him. The extent and nature of the powers vested in an agent are not so much matter of law as matter of fact to be decided in each case in which a question of agency arises. In the present instance—supposing that Gyanath had no written power-of-attorney or mooktearnamah under which he was carrying on the defendants' business—if it should be proved that he acted ordinarily as the agent of the defendants in buying and selling other articles of merchandize, the fact of his not being proved to have previously purchased cotton will not necessarily operate against the plaintiff's case that he purchased the cotton on account of the defendants. If, on the other hand, there is no evidence of Gyanath Shah having bought and sold goods on account of the defendants, and of his acts having been recognized and adopted by the defendants, or by those who, for the time being, were the members of the firm at Mirzapore, now represented by the defendants—and if this purchase of cotton was the first transaction in the buying of merchandize that was entered into by him—then, in the absence of evidence that the defendants actually received or paid for the cotton, it may be difficult to hold it proved that Gyanath acted as the defendants' agent, so as to bind them by what he did. But the Courts, in deciding the question of agency, must look to the general evidence on the record as to the mode of dealing pursued by Gyanath and by those whom he alleged to be his principals.

The Subordinate Judge says that it is proved that certain part-payments on account of this cotton were made by the defendants. It seems doubtful whether the Subordinate Judge intended to say more than that payments on account were made for the defendants by Gyanath. How this may really be I cannot say; but it is evidently most important that it should be ascertained with the utmost accuracy and distinctness, how and by whom and when those

payments on account of the cotton purchased by Gyanath were made. If payments were made by the defendants *direct*—as if they sent hoondees to the sellers of the cotton—it would go far to prove their liability. If, on the other hand, the payments were merely made by Gyanath, and it is not proved that they were made with the defendants' cognizance or by their order, it would prove nothing as against them. The case is one of some nicety and importance in itself, and the Court must try it with care and accuracy. The parties should be allowed to adduce further evidence, if they desire to do so.

The 7th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Possessory suit—Endowments—Issues—Limitation.

Case No. 344 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 20th November 1868, reversing a decision of the Subordinate Judge of that District, dated the 20th April 1868.

Reasut Ali (Plaintiff), *Appellant,*

versus

Mr. J. C. Abbott and others (Defendants), *Respondents.*

Baboos Ashootosh Dhur and *Debendro Narain Bose* for Appellant.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Respondents.

In a suit for a portion of land granted in trust for purposes connected with the preservation of a Mahomedan saint's tomb, where plaintiff claimed as son of the last mutwallee, on the allegation that he (plaintiff) had been dispossessed during his minority, defendant's case being that the grant had never been in the possession of mutwallees, but had been divided among the original grantee's heirs, from one of whom the portion in dispute had come into the possession of his (defendant's) vendor:

HELD that the material point to try was whether plaintiff's ancestors had, from the time of the grant, been in possession, or whether the land had been inherited according to the ordinary rules of Mahomedan inheritance by the heirs of the grantee.

HELD that, on the question of limitation, it was for the Judge to find whether plaintiff's father had been in possession within time.

If mutwallees fail to act up to the directions of an endowment, the grant does not necessarily revert to the heirs of the grantee.

Jackson, J.—THIS case must be remanded to the Judge. It relates to two-thirds of a certain grant of land which was made by Ranee Bhowanee for the preservation of a Mussulman saint's tomb, and for the other usual purposes connected with such a trust. The grant is not denied. In fact, both parties claim under it. But the plaintiff asserts that his father and grandfather held possession of the land as mutwallees of the endowment, and that he is entitled, as son of the last mutwallee, to possession of it now, but the defendant contrived during his minority to dispossess him.

The defendant's case is that the grant has never been in the possession of mutwallees, but remained in the possession of the original grantee during his lifetime, and after his death was divided among his heirs, and finally two-thirds of it came into the possession of Dad Ali, who becoming bankrupt, one Mr. Andrews purchased his share from the assignee of the estate, and the defendant purchased from Mr. Andrews.

The Judge has decided the case solely on the terms of the grant. He finds that those terms are indefinite; that they do not state precisely the purpose for which the grant was made; that the legality of the grant is itself doubtful as being made by a Hindoo lady for Mussulman religious purposes; and that it is admitted that the profits of the grant have not been wholly devoted to the purposes for which it was intended.

We think that the purposes for which the land was granted are sufficiently defined. It is, in fact, a *peeruttur* grant of the usual description. It was made by the proprietor of the land for the time being in favor of a Mussulman subject. All the purposes for which it was conferred are not stated in the grant, but they are sufficiently specified. It is said that the grantees are to take for the purposes of keeping up a Mussulman tomb, &c., *i. e.*, for the other usual purposes connected with keeping up a saint's tomb

Even if all the profits of the grant have not been devoted in keeping up the tomb, &c., it will not follow that the grant is no longer a *wuqf*.

But whether the grant is *wuqf* or no *wuqf*, the material point to try in this suit is whether the plaintiff's ancestors have from the time of the grant been in possession of the disputed property, or whether the land included in the grant has been inherited according to the ordinary rules of Mussulman inheritance law by the heirs of the original grantee. The plaintiff alleges the first, the defendant the second statement. If the plaintiff can show that his father and grandfather inherited the whole estate, and that during his minority he was dispossessed by the defendant under a purchase from one Dad Ali, who never put forward any claim to the property and who never had been in possession, he is entitled to recover possession. As mutwallee, the plaintiff would only be obliged to show that he kept up the tomb for which the grant was made and performed whatever other matters usually accompany the keeping up of a saint's tomb. If the mutwallees failed to act up to the directions of the endowment, the grant would not revert to the original heirs of the grantee. The grant might perhaps be resumed, but the misuse of the grant would not raise any title in other parties, who had no title previously.

We think the Judge has not considered the question which is really at issue in this case, which is whether the plaintiff's own family have been all along in possession of the whole of the disputed grant, or whether it has always descended to the possession of the heirs of the original grantee according to the usual Mahomedan Law of Inheritance.

The Judge is also wrong in his decision on the question of limitation. He has to find on that point whether the plaintiff's father was in possession of this two-thirds of the disputed property, as the plaintiff states he was, within such a time as will prevent the application of the law of limitation. The fact that this suit was brought within 12 years of the purchase from the assignee of Dad Ali's estate will be no bar to the Law of Limitation being enforced if the plaintiff's father never held possession of the disputed two-thirds of the property.

The case is remanded to the Judge for retrial.

The 7th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Champerty.

Case No. 953 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Gya, dated the 30th January 1869, affirming a decision of the Sudder Moonsiff of that District, dated the 2nd July 1868.

Munirakhun Singh (Defendant), *Appellant,*

versus

Bhodoy Singh and another (Plaintiffs), *Respondents.*

Baboo Tarucknath Sein for Appellant.

Mr. C. Gregory for Respondents.

Where the purchaser of a share of land joins his vendor in a suit to recover his own property, his action cannot be termed "champerty."

Glover, J.—There seems to be no ground for interference in this case. The plaint and written statement sufficiently disclose the allegation that the family was joint, and it was for the defendant to prove his special plea that separation had taken place in such and such a year, and that the property in dispute had been separately purchased by the defendant after that date.

The Subordinate Judge found that this was not proved. He found also that the plaintiff had proved his case by evidence.

It is contended by the special appellant that the Subordinate Judge came to no finding on the issue of champerty.

It is true that there is no distinct finding on this issue to be found in the Lower Appellate Court's decision, but there is a general endorsement of the first Court's judgment and of the reasons which led to it.

Moreover, the plaintiff's (No. 2) action in this case cannot be termed "champerty." He bought and paid for a certain share in the land before this suit was instituted, and then joined his vendor in a suit to recover his own property.

Champerty is a bargain between parties, one of whom is already a plaintiff or defendant in a suit, to divide the thing sued for,

if they succeed in the suit, the champertor paying the expenses and carrying on the suit at his own charges—(2 Story's Equity Jurisprudence, p. 143).

In the present case, no suit had been instituted when plaintiff No. 2 purchased his share of the property; and if it had, it would not necessarily follow that the purchase would have savoured of champerty,—Jug Mohun Lall *vs.* Muddun Kooer, 9 Weekly Reporter, p. 243.

The special appeal is dismissed with costs.

The 7th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Declaratory suit—Butwarrah—Section 20, Regulation XIX. of 1814.

Case No. 988 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Shahabad, dated the 3rd February 1869, reversing a decision of the Moonsiff of Sasseeram, dated the 23rd June 1868.

Foolbashee Kowar and others (some of the Plaintiffs), *Appellants,*

versus

Arzun Sahoo (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Rajendurnath Misser* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Yusuff* for Respondent.

Defendant having obtained from the Collector an order for a butwarrah of his share in a mouzah in the vicinity of plaintiff's estate, the latter, after applying in vain to the Revenue Authorities for a declaration that his own estate (Sheopore) had nothing to do with defendant's mouzah, which was found to be recorded on the towjee with an *alias* of Sheopore, brought a civil suit for a declaration of his own right to Sheopore.

HELD, that as the two estates were separately recorded in the towjee with distinct areas and sudder jummas, and as plaintiff's ownership of Sheopore was not disputed and there was no allegation of his lands being incorporated by the partition in the defendant's estate, plaintiff had no cause of action.

HELD, that Section 20, Regulation XIX. of 1814, had no reference to a case like this, where no partition had been made and plaintiff was not a co-sharer.

Kemp, J.—THE plaintiff is the special appellant before us. It appears that the plaintiff is the holder of an estate called Sheopore. The defendant is a 4-annas sharer in a neighbouring estate designated on the rent-roll as Buhurampore Zumeen Goburdhumpore *alias* Sheopore. The defendant applied for a butwarrah of his share in the latter mouzah. This application does not appear to have been opposed by the co-sharers of the mouzah, and the Collector ordered the butwarrah to be made. Upon this, the plaintiffs, apparently apprehensive that the land belonging to his estate of Sheopore would be incorporated by the butwarrah-proceedings with the lands of the defendant's mouzah, applied to the Collector to have it declared that Sheopore had nothing to do with the defendant's mouzah. The Collector passed an order to the effect that as the areas and sudder jummas of the two mouzahs are different, and as they are separately recorded in the towjee, the butwarrah might proceed, and the application of the defendant was rejected. On appeal to the Commissioner, this order of the Collector was affirmed, the Revenue Commissioner further observing that from the decisions filed there did not appear that there was no such *alias* as Sheopore for the defendant's mouzah, and, moreover, that the towjee showed that the defendant's estate was recorded with an *alias* of Sheopore.

The plaintiff not satisfied with this order brought the present suit to set aside these orders, and for a declaration of his right in Mouzah Sheopore within stated boundaries, comprising an area of 473 beegahs, on a sudder jumma of Rupees 58-10-8. He further asked the Court to declare that the defendant had a 4-annas share in Mouzah Buhurampore Zumeen Goburdhunpore within certain boundaries.

The first Court gave the plaintiff a decree.

On appeal, the Subordinate Judge raised a number of irrelevant issues, and some of the grounds of his decision are contrary to law; for instance, he has wholly misapplied the provisions of Section 20 of Regulation XIX. of 1814. That Section applies to orders of the Board of Commissioners on the paper of partition and with reference to disputes between co-sharers, and has no reference to a case like the present, in which no partition has been yet made, and in which the plaintiff is a third party and not a co-sharer. We think also that the Subordinate Judge was wrong in going into the merits of the case, when he found that the plaintiff had no cause of action and that, in his opinion, the Court had no jurisdiction.

Although, therefore, we cannot endorse the reasons given by the Subordinate Judge for

dismissing the plaintiff's suit, we think that the suit has been properly dismissed. It appears to us clear that the estates of the plaintiff and defendant are separate and distinct; they are separately recorded in the towjee with distinct areas and sudder jummas. The defendant does not dispute the plaintiff's ownership of the estate of Sheopore, and the pleader for the plaintiff does not state that any of the lands of his client's estate has been incorporated by the butwarrah in the estate of the defendant. We think, therefore, that the plaintiffs had no cause of action; that they have unnecessarily brought this suit, and must bear the costs of both the Lower Courts as well as of this Court.

The appeal will, therefore, be dismissed, and the butwarrah may proceed on the understanding that the two estates are separate, and that if the plaintiffs' lands of Sheopore are incorporated in the defendant's estate, they are at liberty to seek their remedy in the Civil Court.

The 8th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Section 28, Act X., 1859—Forcible possession—Limitation.

Case No. 306 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 28th October 1868, reversing a decision of the Deputy Collector of that District, dated the 30th June 1868.

Reazoonnissa Beebee (Plaintiff), *Appellant,*

versus

Motee Sing and others (Defendants), *Respondents.*

Messrs. G. C. Paul, R. E. Twidale, and *C. Gregory* for Appellant.

Baboos Grish Chunder Ghose and *Debendro Narain Bose* for Respondents.

An application under Section 28, Act X., 1859, to dispossess the defendant from certain lands which he held rent-free, on the ground that they were part of the plaintiff's estate, and had paid rent subsequent to the Decennial Settlement, was held to raise no cause of action within that Section. But as the plaint was received, and the issue under Section 28 raised, the Courts had jurisdiction to try and decide the case.

The time during which plaintiff was in forcible possession was held not to avail him against a plea of limitation.

Jackson, J.—This was an application to the Collector under Section 28, Act X. of 1859, to dispossess the defendant from certain lands which he held rent-free, on the ground that they were a part of the plaintiff's estate, and had paid rent subsequent to the Decennial Settlement. The Deputy Collector, before whom the application first came, rejected it, on the ground that it was not distinctly alleged that the defendant held under a grant subsequent to 1790. The Judge, on appeal, ordered the Deputy Collector to try whether the defendant obtained the lakheraj subsequent to 1790. The Deputy Collector thereupon heard the evidence of both parties, and considering that the defendant had not proved that he held the lakheraj previous to 1790, he decreed the plaintiff's suit. On appeal, the Judge was of opinion that the Deputy Collector had no jurisdiction on the cause of action stated in the plaint to entertain the application. The Judge went on to rule that if he had jurisdiction, the application must be dismissed, because there was evidence that the lakheraj had existed from before 1790, and because the application to resume it was barred under the Law of Limitation.

On special appeal, it is contended that the Judge was in error in holding that there was no jurisdiction in the Collector—and that, if there was no jurisdiction, that the Judge was in error in deciding the questions of possession and limitation as he has done.

It is quite certain that on the cause for the application stated in the plaint, the Collector might have refused to entertain the application at all. In fact, the Collector did refuse to entertain it until the Judge erroneously directed him to try the case. The plaint having thus been received and heard, the plaintiff might, notwithstanding the manner in which the plaint was drawn out, have satisfied the Courts that the defendant held under a grant subsequent to 1790. The Collector would have jurisdiction to try whether the defendant held under such a grant and whether the plaintiff was barred under the Law of Limitation. Similarly, the Judge, on appeal, would have jurisdiction to enter into those questions. We do not concur then with the Judge that the Collector had no jurisdiction. Had the Courts, throughout the litigation, rejected the plaint as not raising a cause of action

within Section 28, Act X. of 1859, we should have confirmed those orders. But as the plaint has been received, and the issue under Section 28, Act X. of 1859, has been raised, we think that there was jurisdiction to try and decide it.

It is then urged that the decision on the question of limitation is wrongly determined; first, because within 12 years of suit the plaintiff had been in possession of the disputed land. It appears that he had forcibly dispossessed the lakherajdar who had sued him on that ground and had recovered possession. We think that the time during which the plaintiff was in forcible possession will not in any way avail him. The plaintiff's cause of action remains the same as it did before he took the law into his own hands, and he can gain no benefit or advantage by his own illegal acts. It is urged also that the decision is wrong, because the plaintiff at the time he dispossessed the defendant, *viz.*, in 1856, had full authority to do so under Section 10, Regulation XIX. of 1793. If the plaintiff had any *bond-fide* ground for concluding that the defendant held under a grant subsequent to 1790, he had the right to dispossess the defendant; but so far from this being the case, it is clear that neither in this litigation nor in the former litigation, could the plaintiff show that he had a shadow of a ground for arriving at any such conclusion.

It is then urged that the Judge was wrong in holding that the decision in the former suit proved that the defendant had held possession from before 1790. It appears that that decision is not upon the record, and therefore we are unable to say whether it does not afford the evidence which the Judge would adduce from it—and it follows that we cannot pass any judgment as to whether the Judge was right in holding that the plaintiff's suit was barred by limitation on the ground that the defendant had held the lakheraj from before 1790. It would appear from an informal translation of that decision, which has been read, that there is some doubt as to whether the decision in question did determine that point. Under the circumstances, we can give no opinion upon the point, and the question may be considered as still not finally determined between the parties.

As, however, it is clear that upon the evidence on the record, the plaintiff has not in any way substantiated the fact that the defendant holds under a grant subsequent to 1790, the orders passed by the Judge, dismissing the plaintiff's suit are correct, and we dismiss this appeal with all costs.

The 8th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ameen's report — Section 180, Code of Civil Procedure.

Case No. 1029 of 1869.

Special Appeal from a decision passed by the Judge of Gya, dated the 21st December 1868, reversing a decision of the Subordinate Judge of that District, dated the 18th April 1869.

Rajnath Pandah and another (Plaintiffs), *Appellants,*

versus

Doorga Lall (Defendant), *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

Where local enquiry is ordered by a Lower Court and evidence is taken by an Ameen and a report made, the return made by the Ameen becomes legal evidence under Section 180, Act VIII. of 1859, which the Appellate Court is not justified in refusing to consider.

Glover, J.—THIS was a suit to recover 617 rupees as damages for grain stored by the plaintiffs, and which was spoilt in consequence of the defendant not allowing to take it away and to thresh it.

The first Court gave the plaintiff a modified decree. The Judge, on appeal, dismissed the suit entirely, holding that the three witnesses whom the plaintiffs had produced to prove their claim were not credible, and that being so, that the evidence taken by the Ameens and the reports of the Ameens were not proper evidence on which to decide the case.

The point taken in special appeal is that the Judge has acted illegally in refusing to consider the reports of the Ameens and the evidence taken by these officers. It appears to us that this objection must be allowed, inasmuch as Section 180 of the Code of Civil Procedure lays it down most distinctly that the report of an Ameen and

the evidence taken by an Ameen are to be considered in the case. It may be that the Judge was perfectly correct in his opinion that the local enquiry should not have been made. On that we express no opinion, but it is quite clear that the Lower Court had by law discretion to order such an enquiry, and that enquiry having taken place, and evidence having been taken, and a report made by the Ameen, it became legal evidence, and the Judge was not justified in refusing to consider it. We are, therefore, obliged to remand this case in order that the Judge, before deciding against the plaintiff's claim to recover damages, may consider and weigh that evidence and the Ameen's reports, and pass a fresh decision in the case.

Costs to follow the result.

The 8th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Notice—Section 13, Act X., 1859.

Case No. 413 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 23rd November 1868, affirming a decision of the Deputy Collector of Koolneah, dated the 26th September 1867.

Doyamoyee Chowdhrain and others (Plaintiffs), *Appellants,*

versus

Mohima Chunder Roy and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Romanath Bose for Respondents.

The rent of a talookdar cannot be enhanced under a notice treating him as a ryot having a right of occupancy.

Loch, J.—In this case it is urged in special appeal that, though the Judge has found the defendant to be a talookdar, he has not found that the talook was in existence at the time of the Permanent Settlement. But though there is not a distinct finding in the judgment of the Lower Court on this point, yet we think it unnecessary to remand the case for such a finding, as we see that the notice served upon the defendant, under Section 13, Act X. of 1859, was a notice treating the defendant as a ryot having a right of occupancy, and not as a talookdar. As the Judge has found that the defendant is a talookdar, the plaintiff is not entitled, under the notice served by him on the defendant, to enhance the rent. We therefore dismiss the appeal with costs.

The 8th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Liability of a judgment-debtor's property.

Case No. 26 of 1869.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 18th January 1868, affirming a decision of the Subordinate Judge of that District, dated the 18th May 1866.

Kripanath Surmah (Plaintiff), *Appellant,*

versus

Nritokalee Debia and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Issur Chunder Chuckerbutty* for Appellant.

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Respondents.

If a judgment-debtor has sufficient other property to satisfy a decree against him, it cannot be said that, in point of law, every gift of any part of his property is void upon the ground that the whole was hypothecated for the payment of the decree.

Peacock, C. J.—The Judge went too far in point of law in stating that the judgment-debtor had no power after the decree against him to give away any part of his property, and that his property must be considered to have been hypothecated for the debt for which he was liable under the decree. If the judgment-debtor had sufficient other property to satisfy a decree against him, it cannot be said that, in point of law, every gift

of any part of his property is void upon the ground that the whole was hypothecated for the payment of the decree. The fact, however, of his giving away property whilst a decree is pending against him is strong evidence, in the absence of anything to rebut it, that the gifts in such cases are for the purpose of protecting the property from execution. It was, therefore, necessary for us to remand the case under the special appeal in order to try, as a matter of fact, whether the deeds were fraudulent or not. But to save the expense and the delay which would necessarily have been incurred in sending the case back to the Lower Appellate Court, we thought it right to call up the case, and hear it ourselves upon regular appeal.

We have now heard the evidence, and there is nothing to show that, at the time when the judgment-debtor executed those deeds, he had other property sufficient to satisfy the decree. We have no doubt that the deeds are void upon the ground that they were executed for the purpose of protecting the property from execution under the decree; and probably that is what the Judge in the Lower Appellate Court intended, although, looking strictly at the language of his judgment, he appears to have put the case as a matter of law, and not as a matter of fact.

The decree of the first Court is affirmed with costs in the Lower Appellate Court and the costs of this appeal.

The 7th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Enhancement of rents—Ameen's report.

Case No. 325 of 1869 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 19th November 1868, affirming a decision of the Deputy Collector of that District, dated the 25th September 1867.

Mr. James Tweedie (Defendant), *Appellant*,

versus

Poorno Chunder Gangolee and others (Plaintiffs), *Respondents*.

Baboo Kalee Prosunno Roy for Appellant.

Baboos Sreenath Doss and *Motee Lall Mookerjee* for Respondents.

In a suit for enhancement of rent when the defendant objected in his grounds of appeal that the rates of the village in which his land was situated were lower than the Pergunnah rates: HELD that the Judge had no right to take the report of an Ameen who did not give credit to defendant's witnesses on account of something he heard in the neighbourhood; but that he ought himself to have examined those witnesses.

Peacock, C. J.—THE defendant in this case has been held very strictly to the proof of the plea that the property has been held at the same rate of rent from the time of the Permanent Settlement. In order to make out his plea to that effect, he proved that the land had been held at the same rate for the last 13 years. If he had shown that the rent had not been changed for the last 20 years, that would have been sufficient *primâ-facie* evidence to support his plea. To prove his case that the rent had not been changed for a period of 20 years, he called a witness who collected the plaintiff's rents and proved that, when the plaintiff purchased the lands, the jumma-wassil-bakee papers were handed over for the purpose of showing the rates of rent which had been collected. The jumma-wassil-bakee papers, however, which were in the plaintiff's possession, were not produced, as they doubtless would have been if they had shown that the rate of rent of the defendant's land had been changed during the preceding seven years. It was not shown how far back those jumma-wassil-bakee papers went, and in strictness, therefore, I think that the Judge was right in holding that the defendant had not proved that the rent had not been changed for 20 years preceding the suit, the *onus* of proving that fact resting upon him.

On the other hand, it appears to me that, if the plaintiff be held strictly to legal proof as to his grounds of enhancement, he has failed. No evidence was given to show that the rates which are called the Pergunnah rates were paid by ryots of the same class for lands of a similar description and with similar advantages in the places adjacent.

It is said, however, that no objection was made upon that point in the grounds of appeal to the Judge. The defendant did, however, state in his grounds of appeal "that the productive powers of the land have not been increased, and that the rates in the village have been proved to be 10 annas and 11 annas, and notwithstanding that, to assess the

lands at Pergunnah rates without paying any reference to the rates in the village is improper." The substance of that objection is that the Pergunnah rates ought not to have been acted on as the adjacent rates, it having been proved that the rates in the village in which the particular lands were situate were 10 annas and 11 annas, that is, lower than the rates found as the Pergunnah rates.

Without deciding what is the strict legal meaning of the words "places adjacent" in Act X. of 1859, I think it clear that the Pergunnah rates cannot be considered as the rates of the places adjacent, if the rates of the particular village in which the lands to be enhanced are situate are lower than those which prevail in the Pergunnah. The Judge, however, does not appear sufficiently to have entered into the ground of appeal to which I have referred. He treats it rather as if the objection was that the rates of the village, and not the rates of the Pergunnah, as a general rule, ought to be acted upon, but not as raising the question whether, if the Pergunnah rates are higher than those of the particular village, the Pergunnah rates are those which ought to prevail. He did not examine the evidence adduced by the defendant to show that the rates alleged in his grounds of appeal as the rates in the village were lower than those which prevailed in the Pergunnah. On that subject, he says "the plaintiff adduced a great "mass of evidence to prove his case, and "there is besides the report of the Ameen; "and this last the Deputy Collector especi-"ally records was not objected to by the "defendant."

But it appears upon that report of the Ameen that, the defendant having called witnesses named in the report, the Ameen made enquiries in the neighbourhood, and from what he learnt, the rates were such as he found them to be, and not as stated by the defendant's witnesses. Witnesses both for the plaintiff and defendant were examined; but the Ameen did not give credit to defendant's witnesses on account of something he heard in the neighbourhood. It appears to me that, when the defendant in his grounds of appeal contended that his witnesses had proved certain rates to be the rates of the village, the Judge had no right to take the Ameen's report, which got rid of the evidence of those witnesses by the statement made in conversation probably in the absence of the parties; and although the defendant had not objected to the Ameen's report before the Deputy Collector, the Judge ought to have examined the defendant's witnesses, and decided whether they did or did not make out the allegations in the defendant's ground of appeal.

It appears to me that the Judge's decision ought to be reversed; and the only question which remains is whether the case ought to be remanded. I am of opinion that it ought not to be remanded at all, unless it is remanded to take the evidence entirely *de novo* on both sides; and I think that we should not be justified in remanding the case for that purpose, seeing that there is no legal evidence to prove that the defendant was holding at lower rates than those which were paid for similar lands with similar advantages held by similar ryots in the places adjacent. The result is, as it appears to me, that the plaintiff's suit ought to be dismissed. In these cases of enhancement of rent, we should be doing great mischief if, whenever a case has been imperfectly proved, we should send it back again to permit fresh evidence to be given on both sides.

The decrees of the Lower Courts are reversed, and the plaintiff's suit is dismissed with costs in both the Lower Courts and of this appeal.

The 8th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Section 180, Act VIII., 1859—Notice to parties.

Case No. 419 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 4th November 1868, affirming a decision of the Deputy Collector of Khoolneah, dated the 28th August 1867.

Kristo Monee Debia (Defendant), *Appellant,*

versus

Mr. H. Eglinton (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

No one for Respondent.

Though there is no express direction to that effect in Section 180, Act VIII., 1859, yet it is necessary to give notice to parties of the time when a local investigation ordered by the Court is to be held.

Loch, J.—We think the Judge is wrong in saying generally that it is not necessary to give notice to the parties. Though there be no express direction in Section 180, Act VIII. of 1859, that notice is to be served on the parties, yet it is certainly necessary to give them notice that they may be made aware of the time when the local investigation ordered by a Court is to be held. But in this case the Ameen sets forth in the beginning of his report that he did serve notice upon both parties, and then he proceeds to state how he measured the land pointed out by the plaintiff's people. Statements thus made by the Ameen in his report are evidence; and if the defendant, special appellant, intended to show that these statements were incorrect, he should have proved that this was the case, and should have asked the Court to summon the Ameen and examine him. As he failed to do so, we do not think there is any ground for admitting this special appeal. We therefore dismiss it.

The 9th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Bastoo lands—Enhancement of rent—Clause 1, Section 17, Act X., 1859.

Case No. 478 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 25th November 1868, affirming a decision of the Deputy Collector of Kooshtea, dated the 29th November 1867.

Nymooddee Joardar (Defendant), *Appellant,*

versus

Mr. R. S. Moncrieff (Plaintiff), *Respondent.*

Mr. M. L. Sandel for Appellant.

Mr. R. T. Allan for Respondent.

Bastoo land, when it is a part of a ryot's jote or holding, is as liable to enhancement of rent as any other kind of land, and comes equally under the provisions of Act X., 1859.

The omission of the words "with similar advantages in the places adjacent," in the judgment of a Judge which found certain lands to be liable to enhancement under Clause 1, Section 17, Act X., 1859, was held, under the circumstances, to be insufficient in appeal to justify a remand or reversal.

Loch, J.—The first ground taken in special appeal in this case is that the Collector had no jurisdiction to try this case under Act X. of 1859, as the land was not used for agricultural or horticultural purposes.

The question of jurisdiction is now raised in special appeal for the first time; and I think it is taken at too late a stage of the proceedings. Certain cases have been referred to, in which it is said that the plea of want of jurisdiction was admitted in special appeal, although it was not urged in the Court below. But in those cases the question of jurisdiction was clear upon the pleadings, or from the admission of parties. It is urged that in this case also the question of jurisdiction is patent upon the pleadings, for the suit is to enhance the rent of *bastoo* land only; and *bastoo* land is land used for sites of houses, and not for agricultural and horticultural purposes; and reference has been made to certain judgments of this Court, to be found in 8 Weekly Reporter, page 251, 9 Weekly Reporter, page 553, 11 Weekly Reporter, page 183, and also to a judgment of a Full Bench of the Agra Court in Volume III., page 52, to show that suits for enhancement of rent of lands of this description do not come under the provisions of Act X. of 1859. It is admitted, however, that there is nothing in the pleadings to show that the land which is the subject of this suit is situated in a town, and it is only to the lands of this description that the judgments quoted apply. *Bastoo* land, when it is a part of a ryot's jote or holding, is as much liable to enhancement as any other kinds of land, and is equally liable to be dealt with as other lands under the provisions of Act X. of 1859. There is nothing in the proceedings below to show that any question of jurisdiction was raised on the use of the words *bastoo* land, and while I concur in the rulings which have been quoted to us, yet I think it is now too late in this case to admit this question of jurisdiction.

The second point taken in this special appeal is that the facts found by the Judge below are not sufficient in law to establish enhancement under Clause 1, Section 17, Act X. of 1859. This may be disposed of with another objection, *viz.*, that the Judge was wrong in saying that the defendant's deposition amounts to an admission of the rate of rent being 5 rupees.

What the defendant says on being examined with regard to this land is that the whole of it is *bastoo* land, and that the rate of 5 rupees is prevalent. The Judge considers this statement with the evidence regarding rates recorded in another case, No. 676, which appears to have been disposed of at the same time, and he says: "The Court "considers that there is evidence sufficient "to show that 5 rupees is the prevailing "rate for lands of a similar description "held by ryots of the same class as the "appellants." This finding meets all the requisitions of Clause 1, Section 17, Act X. of 1859, but omits to find whether the land is "with similar advantages in the places adjacent;" and it is urged for the appellant that the absence of these words renders it necessary that the judgment should be reversed.

No doubt, it would have been better had the Judge made his judgment complete by the use of these words. But looking at the finding of the Judge on this point, it appears to me very unlikely that he omitted to look to this point while considering the other points referred to in Clause 1, Section 17, Act X. of 1859, though he has failed to state it distinctly. I do not think that the omission of these words is sufficient to justify a remand or reversal.

Another ground taken in this special appeal is that the Judge was wrong in saying that there is *no* evidence of the purchase by the defendant of his alleged mokurruree and mowrosee tenure.

I have no doubt that, when the Judge made use of the words "no proof," all that he meant to say was that there was no sufficient proof, because he himself mentions the evidence that was adduced by the plaintiff to prove this point, and in the face of that he could not have meant that there was no evidence.

Under the circumstances stated above, we think this special appeal must be rejected, and we dismiss it accordingly with costs.

Macpherson, J.—I wish to add one word with regard to the point of jurisdiction, and to say distinctly that, in my opinion, the appellant would have been entitled to have this suit dismissed if it appeared upon the face of the pleadings or the admissions of the parties, or upon the evidence, that the land is of such a nature that a suit for enhancement will not lie under Act X. of 1859. But I consider that there is no evidence whatever, and that it does not appear on the pleadings, and has not been admitted, that the land is of such a nature.

It is true that some kinds of *bastoo* lands cannot be enhanced under Act X, *e. g.*, land in a town on which a house is built. But it is equally true that some kinds of *bastoo* lands *are* liable to enhancement, and do come under the provisions of Act X. of 1859, *e. g.*, land on which stands the house of a ryot who is engaged in cultivating the surrounding lands. In the absence of any plea by the defendant, or any suggestion even by him in the Lower Courts that the lands, the subject of suit, belong to the former class, it certainly seems to me that it would be preposterous for us upon a mere suggestion (for it is nothing more than a mere suggestion) of the appellants, now made by them in special appeal, to send the case back in order to ascertain what kind of *bastoo* land it is for the enhancement of the rent of which a decree has been obtained, and in order now to consider whether the Revenue Court has jurisdiction or not.

Our decision in no way conflicts with any of the cases quoted by the special appellant; nor do we at all dissent from the rule to be found laid down in them.

The 9th July 1869.

Present:

The Hon'ble Dwarkanath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

Enhancement of rent—Jurisdiction.

Case No. 399 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 24th November 1868, reversing a decision of the Deputy Collector of that District, dated the 15th June 1868.

Bhoobun Mohinee Dassee (Defendant), *Appellant,*

versus

Kedarnath Bose (Plaintiff), *Respondent.*

Baboo Anund Chunder Ghossal for Appellant.

Baboos Opendro Chunder Bose and *Bhowanee Churn Dutt* for Respondent.

In a suit for arrears of rent of a particular year after notice of enhancement on specified grounds, plaintiff (if his title is established) can only have a decree for the arrear claimed and on one or other of the grounds alleged. The Judge has no jurisdiction in appeal to declare his right to any enhanced rents for the future.

Hobhouse, J.—THIS was a suit for arrears of rent at an enhanced rate, the rents claimed being for the year 1273.

The grounds upon which the enhanced rents were demanded, as specified in the notice, were the increase in the value of the produce and in the productive powers of the lands, and these were the sole grounds stated in the notice.

The first Court laid down the issue as to whether the rate of rent demanded by the plaintiff was the prevailing rate in the neighbourhood, and upon that issue the Court gave the plaintiff a decree for the arrears of rent of 1273 at the enhanced rate of 2 rupees 8 annas a beegah, being something less than what the plaintiff claimed.

On the 2nd April 1868, the Judge, in appeal, found as a fact that neither of the grounds of enhancement specified in the notice, nor the one ground in issue in the suit, had been established by evidence, and he, therefore, disallowed the plaintiff's claim for the enhanced rents. But the Judge considered that, according to the practice of our Courts, the suit might be allowed to proceed for the purpose of determining the equitable rate leviable from the lands in future, and therefore the Judge remanded the case to be tried upon three issues; the material issue as regards the points before us being the question of the prevailing rates.

The first Court, on remand, adhered to its former decision, but the Judge, on appeal, has so far amended that decision that he has given a decree declaring the plaintiff's right to obtain enhanced rents for the year 1275 at the rate of Rs. 2-8 per beegah.

It is quite clear to us that, upon the very face of this decision, it cannot stand.

The plaintiff sued for arrears of rent of a particular year, and not for any declaration of his right to obtain enhanced rents for the future. In the notice, also, he set up as the only grounds of enhancement the increase in the value of produce and in the productive powers of the lands. If, therefore, he was entitled to any decree at all, he could only get a decree on one or other of those two grounds and for the arrears of rent of the year claimed, and the Judge, in fact, had no jurisdiction, sitting as a Revenue Court in appeal, to declare the plaintiff's right to any enhanced arrears for the future.

When, therefore, the Judge has found as a fact in his decision of April 1868 that the plaintiff has failed to establish the case on which he sued, we think that the case should have been dismissed, and we hold that the decisions of both the Courts below are erroneous in law, and that they must be reversed, and this special appeal decreed with costs of all the Courts.

The 9th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Execution-case—Attachment.

Case No. 206 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 23rd February 1869, affirming an order of the Moonsiff of Monghyr, dated the 5th June 1868.

Golam Yaheya (Decree-holder), *Appellant,*

versus

Sham Soonduree Kooeree (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Kalee Kishen Sein for Respondent.

In executing an *ex-parte* decree, dated 22nd September 1864, plaintiff obtained an order for attachment in December of that year. On 12th May 1866 defendant prayed under Section 119, Act VIII, 1859, to have the judgment against him set aside. His petition having been rejected, he appealed to the Judge, who remanded the case for trial upon which the Moonsiff struck the execution-case off his files. The plaintiff having appealed from the decision of the Judge to the High Court, the Judge's order was set aside, and the case remanded. In February 1868 the Judge found that defendant, not having come within 30 days after the first process to enforce the judgment, could not come in under Section 119. Defendant then applied for an order for the sale of the property.

HELD that, when the Judge's order of remand was set aside after the finding to which he came in February 1868, it was the Moonsiff's duty to allow the execution to proceed in the ordinary course; and that, whether the case was formally restored to the file or not, the order for attachment revived when the Judge's decision of 20th August 1866 was reversed.

There is no authority in Act VIII. of 1859 for saying that an attachment is at an end, because the execution-suit is struck off the file.

Norman, J.—THE appellant in this case is a decree-holder, who had attached a cer-

tain property called Rusoolpore belonging to the judgment-debtor. By a petition, dated the 3rd June 1868, he applied to the Court for an order for the sale of the property by auction under Section 249 of Act VIII. of 1859.

The Moonsiff refused the application, on the ground that "the execution-case had been struck off on the 26th of September 1866;" that the attachment, being prior to that date, had ceased to have any effect; and that an order for a sale by auction could not be made except on fresh attachment. The Moonsiff, accordingly, rejected the petition, and directed the petitioner to take out a fresh attachment.

The judgment-creditor appealed to the Judge, who held that the decree under which the decree-holder was proceeding was invalid, and therefore dismissed the appeal. From these decisions, the decree-holder appeals to this Court.

The facts of the case are briefly as follow:—

The plaintiff obtained an *ex-parte* decree on the 22nd of September 1864 for Rupees 545. He applied for execution of his decree by the attachment of Talook Rusoolpore, and obtained an order for that purpose in December 1864. For the present, we must assume that the order for attachment was duly made known as required by Section 239. Upon that order, under circumstances of which at present we know nothing, no further proceedings to bring the property to sale took place till the 12th of May 1866. On that day, the defendant presented a petition under Section 119, alleging that he had not received any notice of the proceedings, and praying for an order to set aside the judgment against him. On the 21st June 1866, his petition was rejected by the Moonsiff. From that decision, the defendant appealed to the Judge. On the 20th August 1866, the Judge reversed the Moonsiff's order, and remanded the case for trial.

The Moonsiff, by a roobocaree stating that the original decree, execution of which had been sought, had been set aside by the order of the Judge, and that the case had been remanded for trial, ordered that, therefore, the case in execution of that decree must be struck off. And, accordingly, the execution-case was then and there struck off the files of the Moonsiff.

The plaintiff appealed from the decision of the Judge to the High Court, and on the 11th of April 1867 the High Court decided that, under Section 119, Act VIII. of 1859, the defendant should have come in within thirty days from the time when the first process for enforcing the judgment of the Court had been executed; and setting aside the Judge's order, remanded the case to the Judge to try on what date the first process for enforcing the judgment of the Court was executed.

On the 1st February 1868, the Judge took up the case. He found that the defendant had not come in within thirty days after such first process had been executed; and he, accordingly, held that the defendant could not come in under Section 119, thus leaving the original *ex-parte* judgment of the Moonsiff from that date in full force and effect. On the 25th March 1868, the plaintiff applied for an order for the sale of the property, and after some other intermediate applications came that of the 3rd June to which I have already alluded.

I think that I must assume that, on the 12th of May 1866, when the defendant first applied to the Moonsiff to set aside the *ex-parte* decree, there was a valid attachment upon which the plaintiff was entitled to proceed to obtain an order for the sale of the property under Section 249. It appears to me plain that the defendant could not, by proceedings which were irregular and were afterwards set aside, remove the plaintiff from the advantageous position in which he stood on that day. The order of the Judge of the 20th August 1866, reversing the Moonsiff's decision, has been set aside, and the case must be treated as if no such order had ever existed. The order for the removal of the case from the files of the Court by the Moonsiff was passed while that order of the Judge was in force; and when the Judge's order was afterwards set aside in pursuance of the decision of the High Court after the finding on the facts to which the Judge came on the 3rd of February 1868, it became the duty of the Moonsiff to allow the execution to proceed in the ordinary course. The order which had been set aside, and the striking off of the case, an act merely done to give effect to the invalid order, could not affect the legal position and rights of the plaintiff. The Moonsiff should, when the decree-holder applied for an order for sale, have at once restored the case to the file, if restoration to the file was necessary.

I myself entertain a strong opinion that whether the case was formally restored to

the file or not, the order for attachment made under Section 235, prohibiting the defendant by a written order from alienating the property by sale, or gift, or in any other way, and all other persons from receiving the property by purchase, gift, or otherwise, was in full force and effect in May 1866. No doubt, while the decision of the 20th of August 1866 stood, the decrée on which the order for attachment was based having fallen to the ground, the order itself was inoperative. But when the Judge's decision was reversed, the original *ex-parte* decree with all proceedings held thereon, including, of course, the order for attachment, was at once revived.

I think that, except *possibly* as regards third persons who may have acquired rights during the time when the Judge's order was in force, or who may be able to show that the decree-holder has abandoned any of his rights or lost them by laches, the order for attachment must be deemed and taken to have full effect and operation from December 1864, or at any rate from the date when such order was duly notified. If, then, the force and effect of the attachment revived on the 3rd of February 1868, from that time it became unnecessary that the plaintiff should obtain any fresh order for attachment before proceeding to the sale of the property.

I entirely agree with what the Chief Justice says in the case of Mussamut Zuhoorun *versus* Tayler, X. Weekly Reporter, page 382. I know of no authority in Act VIII. for saying that an attachment is at an end, because the execution-suit is struck off the file. Mr. Justice Loch and myself decided a case in accordance with this opinion on the 27th of January 1864—Sutherland's Weekly Reporter, Civil Rulings, page 26.

I am not aware that there is any decision that conflicts with the decision that we now pronounce. (His Lordship referred to VIII. Weekly Reporter, pp. 418 and 49 and 51, and V. Weekly Reporter, page 4) I do not think that our decision is in conflict with any one of these cases. If it were, I should have thought it necessary to refer the matter to a Full Bench. We follow the decision of the 27th of January 1864; and our decision is in accordance with a case decided by the Privy Council (Rajah Mohesh Narain Sing *versus* Kishnanund Misser and Rughoobur Dyal Singh), reported at page 488, Sutherland's Privy Council cases.

The case must go back to the first Court, and the Moonsiff will order the sale to proceed, unless it is shown that there is some objection arising from the delay between December 1864 and May 1866, of which at present we know nothing.

Jackson, J.—I concur in the decision pronounced by Mr. Justice Norman. It has reference solely and specially to the objections which have been urged before us by the judgment-creditor to the sale of the property upon the attachment which has already taken place. The question is, whether the order of the 26th of September 1866, striking the execution-case off the file, did not become altogether null and void when the order of the Judge of the 20th of August 1866, on which that order was founded, was afterwards reversed by the decision of the 3rd February 1868, and when the judgment-creditor, without any delay at once asked that the execution-case might be carried on.

I think that, under the circumstances, the Court was able to revive the execution, and to continue the proceedings as if the orders of the 26th September had never been passed.

I give no opinion as to what would have been the case had the judgment-creditor delayed to revive and carry on the execution-proceedings. But I see no reason, as the case stands at present, why, if the judgment-creditor wishes to act on the attachment of December 1864, he may not act on it. The judgment-debtor has, as far as I can see shown no sufficient cause against his doing so.

It is impossible to say what may be the effect, if other parties have acquired rights in the meantime. That is a question to be decided between the judgment-creditor and those parties when it arises.

The case will be remanded to the first Court.

The 9th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit against Landlord for damages—Fire.

Case No. 920 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 19th January 1869, reversing a decision of the Officiating Subordinate Judge of that District, dated the 21st May 1868.

Radha Kishen (Defendant), Appellant,

versus

Mr. W. C. O'Flaherty (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Sreenath Doss* for Appellant.

Mr. W. L. Mackenzie for Respondent.

Plaintiff hired a thatched bungalow from defendant, and some months after he had entered it, lighted a fire in one of the rooms, which, owing to the chimney wanting a proper vent, led to the thatch of the building taking fire and to the destruction of the building and plaintiff's furniture. The suit was to recover the value of the furniture and was decreed by the Lower Appellate Court.

HELD, that it was reasonable for plaintiff to assume that where there was a fire-place with a chimney which extended to the roof, there was also a proper vent; that the Judge's finding that the plaintiff had been guilty of no act of negligence could not be interfered with in special appeal; and that his decision was correct.

Kemp, J.—THE defendant is the special appellant in this case. It appears that the plaintiff hired a thatched bungalow from the defendant at a monthly rent of 30 rupees. We are not told whether there was any lease executed, but it appears that the negociations respecting the hiring of the bungalow were carried on between the plaintiff and the son of the defendant. The plaintiff entered the house in the month of August 1867. On the 6th of December or thereabouts, the plaintiff lighted a fire in one of the rooms of the house, and the consequence was that owing to the chimney being in an incomplete state, the thatch of the bungalow caught fire, the building was destroyed, and with it the plaintiff's furniture, including a billiard table. The plaintiff brings this suit to recover the value of his furniture which he estimates at Rs. 1,396-7, the principal item being the aforesaid billiard table. The plaintiff's case is this, that he was not aware until the 6th of December, when he lit the fire, that the chimney was not built so as to admit of the vent of the chimney passing through the roof; and that assuming that the chimney was constructed in a proper manner, he lit the fire; and that as he has been endamaged by the defendant's not giving him previous notice of the defect in the chimney, he is entitled to recover the amount claimed.

The defendant's answer is to this effect. In his written statement, he does not say that he gave any special notice to plaintiff of the defect in the chimney, but he says that as the plaintiff made certain alterations in the bungalow to suit his convenience, he must have been well aware that the chimeny was in an incomplete state, and that, therefore, the plaintiff was guilty of an act of negligence, and that he must bear the consequences thereof.

The first Court dismissed the plaintiff's case, and held that because the plaintiff occupied the bungalow for four months he ought to have acquainted himself with the defect in the construction of the chimney, and that not having done so, he has only himself to blame for the loss incurred.

The second Court, the Judge of Patna, has reversed this decision, holding that the tenant, the plaintiff, was fully justified in taking it for granted that the chimney was built in a workmanlike manner; that he had no notice to the contrary from the landlord; and that the tenant, the plaintiff, has been guilty of no act of neglect.

The Judge, on the question of the amount claimed, found that it was a reasonable claim, and gave the plaintiff a decree with costs and interest.

I think that the decision of the Judge is a correct one, and that this appeal must be dismissed. The landlord attempted to prove that he had given notice to the tenant of the defect in the chimney, but he completely failed to prove that notice. It seems to me that when the landlord attempted to prove more than he had advanced in his original written statement, he was conscious of the defect in the chimney, and that he ought to have given notice to the tenant of that defect, more particularly as the bungalow is one with a thatched roof. The Judge has found as a fact that the plaintiff was guilty of no act of negligence, and I think that it is but reasonable that a party should assume that where there is a fire-place in a room and

a chimney which admittedly extended at all events to the roof of the house, there was also a proper vent to it. As the finding of the Judge, therefore, is a finding on a question of fact, I would dismiss the special appeal with all costs payable by the special appellant.

Glover, J.—I concur in thinking that this special appeal should be dismissed with costs. because it appears to me that the Judge's finding that the plaintiff was not guilty of any negligence, is a substantial finding of fact with which we could not interfere under any circumstances in special appeal.

The 9th July 1869.

Present:

The Hon'ble Dwarkanath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

Possession—Forcible ouster—Onus probandi—Evidence.

Case No. 3222 of 1868.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 7th September 1868, reversing a decision of the Moonsiff of that District, dated the 8th July 1867.

Ayesha Beebee and others (Plaintiffs), *Appellants,*

versus

Kanhye Mollah and others (Defendants), *Respondents:*

Baboo Debendro Chunder Ghose for Appellants.

Baboo Kalee Kishen Sein for Respondents.

Possession is evidence of title, and if a plaintiff proves that he had possession and that that possession has been forcibly disturbed by defendant, he makes out a *primâ-facie* title which it is for defendant to rebut.

Mitter, J.—I AM of opinion that the Lower Appellate Court has committed an error in law in refusing to decide upon the question of possession and dispossession.

If the plaintiff in this case can prove that she, or the party through whom she claims to derive her title, was in possession of the property in dispute, and that she was subsequently dispossessed by the defendant against her consent and without the intervention of a Court of law, the *onus* of proving title would be clearly upon the defendant.

It would be contrary to all principles of justice to hold that a man who has forcibly dispossessed another, is entitled to say, when the dispossessed party sues to recover possession that the burden of proving title is upon the latter. If such were the state of the law which we are bound to administer, we should be holding out a premium to violence and fraud. That evidence of possession is evidence of title is a proposition of law beyond all dispute. If, therefore, the party seeking to recover possession proves that he was in possession, and that he has been illegally dispossessed by the defendant, the proof of such previous possession would be at any rate sufficient to make out such a *primâ-facie* case in his favor as to shift the *onus* of proof from his shoulders to those of the defendant. For the purpose of doing justice between the parties to this litigation, it was therefore incumbent upon the Judge, first of all, to enquire whether the plaintiff's allegation of possession and dispossession was correct. The Court of first instance laid down a distinct issue on that point, and as far as I can gather from the judgment of that Court, it appears to have come to the conclusion that the plaintiff's husband through whom she claimed the property in dispute, had been in possession thereof ever since the year 1226, until the date of dispossession, which took place in the year 1268. If this conclusion is correct, the Judge ought not to have set aside the decision of the Court of first instance without requiring the defendant to rebut the *primâ-facie* case made out by the plaintiff by proving her previous possession and dispossession. If the defendant did dispossess the plaintiff, he ought to be called upon to prove his title; and it is only when he succeeds in proving a title, that the plaintiff ought to be required to prove a better one. But if the defendant, after he is proved to have dispossessed the plaintiff, fails to prove his title, the plaintiff would be entitled to a decree on the strength of the *primâ facie* case made out in her favor by the fact of her previous possession.

There is another point to which I wish to draw the attention of the Lower Appellate Court. Admitting, for the sake of argument, that the plaintiff has failed in proving the genuineness of the pottah propounded by her, it will be still necessary for the Judge to enquire, whether the plaintiff, or the party through whom she claims, had been in possession of the property in dis-

pute for such a length of time as would be sufficient to create a title by prescription in her favor, or at any rate a title by right of occupancy under the provisions of Act X. of 1859. Irrespective of the question of title by prescription, if the plaintiff or her predecessor had been in possession for more than 12 years, she has, by the operation of Act X. of 1859, acquired a right of occupancy against her landlord, who is admitted on all sides to be the owner of the land in suit; and the defendant claiming under a lease from the same landlord had no right whatever to interfere with that right of occupancy.

The case is, therefore, remanded to the Lower Appellate Court, in order that that Court may try, first of all, whether the plaintiff was in possession, and whether she was dispossessed by the defendant. If this point is found in her favor, the question of title must be decided with reference to the foregoing remarks. The Judge is also requested to decide whether the plaintiff's and her husband's possession did exist for such a length of time as would be sufficient to create in her favor either a title by prescription or a right of occupancy within the meaning of Act X. of 1859.

The costs of this appeal will follow the final result of the case.

Hobhouse, J.—I agree in remanding this case. The land in dispute was, as I understand it, a jote. The plaintiffs alleged that they had bought this jote from the original jotedar, Shoulut Khan, in the year 1226; that the jote had subsequently been confirmed to them by a pottah from the naib of the zemindar in the year 1249, and that they had held the jote up to the year 1268, when they had been dispossessed by the defendant.

The issue laid down by the first Court was this: "Is it true that the disputed "land formed the holding of Shoulut Khan, "and was held by him as such, and that "plaintiffs have been dispossessed by the "defendant; or is it a fact that it forms the "holding of the defendants, and that they "are in possession?"

The Lower Appellate Court has found that the pottah set up by the plaintiffs, as given by the naib of the zemindar in the year 1249, is not proved; and as the Lower Appellate Court finds that pottah to be the plaintiffs' title-deed, that Court holds that the plaintiffs have failed to prove their title, and so has refused to go into the question of possession, and has dismissed the suit.

I think that, not only under the rulings of this Court generally, but under the particular pleadings in this case, the Lower Appellate Court has committed an error in law. The plaintiffs did not rest their title solely, or even materially, upon the pottah derived from the naib; they rested it on the fact that some 23 years previous to the grant of that pottah they had obtained the jote from the defendant. The pottah, it seems to me, was never anything more than a piece of evidence in the case, and should not have been treated as if it were the foundation of the plaintiffs' title. If anything, it seems only to have been put forward as in confirmation of their title.

On the general question of the effect of forcible ouster, that is, as I understand it, an ouster without the consent, either express or implied, of the occupant, I adhere to the decision in which I agreed with Mr. Justice Phear, and which will be found in page 602, Volume IX. of the Weekly Reporter. I think that possession is evidence of title, and that, if a plaintiff proves that he had possession, and that that possession has been forcibly disturbed by another person, he will have made out a *primâ-facie* title which it would be upon that other person to rebut.

The 9th July 1869.

Present:

The Hon'ble Dwarkanath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

Suit by judgment-debtor—Allegation of fraud—Onus probandi.

Case No. 337 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 20th November 1868, reversing a decision of the Sudder Ameen of that District, dated the 29th March 1867.

Mohima Chunder Mullick (one of the Defendants), *Appellant,*

versus

Buroda Soonduree Dossee (Plaintiff) and others (Defendants), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

A, having obtained a decree in a suit instituted on a bond purporting to have been executed by plaintiff's father and one *D*, proceeded to execute it by putting up for sale certain rights and interests of plaintiff as the legal representative of her father. Plaintiff sued on the allegation that the decree was fraudulent and collusive, and that she had been served with no notice of the proceedings taken in execution.

HELD that it was for plaintiff to make out her case of fraud, and that it was not for defendant to show that the decree obtained from a competent Court was not collusive, or that the notice had been actually served.

Miller, J.—WE are of opinion, and indeed it is admitted by the pleader for the respondent, that the decision of the Lower Appellate Court cannot stand.

The Lower Appellate Court appears to have thrown the entire *onus* of proof upon the defendant, now special appellant before us, but the circumstances of the case clearly show that the *onus* was upon the plaintiff to establish the substantive case of fraud with which she came into Court.

It appears that one Hulodhur instituted a suit on the basis of a bond purporting to have been executed by Indro Narain, the father of the plaintiff, respondent, and by one Degumburee Dassee. The suit was instituted against the plaintiff Hurro Monee and against Degumburee Dassee, and a decree was passed in that suit in favor of Hulodhur on the 31st July 1854. In execution of that decree, the rights and interests of the respondent, the daughter and legal representative of Indro Narain, in a certain decree, were put up for sale and purchased by the special appellant, who had previously purchased by a private sale the decree which Hulodhur had obtained against Hurro Monee and Degumburee. The plaintiff instituted this suit on the allegation that the decree of 1854, as well as the proceedings taken in execution of that decree, were altogether fraudulent, and it is clear, therefore, that it is upon the plaintiff to establish the case of fraud upon which her suit is based.

Section 11, Act XXIII. of 1861, distinctly provides that all questions arising between the decree-holder and the judgment-debtor must be determined in the execution-department, and not by a regular suit. It was, therefore, incumbent upon the plaintiff, if she had any notice of the proceedings which were taken against her in execution of the decree of 1854, to appear in the execution-department, and to raise whatever objections she had against those proceedings The plaintiff, however, says that she had no knowledge whatever of the execution-proceedings, and that the notice, which is alleged to have been served upon her under the provision of Section 216, Act VIII. of 1859, was not really served. Under these circumstances, it was for the plaintiff to establish in the first place that the decree of 1854, which was based on a bond purporting to have been executed by her father, was a fraudulent and collusive decree; and in the next place, that she had no knowledge whatever of the proceedings taken in execution of that decree in consequence of the non-service of the notice above referred to upon her.

The learned Judge in the Court below appears to have thought that it was for the defendant to prove that the bond purporting to have been executed by the plaintiff's father was a genuine instrument; and because the Judge was of opinion that the evidence adduced in support of that bond was not sufficient, he came to the conclusion that the decree passed on the basis thereof must have been a fraudulent one. He has further found that the evidence adduced by the defendant to prove the service of notice, under the provisions of Section 216, Act VIII. of 1859, was not sufficient, and he has, therefore, come to the conclusion that the plaintiff was purposely and fraudulently kept in ignorance of the proceedings which were taken against her in the execution-department.

We are of opinion that both these conclusions are erroneous in law. It was for the plaintiff to make out her case of fraud, and not for the defendant to show that the decree which his vendor had obtained from a Court of competent jurisdiction, and against a party who then represented the estate of the plaintiff's father, was not a collusive decree, or to show that the notice in question had been actually served.

The only question, therefore, which remains is whether this case ought to be remanded to the Lower Court, in order that it might re-investigate it by throwing the *onus* of proof upon the plaintiff. We find, however, that there is no evidence whatever to substantiate the allegation of fraud on which the plaintiff has come into Court.

It has been said that there are certain circumstances connected with the conduct of Hulodhur, from which a Court of justice might infer fraud; and it has been urged that, because the execution of the decree was taken out some 10 years after the date on which it was passed, the Court can rea-

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sonably infer from that fact that the whole of the proceedings were fraudulent and collusive.

We observe, however, that there is nothing to show that no intermediate proceedings were taken between the date of the decree and that of the last application for execution which resulted in the sale of the property in question. Under these circumstances, the plaintiff is not entitled to ask the Court to infer fraud, merely because this last application was made 10 years after the date of the decree.

But be that as it may, it is quite clear that there is no evidence on the record to prove fraud against the defendant, special appellant. Whether there is any evidence of fraud against Hulodhur or not, it is unnecessary for us to determine; but in the absence of any evidence of fraud against the special appellant, who appears to be a *bond-fide* purchaser for value, we cannot set aside the purchase which he has made in execution of his decree.

We reverse the decision of the Judge, and restore that of the Court of first instance with costs of this appeal, and the costs of the Lower Appellate Court.

The 10th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of contract—Right of action—Lessor and lessee.

Case No. 146 of 1869.

*Application for review of judgment passed by the Hon'ble Justices Kemp and Glover on the 24th March 1869, in Special Appeal No. 3234 of 1868.**

Munnee Dutt Sing, Defendant (Appellant), *Petitioner,*

versus

Mr. William Campbell, Plaintiff (Respondent), *Opposite Party.*

* 9 W. R. 278.

Baboo Romesh Chunder Mitter for Petitioner.

Mr. C. Gregory for Opposite Party.

A party failing to perform his contract may be sued at the pleasure of the other party, either for specific performance or for damages.

When he gives a lease, a lessor enters into an implied contract to give his lessee peaceable possession of the land which is the subject of the lease.

Glover, J.—The grounds taken in this petition for review are, *first*, that under the contract, the plaintiff is entitled only to sue for specific performance, that is to say, for possession of the land leased to him, and not for the recovery of the zur-i-peshgee money; and, *secondly*, that the petitioner was never applied to to make over possession to the lessee, and that, therefore, the suit brought by the lessee ought to have been dismissed. Neither of these objections appears to us to be a good ground for review. In the first place, a party contracting and failing to perform his contract may be sued, at the pleasure of the other party to the contract, either for specific performance of what he contracted to do, or for such a sum in the way of damages as may fairly represent the loss incurred.

In this case, the plaintiff, who could not obtain possession of the land leased out to him was perfectly justified in suing for the recovery of the money advanced for that land. He might of course have sued for specific performance, but if he chose instead of that to get back his money, there is nothing in the law to prevent him from doing so.

With regard to the second objection, the terms of the pottah were distinctly that the lessor should put the lessee into possession of the land leased, and we also held at the time of the first hearing that even if that stipulation had been absent from the lease, the lessee had always that right under the implied understanding that every lessor enters into, when he gives a lease, of giving peaceable possession of the land which is the subject of the lease to his lessee. There is nothing in the agreement between the parties, nor is there any thing in the law that we are aware of, which compelled the plaintiff, the lessee, to apply to his lessor to be put in possession. On the contrary, we find it proved by the evidence of the lease itself that the obligation was on the lessor to give the plaintiff possession of the property leased to him. The application is, therefore, refused with costs.

The 10th July 1869.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Adjudication of District boundaries—Jurisdiction—Competent authority—Section 14, Act VIII., 1859.

Case No. 752 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 26th January 1869, affirming a decision of the Moonsiff of Bazeetpore, dated the 22nd August 1868.

Mr. G. N. Pogose and another (Plaintiffs), *Appellants,*

versus

The Collector of Sylhet and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Nuleet Chunder Sein* for Appellants.

Baboos Juggadanund Mookerjee and *Bama Churn Banerjee* for Respondents.

An adjudication for the purposes of settlement and assessment is not an authoritative decision of a question of civil jurisdiction or of proprietary right.

The final order of a Commissioner of Revenue in the department of resumption, settlement, and assessment is not that of a competent authority within the meaning of Section 14, Act VIII., 1859.

Bayley, J.—I AM of opinion that the judgment of the Lower Appellate Court is wrong and must be reversed.

The facts are simply these. The plaintiff sued in Mymensingh for a certain julkur as being situated in Pergunnah Jowanshye of that Zillah.

The defendant's case was that the julkur in question appertained to his estate lying in Zillah Sylhet.

The case being brought by the plaintiff in the Moonsiff's Court at Chowkee Bazeetpore in Mymensingh, that Court held, with reference to the precedent of the High Court, reported at page 213, Volume II., Weekly Reporter, that it had no jurisdiction to try the case.

The Subordinate Judge, in the Lower Appellate Court, affirmed that decision and dismissed the plaintiff's suit.

The plaintiff appeals specially, and urges before us that the Lower Appellate Court is wrong in holding that because the julkur had been adjudged by a competent authority to belong to a known division within the local limits of another district, it had no jurisdiction to try the case under the provisions of Section 14, Act VIII. of 1859, inasmuch as, *firstly*, as a matter of fact, there was no adjudication at all; and, *secondly*, if there were, it was not that of a *competent authority* within the meaning of Section 14.

I concur with the pleader for the special appellant on both these points.

On the *first* point, what we have to look to is the proceeding of the Commissioner of the Dacca Division, dated the 9th March 1864, which is the final order of the Revenue authority. It appears from that proceeding that the plaintiff claimed the julkur in question, as he now does, as appertaining to his estate forming part of Pergunnah Jowanshye in Mymensingh. The Commissioner held that he adduced no sufficient proof of that fact. The Commissioner added that the Collector of Mymensingh being asked on the point, reported that half of the river lay in one district and half in the other. But the Commissioner, taking into consideration the fact that the Superintendent of Survey included it in the district of Sylhet, ordered that the julkur should be considered, for the purposes of settlement and assessment, as appertaining to the district of Sylhet.

We do not think that such a proceeding as the above really does show, in the terms of Section 14, that it had been adjudged by a competent authority that the julkur belongs to a known division within the local jurisdiction of another Court. This perhaps would be sufficient for our decision in the present case; but as the other point has also been fully gone into, we give our opinion.

On that point, also, the pleader for the special respondent has referred to a decision of the High Court of the North-Western Provinces, page 654, Volume IX. of 1864. There it was held that as the Commissioner had assigned the lands under the provisions of Regulation XI. of 1825 as belonging to a certain district, this was an adjudication by a *competent authority* to give jurisdiction to a Civil Court. Now, with the highest respect for the decisions of the High Court in the North-Western Provinces, I have in the first place to observe that we are not bound by those decisions; and, secondly, that the present case is not at all one coming under the provisions of Regulation XI. of 1825.

Proceeding, then, to the decisions of our own Court, the first case quoted is from page 213, Volume II., Weekly Reporter, Civil Rulings, where it has been held that, "when a survey-award is contested by a "plaintiff within the proper time, and the "accuracy or otherwise of the same is the "very question to be tried, it cannot be held "to be the award of a competent authority "within the meaning of Section 14, Act "VIII. of 1859."

The next case quoted is a Full Bench decision, reported at page 200, Volume VII., Weekly Reporter. There it has been held that neither the Magistrate, nor the Superintendent of Survey, has power to determine the question of jurisdiction, that is to say, it was held that neither the decision of the Magistrate nor that of the Superintendent of Survey was the decision of a competent authority within the provisions of Section 14.

The third case cited is from page 389, Volume XI., Weekly Reporter, where it was held that "the adjudication by Revenue "Authorities of the boundaries of two dis-"tricts is not an effectual settlement of the "question of jurisdiction, which must be "tried by the Civil Court itself under Sec-"tion 14 of the Code of Civil Procedure."

I do not say, however, that we can follow the decision of the Division Bench in Volume XI. to the extent of saying that the Civil Court itself must be the only "competent authority" under that Section.

I think, then, that the final order of the Commissioner of Revenue in the Department of resumption, assessment, and settlement (dated 9th March 1864) is not that of a competent authority within the meaning of the Section above cited. Regulation II. of 1819 is the main Regulation for defining the rights of Government and zemindars in matters of resumption, and it has always been held from the case of Hurgovind Bose downwards that the province of those Resumption Courts is only to say whether the lands are liable to assessment or not, and not to determine proprietary rights of parties to estates.

Again, looking to the order of the Commissioner, what does he adjudicate? He merely adjudicates that, for the purposes of settlement and assessment, the property was to be considered to be in Zillah Sylhet. That surely is not a determination and adjudication by a competent authority of the question raised before us, namely, whether, for the purposes of proprietary right, of which the Commissioner's own proceedings show he took little direct notice, the julkur lies within the local limits of the district of Mymensingh or those of Zillah Sylhet.

In this view, I think the judgment of the Lower Appellate Court must be reversed, and the case remanded to the first Court to be tried on the merits.

Jackson, J.—I concur with Mr. Justice Bayley that the decision of the Revenue Commissioner, which the Lower Courts have considered to be an adjudication by a competent authority as regards the disputed julkur being situated in Zillah Sylhet, is not a sufficient adjudication. It does not appear upon the face of it that the Commissioner entered into the question at all. He simply records having obtained two conflicting reports from two different places, and considers it unnecessary to interfere with the resumption-proceedings. This, therefore, not being sufficient, the Courts have now to determine whether the julkur lies within the local limits of Mymensingh or of Sylhet.

It is, therefore, not necessary to go into the question whether the adjudication by the Revenue Commissioner would be an adjudication by a competent authority within the meaning of Section 14 of Act VIII. of 1859.

I am inclined to think that the decision of the Full Bench of this Court went almost to the effect of holding that no authority, excepting a Civil Court, is such an authority. My only doubt is that, under Regulation II. of 1819, the Resumption Court had judicial powers, and, in fact, had to determine such questions for the purposes of ascertaining jurisdiction; but it is not necessary to enter into that question.

This case must be remanded to the first Court for trial on the merits.

The costs will follow the result.

The 15th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Omission of reasons in a judgment—Special appeal.

Case No. 116 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 26th October 1868, reversing a decision of the Moonsiff of Doobrajpore, dated the 23rd March 1868.

Golam Hossein (Plaintiff), *Appellant,*

versus

Ram Doyal Ghose (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

No one for Respondent.

As a matter of law, the decision of a Lower Appellate Court cannot be said to be erroneous or fit to be reversed, because the Judge has not, in reversing the decision of the Court below, categorically met and refuted the reasons on which that decision had proceeded; but such an omission may form a good ground for an application to the High Court to require the Lower Appellate Court to set forth the reasons on which its judgment proceeded.

Jackson, J.—The vakeel for the special appellant in this case states that he feels he is unable to support this appeal. He, therefore, does not ask the Court to try these grounds of special appeal which had been framed. Of course, under these circumstances, we have no choice but to dismiss the appeal with costs.

In making this statement to the Court, Mr. Twidale observed specifically that one of the grounds of special appeal upon which he had been disposed to rely, namely, that the Lower Appellate Court had not met in its decision the grounds set forth by the first Court, was one which he could not hope to urge with any effect before this Bench, although he had reason to think that it was a ground of special appeal which might find favor with other Division Benches of this Court.

This observation, I think, makes it necessary that we should say something upon the mode in which we should deal with such an objection, if it were set forth with anything like grounds to support it.

I do not think that, as a matter of law, we can say that a decision is erroneous or fit to be reversed, because the Judge of the Lower Appellate Court has not categorically met, as it is called, and refuted the reasons on which the decision of the Court below has proceeded when he reversed that decision; but I do think that, in such circumstances, the party who is defeated in the Lower Appellate Court may have a very good ground of objection, and may very properly apply to this Court for relief, although he may not ask that the decision should be set aside upon that particular ground. I think that, if the Lower Appellate Court reversed a well-considered and clear judgment of a Court below, without assigning any reasons for its decision, and it should appear upon reading the two judgments that, if those reasons had been fully given, the losing party might very probably be enabled to base upon such reasons, a ground of special appeal, in such a case, I think, the special appellant might very properly apply to this Court to require and direct the Lower Appellate Court to do that which the law requires, *viz.*, set forth the reasons on which its judgment has proceeded; and I think that, if an application was made to us in proper time, and if the nature of the case appeared to require it, we should make that order; and thereupon, having the reasons of the Lower Appellate Court before us, we should, of course, give the special appellant an opportunity of framing his grounds of special appeal, in order that the case might have a proper hearing in the special Appellate Court.

I am bound to say that, on looking at this case, even supposing such an application had been made to us, I do not think it is a case in which we ought to grant it. I observe that the issues have been fairly stated, as far as we can judge, and that reasons have been given at considerable length for the decision upon those issues It will very frequently happen that, in the eyes of the first Court and the Lower Appellate Court, different points in a case may appear to be of greatly varying importance. Those points which the Court of first instance has discussed with great pains, and upon which it has given its judgment at great length, may not appear to the Appellate Court to be cardinal points in the case; and therefore those points which the Court of first instance has comparatively neglected will receive much greater attention at the hands of the Lower Appellate Court; and it would be impossible to say *à priori* that, in respect of the selection of those points in which the judgment should be full, or in which it should be meagre, the Lower Appellate Court was wrong. We ought, on the contrary, to presume that the superior Court, presided over as it is by

the more experienced Judge of the two, was more competent to say which were the really important points in the case. I do not think, therefore, it can ever be said, as matter of law, that, for such a reason as this, we ought to reverse the judgment of the Court below.

I may add also that, although a general observation of this sort has been made, yet Mr. Twidale has not pointed out any decisions of Division Benches of this Court which have held that it is the duty of this Court to reverse the judgment of the Lower Court under such circumstances. There may, no doubt, have been instances in which such an order has been made, and it may have been justified by the circumstances.

I have thought it right to say this, because otherwise it might be supposed that we were proceeding in manifest discord with the views of other Benches of this Court, and, as far as I am concerned, nothing could be further from my intention.

Markby, J.—With regard to this particular case, I must say there is a sufficient statement by the Judge of the motives of his decision, to enable (if there were any grounds for it) the party against whom the decision has been given to frame a special appeal.

With regard to the suggestion that has been made as to the practice of this Bench being different from that of other Division Benches, it is the first time I have ever heard of it. I cannot conceive that the mere omission of the Judge to do his duty in recording the reasons for his decision, could form a ground of special appeal on which that decision may be reversed.

It is unnecessary to say what would be the proper course if the Judge were to reverse the decision of the Lower Court in such brief and indefinite terms as made it impossible to frame any grounds of special appeal. My present impression is that the proper course for the vakeel of the special appellant to adopt would be to come at once with an application to this Court, and to ask that the case may be sent back in order that the Judge may state his reasons more fully. Probably he would have to make out a very good case before that would be done; but I am not at present prepared to say that he might not do it, but that it would be a good ground of special appeal upon which the judgment of the Lower Appellate Court might be reversed. I have not heard, nor do I know, of any decision of this Court to that effect. If there are, it is the duty of the vakeel to bring them before us, and if we do not follow them, we should, I imagine, take the usual course of referring the matter to a Full Bench.

The 12th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Questions of title—Intervenors—Section 77, Act X., 1859.

Case No. 565 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 2nd December 1868, reversing a decision of the Deputy Collector of that District, dated the 19th September 1867.

Ram Chunder Banerjee (Plaintiff), *Appellant*,

versus

Shaik Ekramoollah (Objector), *Respondent*.

Baboos Motee Lall Mookerjee and *Mothooranath Bose* for Appellant.

Baboo Obhoy Churn Bose for Respondent.

Where parties have conflicting interests, Section 77, Act X. of 1859, does not allow the title to receive rents to be tried in a rent-suit, but reserves such questions to be determined in a regular suit.

Peacock, C. J.—It appears to me that the decision of the Lower Appellate Court ought to be reversed. It clearly ought to be reversed as to the rent of 1271, 1272, and 1273, which became due to plaintiff and which was found never to have been paid, and for which he got a decree from the first Court. The only remaining question is as to the rent of 1274.

It appears to me that Section 77, Act X. of 1859, was never intended to allow the title to receive rents to be tried in a rent-suit in cases in which parties might have conflicting interests. That Section reserves such questions to be determined in a regular suit. But as there are decisions by Division Benches of this Court to the effect that, independently of that Section, questions of

title may be raised by intervenors, I should have thought it necessary, if this case fell within the principle of those cases, to refer it for the consideration of a Full Bench. But it appears to me on the showing of the intervenor himself, that at the time of his intervention he had no title to receive the rents. According to the cases cited, one* from 1 Bengal Law Reports, Privy Council cases, page 23, and another from Volume XI. of the Weekly Reporter, page 161, it appears that a mere purchase of a mourosee tenure sold under Act VIII. of 1865 of the Bengal Council, does not of itself necessarily destroy all under-tenures. In this case up to the time of his intervention, the purchaser who intervened had never made any claim whatever to set aside the dur-mourosee of plaintiff, nor does he show that the ryots who held under the dur-mouroseedar had attorned to the intervenor, or in any way become his tenants.

For the above reasons, it appears to me that, the decision of the Lower Appellate Court ought to be reversed, and the decision of the first Court restored with the costs of this appeal and the costs in the Lower Appellate Court.

The 12th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Cognate cases—Appeal to Privy Council—High Court reversing its own decision.

Cases Nos. 91 to 93 of 1869.

Applications for review of judgment passed by the Hon'ble Justices Kemp and Seton-Karr, on the 30th August 1865, in Special Appeals Nos. 937, 1635, and 3288 of 1864.

Sutto Surrun Ghosal Bahadoor, Defendant (Appellant), *Petitioner*,

versus

Tarinee Churn Ghose and others, Plaintiffs (Respondents), *Opposite Party*.

Baboos Hem Chunder Banerjee and *Obhoy Churn Bose* for Petitioner.

Baboos Mohendro Lall Shome and *Khetturnath Bose* for Opposite Party.

* Fatima Khatoon vs. Mahomed Jan Chowdhry, 10 W. R. 29.

Of five cognate cases governed by one decision of the High Court, the only two which were above 10,000 rupees were appealed to the Privy Council, who reversed the decision of the Court. On an application of the successful appellant made within 90 days from the decision of the Privy Council, the High Court reversed its own decision in the three cases which had not been appealed.

Kemp, J.—THESE are three applications to review the judgment of this Court, dated 30th of August 1865.

It appears that Baboo Degumbur Mitter brought five separate suits for enhancement of rent against Rajah Sutto Surrun Ghosal. The five cases were appealed to this Court specially, and on the 30th August 1865, the Court (Present: Kemp and Seton-Karr, *JJ.*) dismissed the appeals.

The Rajah appealed two of the five cases, the valuations of which were above 10,000 rupees, to the Privy Council, and the decision of this Court was reversed.

The Rajah now applies praying that, with reference to the decision of the Privy Council, this Court will reverse its decision in the three cases which were not appealed to England.

The other side contend that as this application has been made after more than 90 days from the date of the decision of this Court, and as the applicant did not ask for a review of the decision of this Court in the three cases, the subject of this application, nor take any step to obtain the permission of the Privy Council to include those three cases in the appeal made to that tribunal, the application ought to be rejected. A decision of the Full Bench, published in Volume IX., Weekly Reporter, page 181, and other decisions by Divisional Benches following that ruling, have been quoted.

We think that the present application must be granted. The ruling of the Full Bench refers to a case in which a new exposition of the law had been laid down contrary to that which had governed the decision of cases for years past. It was held that it would not be right to permit a review of decisions which had been passed years ago, merely because this Court had taken a different view of the law from that hitherto taken, not by one Bench, but by the Courts throughout the country.

In the case before us, the interpretation put by the Court upon a decision of the Privy Council in the case of Ranee Surnomoyee, and upon Regulation XI. of 1822, was held by their Lordships of the Privy Council

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to be erroneous. One decision governed the five cases appealed to this Court, and the cases were cognate cases.

It is true that the applicant might have asked this Court to review its decision in the three cases which were not appealed to the Privy Council. or he might, following the precedent laid down in the case of Baboo Gopal Lall Tagore,* have applied to that tribunal to call for the three cases, and decide them with the cases appealed; but it is clear to us that the applicant did not take this step, because he was under the impression that an appeal in a case of a valuation below 10,000 rupees was wholly inadmissible.

Taking, therefore, into consideration that the five cases were cognate cases; that one judgment governed the five cases; and that the judgment of this Court has been set aside in appeal by the superior Court, we think that a just and reasonable cause has been shown by the applicant why he did not apply for a review at an earlier date.

We may observe that this application has been made within 90 days from the decision of the Privy Council.

The decision of the Court in special appeals, Nos. 937, 1635, and 3288, as also the decision of the Principal Sudder Ameen of the 24-Pergunnahs, are reversed, and the special appeals Nos. 937, 1635, and 3288 are decreed with costs, including the costs of this application.

The 12th July 1869.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Possessory suit—Fraud.

Case No. 2267 of 1869.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 13th May 1868, affirming a decision of the Subordinate Judge of that District, dated the 28th June 1866.

Echamoyee and others (Plaintiffs), *Appellants,*

versus

Huro Soonduree Dassee and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboos Onookool Chunder Mookerjee and *Sreenath Doss* for Respondents.

In a suit to recover immoveable property alleged to have belonged to plaintiff's husband, which she inherited from him at his death, and from which, after seven years of possession, she was ousted by defendant, whose possession was confirmed by the Magistrate under Section 318 of the Code of Criminal Procedure, defendant claimed under a deed of sale which the Lower Courts found to have been executed in fraud of creditors.

HELD that, if plaintiff was in possession for seven years since her husband's death, she should not be allowed to be dispossessed on the ground of a fraudulent deed to which defendant was a party years previously, to which plaintiff was no party.

Jackson, J.—THE principal plaintiff in this case sues to recover certain immoveable property. She alleges that it belonged to her husband, Protab Chunder, who died in 1857, who remained in possession of it up to the date of his death, and that she then inherited it, and possessed it from his death until the year 1864, when the defendant, who is the sister of Protab Chunder, succeeded by connivance with the plaintiff's servants and omlah in ousting her, and obtained an order from the Magistrate confirming her possession.

The defendant alleges that she is entitled to the property in dispute, partly under a gift and partly under a deed of sale, and that she has been in possession of the property for more than twenty years, and that the plaintiff's suit is consequently barred under the Law of Limitation.

The first Court found against the defendant's allegation of gift. As respects the deed of sale, it found that, as it was admitted that the deed in question had been executed in fraud of creditors, it was binding upon the plaintiff.

The Judge, on appeal, was of the same opinion, and the real contention before this Court on special appeal is whether the Courts were right in the law they have thus laid down. The Judge has given no opinion upon the facts of the case. He has not decided whether, since the deed of sale was executed, the plaintiff, and, before her, the plaintiff's husband, remained in possession, notwithstanding that deed; but taking even these facts as proved, the Judge is of opinion that the plaintiff's claim should be dismissed because the plaintiff was a party to the fraud, which she admits was practised by her husband.

We think that the Judge is not correct in ruling that the plaintiff was a party to the fraud of her husband. If the plaintiff's

* 3 W. R. 1.

statement of fact is correct, there has been a great fraud committed by the defendant upon her, and it may be that the plaintiff's husband and the defendant joined in committing a fraud when the deed of sale was executed; but so far from the plaintiff upon her own statement joining in that fraud, the fact appears to be that the plaintiff, in some petition to the Court, stated that the transaction was a fraudulent one. If, this had been a suit brought by the plaintiff's husband to recover this property, alleging that the deed was a fraud, the Courts would rightly have held him bound by his own acts, and would not let him obtain any advantage from his fraud. If, again, the plaintiff in this suit has never been in possession, and the defendant has been in possession, the Courts would not now listen to any allegation of the plaintiff attempting to void the transaction on the ground of fraud. But if the plaintiff's allegations are correct, that is, if she has been in possession of this property for seven years since her husband's death, it seems contrary to all equity that the defendant should be allowed to dispossess her on the strength of a fraudulent deed to which the defendant was a party years previously. The result would be that, because the plaintiff's husband and the defendant attempted to commit another fraud twenty years ago, the defendant is to be allowed to commit another fraud now upon the plaintiff who was no party to the former fraud.

The case, of Porikheet Sahoo, reported at page 221, Volume III., Weekly Reporter, is quoted against this view of the law. From the judgment it is not clear whether the plaintiffs were found to have been in possession, as alleged, or not. If the plaintiffs were not in possession, no fraud was committed upon them. The estate had been actually made over to the defendant, and even the heirs of the person who made it over in fraud would not be entitled to recover that estate on the allegation that it was made over for fraudulent purposes.

The most important point for the plaintiff to establish by clear and undoubted evidence is that she has been in possession, as she alleges, during the seven years which elapsed from the date of her husband's death until she was ousted. As the alleged ouster was the result of an enquiry under Section 318, Act XXV. of 1861, there is every presumption against the plaintiff's having been in possession; but still it may be able to prove that the decision on that point by the Magistrate was erroneous, and that she has all along been in possession. If she can prove this, then will come the question whether the deed propounded by the defendant is a valid deed or a fraudulent transaction. No statement made by the plaintiff's husband or the plaintiff will be any evidence upon that point. The plaintiff will have to give some evidence, to make out a *primâ-facie* case that the deed was a mere paper-transaction.

The Judge will have to consider whether the fact of possession will not be sufficient *primâ-facie* evidence, as it is inconsistent with the sale being a genuine transfer of the property, and then it will be for the defendant to establish her purchase.

The Judge has also in his decision found against the plaintiff, apparently on the allegation that she is attempting to vary a contract entered into by her husband by parol evidence. But the question here is whether a contract was entered into at all, or not. There is no attempt merely to vary the terms of a contract.

The Judge's decision must be reversed, and the case remanded for re-trial.

The 12th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Statements made by parties—Evidence.

Case No. 762 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 31st December 1868, affirming a decision of the Moonsiff of Raojan, dated the 25th April 1868.

Ayetun and others (Plaintiffs), *Appellants,*

versus

Ram Sebuk Poddar and others (Defendants), *Respondents.*

Baboo Bykuntnath Paul for Appellants.

No one for Respondents.

A statement made by a party is not *ipso facto* conclusive against him, though it may be used against him, and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation.

Bayley, J.—THE plaintiffs in this case sued for possession of 4 gundahs 3 cowries

3 krants of land. Their allegation was that they held 7 gundahs of land through the defendant No. 2, and that on that defendant's relinquishing those lands, they were in *khas* possession thereof, but that the defendant No. 1 encroached on the lands and took possession of the 4 gundahs 3 cowries 3 krants of land in suit.

The defendant No. 1, Ram Sebuk, pleaded that the plaintiffs had no right whatever to the lands in dispute, and that the whole of the 7 gundahs, *including* the 4 gundahs 3 cowries 3 krants of lands sued for, was occupied by the homestead of the defendant No. 2, and was in his possession.

The defendant No. 2 supported this answer.

The Moonsiff dismissed the plaintiffs' suit, on the ground that the plaintiffs produced no witnesses, and took no steps for conducting the case on the day fixed for its hearing.

The Lower Appellate Court originally remanded the case for additional evidence to be taken. It is not stated under what Section of the Procedure Code this was done, nor is there any thing on the record to show whether it was done in accordance with the provisions of Section 351, or any other Section. But be that as it may on the additional evidence being before the Lower Appellate Court, that Court dismissed the plaintiffs' suit on the ground that the plaintiffs did not sufficiently state in their plaint the right upon which they came into Court, nor did they prove any possession at all, nor, consequently, any dispossession of what they declared they were in possession of by the relinquishment of defendant No. 2: nor did they state whether they purchased ryotee, or what specific right. The Lower Appellate Court also refers to certain decisions in which the plaintiffs, as defendants there, set up their title by purchase of the lands in dispute, as also their right to certain trees, but these claims were rejected. In those cases, the defendant No. 2, Peetambur, was a party, but the defendants Nos. 1 and 3 were not.

The Lower Appellate Court having dismissed the plaintiffs' suit, the plaintiff's appeal specially, and urge, *firstly*, that the Lower Appellate Court should have held the defendant No. 2 concluded by his statements in the former case; and, *secondly*, that the Lower Appellate Court is wrong in admitting the plea of the collusion of defendant No. 3 with the plaintiffs in the former suit as there was no legal evidence to support that charge.

On the first point, we asked the pleader for the special appellant to show us authority to support his plea that a statement made by a party is *ipso facto* conclusive against him, but he has been unable to show us any. The rule of law appears to us to be that any statement made by a party may be used against him, and *may* be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case and the result come to by judicial investigation of the case.

In regard to the *second* plea, it is quite clear that the Lower Appellate Court has credited the evidence supporting the plea of the defendant No. 2, that the statement relied upon by the plaintiffs as evidence against the defendants was made in collusion, that is to say, in his absence and without any opportunity of showing that he was really no party to that statement.

Under these circumstances, we see no reason whatever to interfere with the decision of the Lower Appellate Court.

We would only add that the judgment of the Lower Appellate Court has been based on the facts that no sufficiently clear title was set up by the plaintiffs in their plaint, and no sufficient proof given by them of any title or possession It has not been shown that this finding of fact and decision on it is any way erroneous in law.

We dismiss this special appeal, but without costs as the respondent does not appear.

The 12th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Section 77, Act X., 1859—Jurisdiction.

Case No. 20 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Cuttack, dated the 30th October 1868, affirming a decision of the Assistant Collector of Jajpore, dated the 30th May 1868.

Markoond Mytee (Intervenor), *Appellant,*

versus

Ununt Mohapattur (Plaintiff), and another (Defendant), *Respondents.*

Baboos Obhoy Churn Bose and *Mohendro Lall Mitter* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondents.

The only question which an intervenor under Section 77, Act X., 1859, is entitled to raise, either before the Collector or in appeal, is one relating to the fact of previous receipt and enjoyment of rent. The legal title, if any, of the losing party is saved for determination in the Civil Court.

Jackson, J.—In this case, the intervenor appealing specially from the decision of the Judge, desires to bring before this Court a question relating to his title to the land for which the rent was claimed. I think it quite clear that the only question which an intervenor in a rent-suit under Section 77 Act X. of 1859, is entitled to raise, either before the Collector or in appeal, is one relating to the fact of previous receipt and enjoyment of rent. The party, whether intervenor or plaintiff, against whom the decision upon that point is given in the Revenue Court, has his right expressly saved. if he has a legal title to the rent of such land or tenure, to establish his title by a suit in the Civil Court, if instituted within one year from the date of the decision. That clearly indicates the line of demarcation between the jurisdictions of the two Courts. The Revenue Court enquires merely into the fact of previous receipt and enjoyment of rent; and the Civil Court, by way of supplement, determines, if necessary, the legal rights of the parties.

We have been referred to two precedents of this Court, one in 7 Weekly Reporter 25, and the other in 10 Weekly Reporter 67. In the first of those two cases, the special appellant was the defendant, and in the second of them, the question brought before the Division Bench was, whether or not, when a Collector had decided the question which under Section 77 may be raised between the plaintiff and the intervenor, an appeal lay to the Zillah Judge. I think, therefore, that neither of those two cases is any guide for us in the present instance, and that this special appeal must be dismissed with costs.

Markby, J.—I am of the same opinion.

The 12th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Younger widow—Succession—Mitakshara Law.

Case No. 877 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 24th November 1868, reversing a decision of the Subordinate Judge of that District, dated the 18th February 1868.

Judoobunsee Koer (Plaintiff), *Appellant,*

versus

Girblurun Koer and others (Defendants), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

Plaintiff sued for a declaration of her right in, and possession, with mesne-profits, of the estate of her late husband, whose younger wife she had been. On his death, the elder widow was allowed to enjoy possession during her lifetime, and on her death the present suit was brought. The Lower Appellate Court holding that the widows had equal rights, dated plaintiff's cause of action from the death of her husband, and held the suit barred by limitation.

Held that even if the widows had equal rights under Hindoo Law, yet the cause of action to the younger, with reference to the moiety of the estate held by the elder widow, accrued on the death of the latter, and then only.

Held that as the younger widow received an allowance during the lifetime of the elder from the profits of the estate, the possession of the latter was not adverse to the former.

Quære.—Under the Mitakshara, does the elder widow inherit the whole estate, the younger receiving maintenance therefrom; or, are their rights equal?

Kemp, J.—The plaintiff, who is the special appellant before us, sued for a declaration of her right in, and for possession, with mesne-profits, of the estate of her late husband Lall Beharee Singh.

It is not denied that Lall Beharee died in September 1849, leaving two wives, Pholessuree, the elder, and the plaintiff, the younger wife. By the first wife, he had three daughters. He had no issue by the plaintiff.

The Court of first instance gave the plaintiff a decree, overruling the plea of limitation raised by the defendants.

On appeal, the Additional Judge has reversed the decision of the first Court.

The Judge is of opinion that the suit of the plaintiff is barred under the Statute of Limitations. Before the Judge, on the issue in bar, it was contended for the defendants that the plaintiff's cause of action arose in 1849, when her husband died, and that inasmuch as the suit has not been brought within 12 years from the date of the death of her husband, the claim is barred. For the plaintiff, it was contended before the Judge that the cause of action to the plaintiff arose on the death of the elder widow of Lall Beharee Singh, which took place in Magh 1274, and that the suit is therefore well within time.

The Judge observes that the question to be decided is this: "When a Hindoo dies, "leaving two widows, do they both inherit "equally, or is the right of the second "wife to possession in abeyance during the "life of the elder?"

The Judge, after remarking that he can find no decisions of the late Sudder or of this Court on the point, proceeds to state that at page 19 of Volume I. Sir William Macnaghten says: "If there be more than one widow, their rights are equal."

That in the *Vyavastha Darpana* it is stated: "If there be two or more wives, they "have an equal right to inherit the estate, "since they, being of the same tribe, are all "*patnis*."*

That, on the other hand, Sir Thomas Strange, at page 56, Volume I, says: "She "it is (the elder or first) who succeeds even-"tually to her husband as his heir, maintain-"ing the others, who inherit in their turn on "her death;" and he repeats this statement at page 137. The Judge here remarks that Sir Thomas Strange refers to Volume III. of Colebrooke's Digest, but that the Judge was unable to find in the Digest any such passage. He therefore concludes that Sir Thomas Strange was referring to a case where the wives not being of the same tribe are not of equal rank.

On the whole, the Judge was of opinion that the weight of authority was on the side of equal inheritance, and that he must hold that the suit of the plaintiff was barred by limitation.

In special appeal, it is contended—

That the Judge is wrong in law, inasmuch as his decision is based upon the erroneous supposition that the plaintiff had an equal right to possession with the elder widow.

That admitting that the right of the plaintiff was equal, she was competent to waive her right to joint possession in favor of the elder widow by consenting to take from the estate a suitable maintenance during the life of the elder widow.

That the estate of the deceased was not in the actual possession of either of the widows, and therefore neither of them can be said to have been holding the property in exclusion of the other.

That no adverse possession for more than 12 years has been pleaded, proved, or found. The Judge was therefore wrong in dismissing the suit as barred.

That as regards a moiety of the estate, the cause of action could under no circumstances arise until the death of the elder widow. The Judge was, therefore, clearly in error in dismissing the entire claim of the plaintiff as barred by limitation.

With respect to the last ground, there can be no doubt that the Judge was wrong in dismissing the plaintiff's suit in its entirety. Admitting that the two widows of the deceased had an equal right, it is clear that on the death of the elder widow, the heir of the husband would be the younger widow. The elder widow had but a life-interest in the estate of her husband, which terminated with her life. The cause of action to the younger widow, with reference to the moiety of the estate of the husband held by the elder widow, accrued on her death, and then only.

But it is a moot point whether, under the Mitakshara, the elder widow inherits the whole estate, the younger widow receiving maintenance from the estate; or whether the rights of the two widows are equal. There are authorities both ways.

At page 55, Volume I of the Elements of the Hindoo Law by Sir Thomas Strange, it is stated that "the elder widow succeeds "eventually to her husband as heir, main-"taining the others, who inherit in their "turn on her death, or even during her life "in the event of her degradation or the "like." Again, at page 158 of the same author: "Where a man has left more widows "than one, and no son by any, she who was "first married succeeds, maintaining the "others." On the other hand, Macnaghten, at page 19, says: "If there be more than one widow, their rights are equal."

* Vyavastha 22, 8. vo. Ed., p. 41.

This much, however, is clear that in this case the possession of Phulessuree, the elder widow, was not adverse to the younger widow, the plaintiff; the elder widow was permitted to enjoy the possession of the husband's estate during her lifetime, the younger widow receiving an allowance from the profits of the estate.

Holding, therefore, that the suit of the plaintiff is not barred, we remand the case for trial on the merits. Costs to follow the result.

The 13th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Obstruction to thoroughfares—Right of suit—Section 308 et seq., Code of Criminal Procedure—Right to a Jury.

Case No. 654 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 21st December 1868, reversing a decision of the Moonsiff of Khoolneah, dated the 20th March 1868.

Buroda Pershad Moostafee (Defendant), *Appellant*,

versus

Gora Chand Moostafee (Plaintiff), *Respondent*.

Baboo Bungshee Dhur Sein for Appellant.

Baboo Ashootosh Chatterjee for Respondent.

No one has a right to sue for obstructing a public road, even if he gave the road to the public, without showing that he has sustained some particular inconvenience in consequence of that obstruction.

The jurisdiction given to a Magistrate by Section 308 *et seq.* of the Code of Criminal Procedure, in regard to the removal of obstructions to thoroughfares cannot be taken away from him and given to a Civil Court. Such a transfer would deprive parties of the right to a Jury.

Peacock, C. J.—We think it is clear that this suit will not lie. The plaintiff sues defendant for obstructing a public road, without showing that he has sustained any particular inconvenience in consequence of that obstruction. If he can maintain this suit, any member of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damages. It is said that the plaintiff has a right to sue, because he was one of the persons who dedicated the road to the public; but it is not because he gave the road to the public that he is necessarily entitled to be the guardian of the public, and to sue whenever there is any obstruction to the public which causes him no inconvenience beyond that which is sustained by every other member of the public.

Section 308 and the following Sections of the Code of Criminal Procedure have provided for the removal of obstructions to thoroughfares. Section 310 says that a person on whom an order is issued shall be bound to obey the same, or he may apply to the Magistrate by petition for an order for a Jury to be appointed to try whether the order is reasonable and proper. But there is no such thing as a Jury in a Civil case in this country; and if the jurisdiction were to be taken away from the Magistrate and given to the Civil Court, the parties will be deprived of a right which the law has intended to give them of having a Jury appointed to decide whether an order in such a case is reasonable or not. In this particular case, the Jury have actually found that no injury to the public has resulted.

It is unnecessary to decide whether this action has been brought from malicious motives, but the first Court found that it was brought merely to annoy the defendant who had erected a new house on the spot.

The decision of the Lower Appellate Court is reversed, and the decision of the first Court affirmed, with costs in the Lower Appellate Court and the costs of this appeal.

The 13th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges*.

Joint ownership—Right to partition.

Case No. 1581 of 1868.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 13th March 1868, reversing a decision of the Subordinate Judge of that District, dated the 19th September 1867.

Shama Soonduree Debia (Plaintiff), *Appellant*,

versus

Messrs. Jardine Skinner and Co. (Defendants), *Respondents*.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Mr. R. T. Allan and *Baboo Bhyrub Chunder Banerjee* for Respondents.

In all cases of joint ownership, each party has a right to demand and enforce partition, in other words, a right to be placed in a position to enjoy his own right separately and without interruption or interference by the other.

Norman, J.—THE plaintiff holds under a putnee lease 13 annas 6 gundahs 2 cowries 2 krants of an estate called Turruf Kushba in Rajshahye; and the defendants, under a distinct putnee granted by co-sharers in the zemindary entitled to such fractional share, hold 2 annas 13 gundahs 1 cowrie 2 krants in the same estate Turruf Kushba.

The plaintiff sues for partition, alleging that she has suffered inconvenience and loss in consequence of the defendant's attempt to enforce the cultivation of indigo.

The first Court decreed a partition. The Judge reversed this order, and dismissed the suit.

From this decision, the plaintiff appeals. Several cases were referred to by the Judge, and one not noticed by him was cited before us. (Sudder Dewanny Adawlut Reports, 1853, page 541; VI. Weekly Reporter 192; VIII. Weekly Reporter 128; IX. Weekly Reporter 487.) The Judge attempts to distinguish the present case from those cited, on the ground that the parties here are putneedars.

But we think it may be laid down broadly that, in all cases of joint ownership, each party has a right to demand and enforce partition; in other words, a right to be placed in a position to enjoy his own right separately and without interruption or interference by the other.—(*See* Spence's Equitable Jurisdiction of the Court of Chancery, Volume I., page 653; Story's Equity Jurisprudence, Sections 648 and 649.)

The zemindars have nothing to do with this question. They have been made defendants, and had they merely appeared for the protection of their own interests, they would have been entitled to their costs; but those who have appeared and opposed the partition must bear their own costs. The partition will, of course, not affect the liabilities of the parties under their several contracts with the zemindar.

The decision of the Lower Appellate Court must be reversed. The respondents must pay the costs of the appeals in the Lower Appellate Court and in this Court.

The case must be remanded to the first Court in order that an Ameen may be appointed to survey and make a partition, as between the plaintiff and the defendants. On the Ameen making his report, either party will be at liberty, if dissatisfied, to except to it in the usual way.

The costs of the suit in the first Court and of the partition are the necessary expenses of obtaining partition by a decree of Court caused, not by any wrongful act of the defendants, but by the nature of the tenancy, *viz.*, a tenancy of an undivided share of an estate. The plaintiff, for her own advantage, convenience, and security, is desirous of exercising her right of exchanging her undivided share for an equivalent share of such estate to be held in severalty. The defendants hold subject to the plaintiff's right to demand such partition. The plaintiff and principal defendants must, therefore, each bear their own costs of the suit in the first Court; and the costs of the partition will be divided between the parties in proportion to their respective shares in the estate.

The 14th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Putnee talooks—Registry in zemindar's books.

Case No. 657 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 19th February 1869, reversing a decision of the Assistant Collector of that District, dated the 16th June 1868.

Ram Narain Doss (Defendant), *Appellant,*

versus

Mr. James Tweedie (Plaintiff), *Respondent.*

Mr. A. T. T. Peterson for Appellant.

The Advocate-General for Respondent.

Where the purchaser of a putnee talook fails to obtain registry of his name in the zemindar's books, a third party who claims to derive his title from the purchaser's vendor has no right, on the ground of such failure, to treat the purchaser as his tenant.

Mitter, J.—WE are of opinion that the decision of the Judge cannot stand.

The genuineness of the kobalah on which the defendant's title is based is admitted on both sides; and the kobalah distinctly shows that the defendant purchased two out of the five villages held in putnee by one Dabee Pershad, through whom both the parties in this suit claim to derive their title.

The kobalah distinctly provides that the defendant and his representatives are to hold the two villages in question as talookdars, subject to the payment of an annual jumma of Rupees 107 to the zemindar under whom the putnee was held; and it also contains a clause authorizing the defendant to get his name registered in the zemindar's books.

There is no doubt whatever that under this instrument the defendant did not acquire the position of a tenant to Dabee Pershad, but he acquired a right co-equal with that held by Dabee Pershad in the three remaining villages.

The learned Judge below seems to be of opinion that, because the defendant has failed to obtain the registry of his name in the zemindar's books, he must be treated as a tenant of the plaintiff, who has obtained a mowrosee lease from one Obhoy Sunkur, who purchased the putnee from Dabee Pershad at a private sale subsequent to the date of the defendant's kobalah.

There is no doubt whatever that the registration of the defendant's name in the zemindar's books was not a condition precedent to the validity of his purchase. Whether his name was registered or not is a matter entirely between him and the zemindar. But the plaintiff who claims to derive his title from the vendor of the defendant has no right whatever to say that merely because the zemindar has refused to register the defendant's name in his books, he, the defendant, must be held to be his tenant.

It has been argued that the Judge has found as a fact that "the defendant paid rent to the plaintiff's predecessors, and that such rent was paid to them as landlord;" but this finding is evidently based on the erroneous supposition that the failure of the defendant to get his name registered in the zemindar's books converted him into a tenant of the plaintiff.

Moreover, we find from the judgment of the Judge that he has thrown the whole *onus* on the defendant, whereas it was for the plaintiff to establish that the defendant was his tenant. This the plaintiff has admittedly failed to do.

Under these circumstances, we do not see how the plaintiff can obtain a decree for enhancing the rent payable by the defendant, not to himself, but to the zemindar. This rent, Rupees 107, is the very amount referred to in the bill of sale; and whether the defendant has paid it directly to the zemindar, or through the hands of Dabee Pershad and his representatives, the legal *status* of the defendant would remain wholly unaffected.

On the whole, then, we think that the Judge's decision is erroneous, and we therefore reverse that decision, and restore that of the Court of first instance with costs of this appeal and of the Lower Appellate Court to be paid by the plaintiff to the defendant, appellant.

The 14th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Case No. 103 of 1869.

Mahomedan Law—Pre-emption—Shaffia-khuleet.

Special Appeal from a decision passed by the 2nd Subordinate Judge of Hooghly, dated the 31st October 1868, reversing a decision of the Moonsiff of that District, dated the 23rd July 1868.

Chand Khan (Plaintiff), *Appellant,*

versus

Nyamut Khan and others (Defendants), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Greeja Sunkur Mozoomdar for Respondents.

In a suit claiming to purchase certain land by the right of *khuleet*, the fact that water from a certain *dighee* was accustomed to flow over plaintiff's land on to the land in dispute, was held to be such participation in the appendages of the land as rendered plaintiff's claim more than usually reasonable.

Jackson, J.—The plaintiff in this case claimed to purchase certain lands which the defendants had mutually sold and bought under *huq shuffa*. He claimed it in two ways, both by the right of *khuleet*, and also by the right of vicinage.

The defendant denied the right called *khuleet;* and as to vicinage, he alleged that he himself was the next neighbour, and therefore had at least an equal right of pre-emption; and he also denied the performance of the *tulub-i-moasibat* and the *tulub-i-istishad.*

The Moonsiff found on all the points for the plaintiff. The Subordinate Judge held that the right which the plaintiff claimed under the denomination of *khuleet* was not such as the Mahomedan Law recognized; but he omitted to consider the plaintiff's alleged co-equal right of vicinage; and he thought it unnecessary to determine whether the preliminary forms had been observed or no.

The plaintiff comes here in special appeal, and asserts that the right of *khuleet* was made out. It appears to me that, in the circumstances of this case, the plaintiff was entitled to claim as *saffia-khuleet*. It appeared, because the defendant's written statement admitted it, that water from certain *dighee* was accustomed to flow across the plaintiff's land and on to the land in dispute. That appears to me to be such participation in the appendages of the land as is referred to in Macnaghten on Mahomedan Law, page 4, Section 6. It seems a more than usually reasonable claim, because it would be a matter of great consequence to the plaintiff that he should be able to acquire land of which his own land was burdened with servitude, such as that of water passing over it.

I am also of opinion that, even if this were not the case, the plaintiff's claim to participate in this purchase, as being a neighbour equally with the defendant, ought to have been considered. This, however, is immaterial, because a *shuffia-khuleet* ranks above a mere neighbour. We are unable, however, to dispose of this case finally, because the Subordinate Judge, as he thought no right was made out, did not determine whether or not the plaintiff had observed the necessary preliminaries. The case, therefore, must go back to him, in order that he may find, on the evidence, whether he observed those forms or no.

Markby, J.—I am of the same opinion.

The 14th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Document creating interest in land—Registration—Evidence.

Case No. 109 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 28th August 1868, affirming a decision of the Subordinate Judge of that District, dated the 21st April 1868.

Kala Chand Mundul (Defendant), *Appellant,*

versus

Gopal Chunder Bhattacharjee (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A document which gives or purports to give a right to have immoveable property brought to sale with a view to the recovery out of its proceeds of money lent (principal and interest) is an instrument which creates an interest in immoveable property, and as such cannot, under Section 49 of the Indian Registration Act, be received in evidence without being registered.

Jackson, J.—It seems to me that the argument addressed to us in this case by Baboo Romesh Chunder Mitter is wholly untenable.

The plaintiff sued to enforce his lien upon immoveable property for the recovery of a sum of money amounting, with interest, to 329 rupees.

The document on which that lien was created was unregistered; and the defendant objected that, under Section 49 of the Indian Registration Act, the instrument could not be received in evidence.

The Courts below held that it might be received, and gave judgment for the plaintiff.

The special appeal turns upon this point. The respondent argues in the first place that, because certain Division Benches of this Court have admitted instruments of this kind when produced in evidence in suits merely for the recovery of money, consequently we are bound by those decisions to admit such a document as this is in evidence where the suit is to enforce an interest in immoveable property, and not merely for the money. The rulings adverted to have been

referred for the consideration of the Full Bench. It certainly seems to me that it would be absurd to expect that we should carry those rulings, even if we concurred in them, a single inch further than the rulings themselves go.

It is then contended (a contention which I confess astonished me much) that the interest which this instrument purports to create is not an interest in immoveable property. If this be not an interest in immoveable property, I confess I am at a loss to understand what is. It gave, or purported to give, the plaintiff a right to have that property brought to sale, and to recover out of the proceeds the amount of money lent, principal and interest, and it deprived the defendant of the right to alienate or otherwise deal with that property to the plaintiff's prejudice.

The last contention was that there was nothing to show that this property was of the value of 100 rupees, and that, consequently, it did not come within the provisions of Section 17, Clause 2. Now, the Act does not require that the property should be of the value of 100 rupees. It only requires that the instrument produced in evidence should purport or operate to create, whether in present or in future, any right, title, or interest, whether vested or contingent, of the value of 100 rupees and upwards, to or in immoveable property. Now, the purport of this instrument was to create in the plaintiff's favor a right to recover the sum of 300 rupees and upwards, by the sale of that property, or in other words, it gave a charge upon that property to that extent. Surely, if this is not an instrument creating an interest in immoveable property, nothing can be. I should hardly have supposed it to be possible to take a different view of the document.

I therefore think that the judgment of the Lower Appellate Court must be set aside, and the special appeal allowed with costs.

Markby, J.—I am of the same opinion Whatever other Division Benches may have held in other cases, we must decide this case upon the words of Act XX. of 1866 Section 49 of that Act declares that no instrument required by Section 17 to be registered shall be received in evidence in any civil proceeding in any Court. Then, in order to see whether this is an instrument which, under Section 17, is required to be registered, we must see whether it creates an interest in land. It seems to me quite clear that an instrument which creates a lien upon property in favor of a person who has lent money as collateral security for that money, creates an interest in the land in favor of the lender of the money. It undoubtedly transfers to the person who advances the money on the security of that property some portion, though a small one, of the rights comprised under the term "ownership."

The 14th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Title-deeds—Possession—Forcible ouster.

Case No. 66 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 10th September 1868, affirming a decision of the Subordinate Judge of that District, dated the 28th April 1868.

Shama Soonduree Debia (Plaintiff), *Appellant,*

versus

The Collector of Maldah and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

In a dispute about julkurs between the proprietors of neighbouring estates, where the title-deeds of the two parties do not specifically mention the particular pieces of land or water in contest, the title of the parties must depend on the fact as to which of them has been in possession.

When a person forcibly dispossessed sues to recover possession, the burden of proving title is on the party by whom he was forcibly dispossessed.

Jackson, J.—THE plaintiff in this suit alleged that she had been in possession of four julkurs by name Choka-Nimtollah, Goramaree-Hilsamaree, Tilcopee, and Oodhwa, being portions of julkur Gungaput-Mirzapore, which is included within her putnee mehal Koowur Purtab in Pergunnah Khunura Gobindpore. The plaintiff states that the possession of these julkurs has been with her and her predecessors, the owners of the putnee mehal, from the time of the Permanent Settlement; and that she was dispossessed by the defendant, partly in the year 1271 and partly in the year 1272.

The defendant, who is the Collector of Zillah Maldah on the part of the Government, denies the allegation of the plaintiff, and states that these four julkurs are contained in a khas-mehal belonging to Government, named Gungaput-Islampore, and have been in the possession of the Government and its predecessors from the time of the Permanent Settlement.

The case for the defendant is that Government, as proprietor of Gungaput-Islampore, is the owner of all the julkurs in the River Ganges from Peerporutee to Sootee. The plaintiff does not contest the right of the defendant to the julkurs between Peerporutee and a place called Oodwah or Oodwah Nullah near Rajmehal; but she claims to possess the julkurs from Oodwah Nullah southwards to a place called Khamra-Gobindpore which is lower down the river than Sootee.

Both the Lower Courts have decided the case against the plaintiff. The Judge, on appeal, says that he does not consider it material to go carefully into the oral evidence and the question of possession. He admits that the documents and evidence filed by the plaintiff prove that the plaintiff has been in possession within 12 years of suit. But he is of opinion that in a case like the present, it is for the plaintiff to make out her title very clearly, and he accordingly reviews the greater portion of the material documents offered on the part of the plaintiff's title. On the other hand, the Judge is of opinion that the Government have established their title to these disputed julkurs.

The title which the Judge considers that the Government have established is under a perwannah granted to one Hoolas Chunder who at the time of the Decennial Settlement was proprietor of Pergunnah Gungaput-Islampore, which estate was subsequently purchased by Government and became a khas-mehal, and has remained in Government possession to the present time.

I think that on the point of possession, the Judge has not properly tried the case. He is bound to go fully into the question of the plaintiff's possession and dispossession; and if he finds that the plaintiff has been in possession from the time of the Permanent Settlement, or even for a long series of years, and that she was dispossessed by the defendant, as plaintiff states she was, forcibly, and not in due course of law, she is entitled to be restored to possession.

In cases of this description, where the title-deeds of the two parties admittedly do not mention these julkurs, and do not specifically mention the particular pieces of land or water in contest between two neighbouring estates, the question of possession is most important; and in point of fact, the title of the parties must depend on the fact as to which party has been in possession.

It is quite clear that so far back as the time of the Permanent Settlement, there were disputes regarding the julkurs on this river going on between the representatives of the plaintiff and Hoolas Chunder, the then representative of the defendant.

It is quite certain from the quinquennial papers and from the *deheebundee* papers, that the plaintiff's representatives then and for many years afterwards asserted their rights to these disputed julkurs. In the year 1838, it appears that some inquiries were made on the part of the Government through one of the Government Collectors regarding these julkurs, which were then in the possession of the Government, and the list of the julkurs which were then in the possession of the Government was drawn up. In that list, these julkurs now in suit do not appear.

The manner in which the Judge gets rid of this important piece of evidence proving that the Government was then not in possession, cannot stand. He says these julkurs may have "shifted." But whether they have shifted or not, it is evident on examining the maps that these are large and valuable julkurs, and no shifting would altogether remove them.

In the year 1847, there were certain Act IV. proceedings as regards one of these julkurs. This also is most important evidence of the plaintiff's possession, inasmuch as in one of these proceedings, the Government ijaradars contested the possession with the plaintiff's then representatives, and the plaintiff's representatives recovered possession. The Judge is, I think, very wrong in stating that these proceedings prove only that there were disputes going on for possession; and I fail to understand what the Judge means by saying that the decisions putting plaintiff into possession were decisions of the Appellate Court. It is because these decisions are decisions of the Appellate Court, which had authority to pronounce a final decision in favor of the plaintiff, that they are such good evidence on her behalf.

The plaintiff has also filed certain survey-proceedings of the year 1857, in which one of these julkurs is specially stated to be in her possession, and boundaries are given showing that the remaining julkurs were in her possession, and not in the possession of Government. The Judge was not right to put aside this evidence, remarking that "it "is not independent evidence, it was not "prepared in the presence of the defendants, "and is moreover easily manufactured." How such evidence could be 'manufactured' it is not easy to understand Had this property been in the possession of the Government at that time, it is quite unintelligible how the julkurs could have been surveyed and demarcated as in the possession of a private individual.

It does appear from all these documents that the plaintiff has given most important documentary evidence, proving that in the years 1838, 1847, and 1857, these julkurs were in her possession, or in the possession of those through whom she derives her title, and that public notice of such possession was taken by the Courts, and that public officers of Government, deputed to make enquiries regarding these julkurs, did not report them as being in the possession of Government. The Judge appears not to have given proper consideration to all these documents. He has rejected them and thrown them on one side as no evidence, whereas they are most important evidence in favor of the plaintiff.

The Judge also found that the documentary evidence on the merits to the title of the plaintiff to the julkurs would be sufficient to support a decree in favor of the plaintiff, if it was not *rebutted* by the evidence to title on the part of the defendant.

That evidence consists of the perwannah above alluded to, granted to Hoolas Chunder. It is clear, however, that that perwannah is not evidence whatever of title. Hoolas Chunder came to the Collector, and stated that the sunnud under which he derived his title to Pergunnah Gungaput-Islampore, had been burnt in his house along with other papers. He accordingly asked the Collector to give him a fresh sunnud to serve as a proof of his title in future. The Collector, accordingly, made enquiry, and ascertained that his sunnud had been burnt, and he gave him a perwannah to continue to hold possession of Pergunnah Gungaput-Islampore as before; and this perwannah contained some boundaries regarding the julkurs belonging to Gungaput-Islampore. But there is nothing to show that these boundaries were boundaries ascertained by the Collector from the Decennial Settlement record, or in any other way. They appear to be the boundaries stated by Hoolas Chunder himself in his petition.

Now, it is quite clear on the proceedings of this case, that Hoolas Chunder was at that time fighting tooth and nail regarding the julkurs on this river; and the very question on which he was contesting with his neighbour, the owner of the estate Kooer Pertual, was, what were the boundaries of his julkur and how far it extended. Any statement, therefore, made by him at that time regarding the boundaries of his julkurs must not be looked upon as any proof of title, but must be received with great caution and even distrust.

The Judge considers this perwannah a conclusive evidence in favor of the defendant, but at most it can only be taken as Hoolas Chunder's own statement of his boundaries. This certainly is not valuable evidence. The quinquennial papers and the *dehabundee* records filed by the plaintiff are evidence of the same description. The real question is, how far this doubtful evidence as to title is supported by possession—whether the owners of Gungaput-Mirzapore, or the owners of Gungaput-Islampore, have been in possession, as each states, since the Decennial Settlement.

This case must be remanded to the Judge in order that he may again try whether the plaintiff is entitled to recover possession or not. In doing so, he must look carefully to all the evidence on the point of possession and to both the oral and documentary evidence in support of it, and he must not reject the documentary evidence of the years 1838, 1847, and 1857 upon any such grounds as those on which he has already rejected them. And he must bear in mind that possession for a long series of years is one of the best evidences of title which any one can bring forward.

If the plaintiff can prove possession for a long series of years, and dispossession by the defendant as alleged, she will be entitled to recover possession. Costs will follow the event.

Mitter, J.—I concur with my learned colleague in remanding this case. I think that the Judge has committed an error in law in refusing to enquire into the point of possession and dispossession.

If the plaintiff can prove that she was in possession of the property in dispute until she was ousted by the defendant against her consent and without the intervention of a Court of law, the defendant ought to be called upon to prove his title. If the defendant succeeds in proving his title, the plaintiff ought then to be required to prove a better one. That evidence of possession, however short, is evidence of title, is an undisputed proposition of law, and it, therefore, follows that such evidence is at least sufficient to make out a *primâ-facie* case in favor of the party by whom it is given. I think it would be holding out a premium to violence and force if we were to hold that a man who has forcibly dispossessed another, is entitled to say, when the dispossessed party sues to recover possession, that the burden of proving title is entirely upon the latter, and not upon himself. The Judge appears to me to have overlooked this principle altogether; and this oversight is one which has materially affected the decision of the case upon the merits.

With reference to the Judge's decision on the question of the title, I entirely agree with my learned colleague in holding that for the purpose of trying that question, assuming even that the *onus* of proving title was on the plaintiff, there could be no better evidence than a long and uninterrupted possession. The Judge appears to have committed two mistakes by which the whole of his decision on this point appears to have been vitiated. He supposes, in the first place, that unless the plaintiff can prove, by producing the papers relating to the Decennial Settlement of her zemindary, that the julkurs in dispute were included within that zemindary, she cannot establish her title by any other means; and in the next place, he seems to have been of opinion that the perwannah of 1798, which was granted to one Hoolas Chunder, conclusively proved that the julkurs in dispute were included within the defendant's estate, namely, Gungaput-Islampore.

Both these opinions appear to me to be incorrect. With regard to the settlement-papers, I observe that the defendant, too, has failed to produce the settlement-papers relating to his own zemindary; and as far as my experience goes, I do not think that any records relating to the settlement of either zemindary could have possibly proved that these small plots of julkurs were included within the one or the other. If the plaintiff can prove that she was in continuous possession of the julkurs in dispute until she was ousted by the defendant, that would be strong *primâ-facie* evidence to show that those julkurs were included within her zemindary at the time of the settlement. I do not, therefore, see how, without entering into the question of possession, any satisfactory decision can be arrived at on the question of title. I would only wish to add that the Judge is entirely wrong in admitting the perwannah of 1798, as evidence of title against the plaintiff. That perwannah, when properly analyzed, does not amount to anything more, as observed by my Hon'ble colleague, than a statement made by Hoolas Chunder to the Collector. I am not aware of any law of evidence by which such a statement can be admitted as evidence of title against the plaintiff, who does not claim through Hoolas Chunder. In determining the question of title, therefore, the Judge ought to exclude that document from his consideration, and the case is then to be decided with reference to the foregoing remarks.

Costs will abide the final result.

The 15th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Possession—Cause of action—Statute of limitation.

Case No. 161 of 1869.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 4th November 1868, affirming a decision of the Deputy Commissioner of Hazareebagh, dated the 8th June 1868.

Khuruckdharee Singh (Defendant), *Appellant,*

versus

Rewat Lall Singh (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Poorno Chunder Shome* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Where a party in permissive possession of land sets up his own absolute title by suing the tenant for rent, he converts his permissive possession into an adverse one, which, as wrongful possession, is a cause of action.

The Statute of Limitation, Act XIV. of 1859, never begins to run until there has been a cause of action.

Jackson, J.—THE plaintiff and defendant in this case are brothers. The plaintiff alleged that in the year 1909 Sumbut, a partition had taken place by which the land in dispute came to the plaintiff's share, and under an arrangement between him and the defendant the land remained from the year 1911 to the year 1918 in the defendant's hands for the liquidation of the debts due by the plaintiff; that in the year 1919, the plaintiff resumed possession, and retained it till 1923, giving a lease of the lands to a ticcadar; that the defendant brought a suit in that year against the ticcadar, produced a kubooleut of his which is charged to have been forged, and obtained a decree for rent against him in the Revenue Court. The plaintiff alleged that he was thereby dispossessed from his land, and that he had been compelled, by what process is not stated, to refund to his own ticcadar the rent of previous years which the ticcadar had paid him. He, therefore, sued to recover possession of the land, and also the money which he had paid, as just stated, to the ticcadar.

The defendant denied the whole of this allegation, and stated that the land belonged to him, he having received a larger portion of the land which came from the ancestor, by reason of being the eldest brother.

The Court below found that the plaintiff's allegation was in substance true, namely, that the possession of the land by the brother, the defendant, previous to 1923, was by permission of the plaintiff; that the suit brought by him, the defendant, against the ticcadar for rent was fraudulent; and that the plaintiff was entitled to the land; and he has consequently got a decree for possession.

The defendant appeals specially, and contends that as the plaintiff failed to make out that he himself had been in possession of the lands, as stated, after 1919, he failed in proving the allegation on which his suit was founded, and the suit ought, therefore, to have been dismissed; and we are referred to a case in 8 Weekly Reporter 385 as authority for that proposition.

That case is clearly distinguishable from the present. The plaintiff there alleged forcible dispossession on a certain date. The Courts found that there was no such forcible dispossession, but that the defendant was apparently, down to the period of suit, in possession by plaintiff's permission. They therefore held that the respondent, that is, the plaintiff, ought to have served the special appellant with a notice to quit the land, and therefore put an end to the permission. They thought the suit ought to have been dismissed, but they said: "We do not attach any "importance to the particular date of dis-"possession, but we are clearly of opinion "that he was bound to show that the dis-"possession under the circumstances was a "wrongful one."

In this case, although down to 1923 the possession by the defendant was permissive, and therefore not such as the plaintiff could complain of, and not wrongful, it seems to me that the moment the defendant converted that possession from a permissive one into an adverse possession, as it were, by suing the ticcadar as tenant, and setting up his own absolute title to the land, that possession became wrongful, and such as the plaintiff might rely upon as a cause of action.

I, therefore, think that the plaintiff rightly stated his cause of action to commence from the period at which that claim was set up, and upon the facts the Courts below have rightly given him a decree. I do not find that in the decrees of the Lower Courts the plaintiff has been allowed to recover the sum of money which he stated he had been compelled to refund to his ticcadar, nor has there been any ground of appeal upon that point taken before us. I think, therefore, that the special appeal must be dismissed, and the judgment of the Lower Appellate Court affirmed with costs.

Markby, J.—I am of the same opinion. I quite go along with the argument of Baboo Mohesh Chunder Chowdhry to this extent that where one party is permissively in the occupation of land which belongs to another, although the period during which he had permission to occupy may have expired, no cause of action arises until one of two things has happened: either that there has been a demand of possession on the part of the owner, or that the owner's title has been denied by the permissive occupant; and, as I understand the case which he has referred to in 8 Weekly Reporter 385, that was all that was decided in that case. There the occupation was originally permissive. The title of the plaintiff was not denied. All that the defendant said was that the result of that permissive occupation was to give her a right of occupancy. I think the Court held rightly that there was no cause of action. This is a mat-

ter of very great importance, as it forms a distinguishing feature of Act XIV. of 1859 that the Statute never begins to run until there has been a cause of action. In this case, the plaintiff has alleged that he was dispossessed by the proceedings in the Revenue Court. I think this is true, because those proceedings did amount to a denial of the plaintiff's title; and whether or no he actually himself resumed possession between the years 1919 and 1923 appears to me to be in this case immaterial, although I would add that, as the allegation appears to have been false, it might very well have operated to the prejudice of the credit attached to his case.

The 15th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Ex-parte judgment—Section 119, Act VIII., 1859.

Case No. 169 of 1869.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 3rd November 1869, reversing a decision of the Moonsiff of Sonamookhy, dated the 14th May 1868.

Gora Chund Gossamee (one of the Plaintiffs), *Appellant,*

versus

Rughoo Mundul and others (Defendants), *Respondents.*

Baboos Bungshee Dhur Sein and *Grish Chunder Mookerjee* for Appellant.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondents.

Where a defendant was absent when the adjourned hearing of his case commenced, but came into Court before judgment was recorded, and his evidence was on the record, the judgment against him was held not to be an *ex-parte judgment* within the meaning of Section 119, Act VIII., 1859.

Jackson, J.—The only ground taken before us in this special appeal is that the Lower Appellate Court had no jurisdiction to entertain the appeal, inasmuch as the case had been decided against the defendant *ex-parte.* This contention is founded upon Section 119 of Act VIII., but that Section will not support the argument. The words of that Section are: "No appeal shall lie "from a judgment passed *ex-parte* against a "defendant *who has not appeared.*" In this case, the defendant had not only appeared, but he had been present at the first hearing of the cause, and was merely absent at the adjourned hearing, that is, when the adjourned hearing commenced, but came into Court before the Moonsiff had actually recorded the judgment, and also his evidence was on the record. The special appeal must be dismissed with costs.

Markby, J.—I am of the same opinion.

The 15th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Default—Appeal—Sections 54, 58, and 68, Act X., 1859.

Cases Nos. 576 and 577 of 1869 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Mymensingh, dated the 2nd December 1868, affirming a decision of the Assistant Collector of Jamalpore, dated the 1st July 1868.

Kalee Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Kisto Chunder Biswas and others (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

The first Court having struck a case off its file under Section 54, Act X., 1859, on the alleged ground that there was no appearance on the part of plaintiff or defendant, the Lower Appellate Court considered an appeal barred by Section 58.

Held that Section 54 was erroneously cited by the first Court, whose view of the case, as well as the order it passed, would be covered by Section 68, and that as the contention was that no default had been committed, but that plaintiff had appeared by his constituted agent, an appeal lay from the order of the first Court, which the Lower Appellate Court had jurisdiction to entertain.

Bayley, J.—The plaintiff in this case sued for arrears of rent, amounting to Rupees 229-8, against 12 defendants in one case, and 11 in another. The suit was instituted on the 25th April 1865 under Act X. of 1859. It was decided *ex-parte* on the 12th February 1866 in the plaintiff's favor.

Of all the defendants, three only, *viz.*, Kisto Coomar, Puddo Lochun, and Indro Kant, applied to the Deputy Collector for a re-hearing, which was granted on the 16th March 1866. The result of the re-hearing was a decree in the plaintiff's favor by the Assistant Collector on the 13th April 1866.

Against this judgment, there was an appeal to the Zillah Judge, who, on the 2nd August 1866, affirmed the Assistant Collector's order of the 13th April 1866.

Then followed two special appeals to this Court, No 2859 of 1866, in which Puddo Lochun was the special appellant, and No. 2860, in which Indro Kant (wrongly called Anund Kant) was the special appellant. Of all the three and twenty defendants, these two persons alone appear on the record in the proceedings of this Court as having appealed. As to the decrees against them, there is nothing before us in these special appeals.

Kisto Coomar, too, who applied for a re-hearing and obtained the order above stated, does not appear to have appealed against the order of the Assistant Collector, dated the 13th April 1866, or, at any rate, to have come before the High Court.

The order of the High Court in the appeals of Puddo Lochun and Indro Kant was that the Lower Appellate Court "shall "try what are the fair and equitable rates to "be paid by the appellants, and shall fix the "rates in all respects at those which talook-"dars of the same class as it finds these to "be, pay for lands of a similar quality in "the neighbourhood." The cases were, accordingly, remanded.

On this order of remand being received by the Lower Appellate Court, that Court remitted the records to the first Court on the 4th July 1867, in order that the issue fixed by the High Court might be decided.

It is especially necessary to give here the order which the first Court passed after the remand by the Zillah Judge.

On the 16th September 1867, the first Court, in accordance with the order of the Zillah Judge and in fulfilment of the remand-order of the High Court, held that as the defendant did not appear in support of his allegation that talookdars paid at a less rate than the ryots, and as no explanation was given for his absence, the Court was bound to decide "that the rates claimed by the plaintiff "were the rates payable by talookdars like "him." The Assistant Collector, accordingly, gave the plaintiff a decree for rents claimed by the plaintiff as rents payable by talookdars like him, quoting Section 68 of Act X. of 1859 in support of his judgment. A similar order was also passed in the other case remanded by the High Court, and thus as to the two special appeals, and to them only, was the order of the Assistant Collector passed in fulfilment of the remand-order of the High Court.

There were again two appeals to the Zillah Court against this order of the Assistant Collector, by Puddo Lochun and Indro Kant (Nos. 151 and 152 of 1867), and on the 18th April 1868 the Judge again remanded the case to the first Court for re-trial with these remarks: "The order of the High Court has "evidently placed the *onus* of proof on the "plaintiff as well as defendant, in order that "he may prove that he is entitled to claim "full ryotee rents from the defendant. If "the Assistant Collector is unable to pro-"cure any evidence, he must then decide "the point between the parties in a fair "and equitable manner." This order having reached the Assistant Collector, he fixed the 30th June for the hearing of the case and the production of evidence.

On the 1st July, he recorded the following judgment: "Plaintiff's mookhtear produces "a man said to be agent of plaintiff. This "person cannot be identified by any person "present at this office. The mookhtear for "plaintiff says he only knows him by sight. "He knows nothing about the facts of the "case, and has no power-of-attorney. This "is no appearance by plaintiff. Defendant "does not appear. I strike the case off the "file under Section 54 of Act X. of 1859." This order was also made to apply to the other appeal, that is to say, this was the order passed in the cases of both Puddo Lochun and Indro Kant.

I may here remark that at the same time that the cases of Puddo Lochun and Indro Kant were remanded by the Judge, there was an order by the Judge in the cases of Kisto Coomar and Prosunno Nath Surma, Nos. 141 and 142, in which there was a like remand; and at the same time an order was recorded in case No. 151 in these terms: "This case and appeal No. 152 should be "heard after the Assistant Collector has "decided whether the appellants in appeal "cases Nos. 141 and 142 can be allowed to "be heard and to prove their answer to the "claim," the answer being that they had no knowledge of the service of notice.

I may here also observe that it will be unnecessary again to refer to Prosunno Nath and Kisto Coomar, inasmuch as they never objected to the above order, and did not appear or give any evidence as to the non-service of notice.

From the decision of the Assistant Collector of the 1st July 1868, two appeals were preferred by the plaintiff to the Zillah Judge; and the Judge, on the 2nd December 1868, gave his judgment in the following terms: "I cannot agree with the Assistant "Collector that his order was a correct one, "because when the case was remanded the "defendants, appellants, were ordered to "prove that they had no notice of the case. "Under the law, it is apparent that no ap-"peal lies against an order under Section 54, "and the only course open to the plaintiff "was to apply under Section 58 for a review "of the order by the Assistant Collector; "and if he had refused to allow the review, "the plaintiff could then have appealed to "this Court. I consider that this Court has "no power to decide this appeal on its "merits, and that the hearing of this appeal "is barred by the provisions of Section 58, "Act X. of 1859."

Against this decision, a special appeal has been preferred on two grounds: *firstly*, that Section 58 does not apply to this case; and, *secondly*, that the provisions of Section 54 having been misunderstood and misapplied by the Assistant Collector, an appeal from his order did lie to the Judge.

In arguing these points, the main contention of Baboo Kally Mohun Dass is that Section 54, Act X. of 1859, contemplates a case *prior* to the recording of an issue for trial, but that in these cases all the issues had been recorded and remands resulted.

Now, the words of Section 54 bear out this contention. They are: "If, on the "day fixed by the summons or proclamation "for the appearance of the defendant, or "on any subsequent day to which the hear-"ing of the case may be adjourned, *prior* "*to the recording of an issue for trial* as "hereinafter provided, neither of the parties "appear in person or by an agent, the case "shall be struck off, with liberty to the "plaintiff to bring a fresh suit, unless pre-"cluded by the rules for the limitation of "actions."

But while it would appear that the Assistant Collector made an error in his procedure in acting, literally speaking, under Section 54, there is a Section—Section 68—which completely covers the view which the Assistant Collector took and the order he passed. That Section is: "If, on the day "fixed for the trial of any issue, *neither* of the "parties appear, the case shall be struck off "under the conditions provided in Section 54. "If, on any such day one only of the parties "appear," the issue may be tried and determined, in the absence "of the other party, upon such proof as may be then before the Court." So far, then, the Assistant Collector's order was legal, but he ought to have cited Section 68, and not Section 54.

Now, whether, under these circumstances, it was open to the Judge to entertain and decide the appeal as it stood is a second question, the answer to which depends upon the point whether the Assistant Collector wrongly or rightly held no one was before him. Now, all long the authorized mookhtear of the plaintiff was so, and it was on this matter the appeal was made to the Judge. So far, then, the Judge should have tried the case on this contention and entertained the appeal.

But the pleader for the special respondent contends that it would be needless to remand the case, as there is no evidence on the record to justify a decree in the plaintiff's favor against his clients.

Now, the only person produced by the plaintiff as his agent supposed to be cognizant of the facts of the case, deposed before the first Court to this effect. He said he was a tehsildar of the plaintiff; that he had no power-of-attorney; that the mookhtear, Gopee Mohun, knew him; and that he had been employed in this business three years. But the mookhtear contradicts this statement and says that he does not know him except by sight, but understands that he has come about the business. The *agent* then goes on to say that he does not know at what rate his master sues for arrears; he does not remember the amount of the claim; does not know the names of the persons sued by the plaintiff: and on being asked as to what he knew of the case, he replied that he knew it was necessary to bring a case. He then went on to say that he was engaged in other cases by the mookhtear but he did not know either the plaintiff or the defendants in these cases, and he concluded by saying that he never before acted as agent for Kally Chunder Chowdhry, the plaintiff in this case. This was the man produced to supply all knowledge necessary for the purpose of the pro-

per adjudication of the case, and from the statement it seems to me almost impossible *primâ facie* for the first Court to hold that there was any means of an adjudication of the case, especially as the defendants did not appear.

It is, however, pressed on us that the Judge was wrong in not considering the question whether Section 54 having been mis-quoted by the first Court for Section 68, and in holding that no appeal lay to him to try this point, the case should be remanded to him. But as the pleader for the respondent objects to this remand on the ground that there is *no evidence* on the record, we are bound to take into consideration that objection before we remand the case. Now it is not denied that the only evidence on the record as to the point of *rates* is evidence to show what the *ryotee* rates are, but that there is nothing to show the *talookdaree* rates.

We are of opinion that the remand-order put upon the plaintiff the burden of proving what the talookdaree rates were, and at one time I thought that there might be a great deal of force in Baboo Kally Mohun's contention that the testimony of the witnesses who spoke to the ryotee rates might afford evidence of the talookdaree rates, as the difference between the talookdaree and the ryotee rate consisted merely in more or less deduction of a percentage. When, however, I come to look to the grounds of appeal to the Judge after remand, I find no statement of such evidence to support the plaintiff's case in this way, *i. e.*, to show that a certain deduction from ryotee rates deposed to would give the proper talookdaree rates in this case. The gist of the grounds of appeal to the Judge is that the first Court was in error in considering that the agent had not sufficient knowledge of the facts, and that even if he had not, it was the duty of the Court to direct that further evidence might be adduced. It is quite clear that the remand-order of the High Court, as also that of the Zillah Judge directing the first Court to act up to the orders of the High Court, required the plaintiff in the first Court to prove the talookdaree rates; and considering the absence of any evidence on this point, or any objection as to the production of witnesses on this point in the grounds of appeal to the Judge, I do not think that any injustice would be done if we refuse to go further than take the evidence as it stands, and see whether the remand-order has been carried out or not. Now, as above stated, there is no evidence as to the talookdaree rates, and it was the fault of the special appellant himself that he did not adduce it or give satisfactory reasons for its non-production up to this time.

Under this state of the facts, I would dismiss this special appeal, but under the circumstances of the case each party must bear his own costs of this appeal as also of the Lower Courts.

Hobhouse, J.—This was a suit for arrears of rent in excess of 100 rupees. There were numerous defendants to the suit, and as we understand it, the Assistant Collector gave an *ex-parte* decree against all the defendants on the 12th February 1866. Thereafter, that is, on the 16th March 1866, three of the defendants, *viz.*, Kisto Coomar, Puddo Lochun, and Indro Kant, obtained a re-hearing; but at that re-hearing, a decree was a second time given against them on the 2nd August 1866. Kisto Coomar did not appeal against this decree. Puddo Lochun and Indro Kant did appeal, and on the 12th March 1867 the High Court remanded the case to be tried, so far as those defendants were concerned, upon the issue which Mr. Justice Bayley has extracted from the High Court's order of remand.

On the 4th July 1867, the High Court's order was sent by the Lower Appellate Court to the first Court with instructions that it should be acted upon. On the 16th September 1867, the Assistant Collector again gave the plaintiff a decree against the two defendants in question.

On the 18th April 1868, the Lower Appellate Court again remanded the case on the ground that the first Court had been in error in laying the burden of proof on the defendants, and directed it to take evidence on the part of the plaintiff in support of his case. Simultaneously with this order of remand there was an order relating to the defendants Kisto Coomar and Prosunno Nath, who are the only special respondents who appear by pleader before us, by which the first Court was directed to take evidence from them upon the point as to whether or not as a matter of fact, notice was served upon them in the matter of the *ex-parte* decree of the 12th February 1866, so as to decide, with regard to them, whether or not they were entitled to relief in the shape of a re-hearing in the matter of that decree.

On the 1st July 1868, the first Court disposed of the plaintiff's suit expressedly

under the provisions of Section 51, but as we take it under the provisions of Section 68, Act X. of 1859, and the Lower Appellate Court on the 2nd December 1868 refused to interfere with the judgment of the first Court, on the ground that it had no jurisdiction to do so.

It is against this judgment of the 2nd December 1868 that the special appeals before us are now made. It seems to me that for the purpose of deciding this case satisfactorily, we may divide the original defendants in the cause into three classes. First of all those who did not ask for any review of the *ex-parte* decree of 12th February 1866. This class comprises all the defendants whom I shall not thereafter mention by name. The second class is made up of those who asked for a review of the decree in question, but did not obtain it. This class comprises the defendants Kisto Coomar and Prosunno Nath only. The third class comprises those who asked for a review and got it, and this class may again be sub-divided into two portions, *viz.*, the defendant Kisto Coomar who did not appeal against the Judge's order of the 2nd August 1866, and the defendants Puddo Lochun and Indro Kant, who did appeal against that order and obtained the order in remand from the High Court which I have above specified.

In regard to the first and second class of defendants, I hold that the *ex-parte* decree of the 12th February 1866 has never been disturbed, and therefore that it stands good. It has never been disturbed against the first class of defendants, because they never asked for a re-hearing of it, and never got any. It has not been disturbed against the second class of defendants, because, although they asked for a re-hearing, yet for very good reasons that re-hearing was not granted. They were given the opportunity of proving, under the provisions of Section 58, Act X. of 1859, that no notice was served upon them, but they neglected to take advantage of that opportunity, and cannot, therefore, now be heard against that decree.

In regard to the defendant Kisto Coomar, I hold that the decree of the 2nd August 1866 stands good against him, because he never appealed against it, and therefore, it cannot be now disputed so far as he is concerned.

In regard to the defendants Puddo Lochun and Indro Kant, I agree with Mr. Justice Bayley that the suit must be dismissed. In the matter of the judgment of the Lower Appellate Court I agree in thinking that that judgment is erroneous. I think that an appeal lay to that Court from the order of the Assistant Collector, and that the Lower Appellate Court has committed an error in law in not entertaining that appeal.

The first Court, in its judgment of the 1st July 1863, supposed that it was acting under the provisions expressedly of Section 51, but, to say more correctly, of Section 68, Act X. of 1859. If the Assistant Collector had been acting correctly under the provisions of that Section, then, no doubt, the only remedy to the plaintiff would have been in the shape of an application for a re-hearing under the provisions of Section 58; but the whole contention of the plaintiff before the Lower Appellate Court was that the first Court, while it supposed that it was acting under the provisions of Section 68, was in error upon that matter, and it was to correct this error that the appeal was made to the Lower Appellate Court. The first Court supposed that neither of the parties had appeared before it, and therefore it dismissed the suit. Had this been so, then of course the plaintiff, against whom judgment had been given by default, could only have had his remedy under Section 58. But the plaintiff's complaint before the Lower Appellate Court was that he committed no default, and that he had, in fact, appeared through his constituted mookhtear.

Now, under the provisions of Section 71, Act X. of 1859, any party to a suit may employ an authorized mookhtear to conduct the suit on his behalf, and what does the first Court say as regards the conduct of this case? It distinctly says that the mookhtear authorized by the plaintiff had conducted the case for him. The first words of the judgment are that "the plaintiff's mookhtear" does such and such an act on the part of the plaintiff. Clearly, therefore, the plaintiff was before the Court in the person of his authorized mookhtear, and could, therefore, have had no remedy under the provisions of Section 58, but was bound to appeal, as he did appeal, to the Judge on the question of law on which as he thought, and thought rightly, that the first Court had come to an erroneous decision. I think, therefore, that the Lower Appellate Court had jurisdiction to entertain the appeal, and ought to have entertained it.

The question then arises as to whether the plaintiff is entitled on the evidence on the

record to any remand in the matter of the two defendants Puddo Lochun and Indro Kant. The issue before the Courts below was that which has been quoted from the remand-order of this Court, and the question therefore is, has the plaintiff had the opportunity that he ought to have had of adducing evidence in support of this issue, or is he now on remand to be allowed such opportunity? I agree with Mr Justice Bayley that he has had the opportunity but has neglected it. The 30th of June 1868 was the day fixed for the production of evidence on this issue. He produced his agent in support of it, and it is not shown to us (and the grounds taken in appeal before the Lower Appellate Court would lead us to infer the contrary), that besides this agent there was any person or any document adduced on the part of the plaintiff in support of this issue; and as to the agent there can be no doubt that he distinctly says that he knows nothing about the case. I think, therefore, that there is no legal evidence on the record in support of the plaintiff's claim against the two defendants Puddo Lochun and Indro Kant, and that this is the case notwithstanding that the plaintiff has had every opportunity of adducing such evidence.

I agree, therefore, in dismissing the plaintiff's suit against the two persons last mentioned, and I think, on the whole, that the best order should be that each party do bear his own costs of this Court and of all the Courts below.

The 15th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Deputy Collector's order—Cause of action.

Case No. 130 of 1869.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Maunbhoom, dated the 29th October 1868, affirming a decision of the Moonsiff of Chatna, dated the 4th March 1868.

Kristo Chunder Doss (Plaintiff), *Appellant,*

versus

Soudamonee Dossee and others (Defendants), *Respondents.*

Baboos Kedarnath Chatterjee and *Bama Churn Banerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Prosunno Coomar Roy* for Respondents.

On a complaint being made in the Survey Department as to a demarcation of land, the Deputy Collector, instead of investigating the circumstances, ordered a local inquiry by an Ameen, and on plaintiff's omitting to deposit the Ameen's fees struck the case off his file:

HELD that the Deputy Collector's decision was no award, and could not be a cause of action.

Jackson, J.—THE plaintiff appears to have been involved in a difficulty in this case by the ill-advice of his vakeel or mookhtears below. He brought a complaint before the Deputy Collector in the Survey Department, complaining of a demarcation by which 200 beegahs of land had been mapped as part of an adjacent property. The Deputy Collector, instead of making an enquiry into the circumstances, thought fit to order a local enquiry by an Ameen; and on the plaintiff omitting to deposit the Ameen's fees, the case was struck off the file on the 22nd April 1863. The plaintiff commenced this suit on the 23rd April 1866, alleging himself to have been dispossessed under that award, and giving the award and the date of it, as his cause of action and the time when it accrued.

The Courts below held that this suit being brought one day more than three years from the date of the decision of the Deputy Collector the suit was barred.

The plaintiff comes here in special appeal, and contends that the order of the Deputy Collector was no award.

Manifestly, I think, it was no award and could not be a cause of action on which the plaintiff was entitled to bring this suit. It is pretty clear that the plaintiff has been dispossessed at some period antecedently to the order of the Deputy Collector; but the precise date does not appear. Under these circumstances, the only course to enable justice to be done between the parties, is that to which they have consented before us to-day, namely, that the plaintiff should be allowed to withdraw from the present suit paying all the costs thereof, and should have leave to bring a fresh suit, alleging the real cause of action and the true date of accruing thereof. The judgment of the Lower Appellate Court will, therefore, be set aside, and the order indicated will be made instead.

Markby, J.—I am of the same opinion.

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The 15th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Possession—Title—Evidence.

Case No. 194 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 3rd September 1868, affirming a decision of the Sudder Ameen of that District, dated the 30th March 1868.

Trilochun Ghose and others (some of the Defendants), *Appellants,*

versus

Koylashnath Bhuttacharjee (Plaintiff), *Respondent.*

Baboos Poorno Chunder Shome and *Bungshee Dhur Sein* for Appellants.

Baboos Ashootosh Chatterjee and *Chunder Madhub Ghose* for Respondent.

In a suit to recover possession of land, where plaintiff showed that he had been in peaceable possession till forcibly dispossessed, and defendant failed to show any right by which he had dispossessed the plaintiff, the Lower Appellate Court was held to have done right in declining to inquire further into plaintiff's title, and in replacing him in possession.

Jackson, J.—I THINK that the decision of the Lower Appellate Court in this case is substantially right. I do not think we are called upon to set that decision aside, or to refer any point, as suggested, for the consideration of the Full Bench.

The plaintiff's case here was that he had purchased from the heirs of one Efazooddeen, who was proprietor of an ayma close to the talook of the defendants, called Chuk Bansberia; that he had held possession down to 1274: and that he was forcibly dispossessed by the defendants.

The defendants deny that the land in dispute was part of the ayma in question. They say it belonged as *mál* land to their talook, and was held by Efazooddeen as tenant under them.

The Lower Appellate Court found that the plaintiffs had been in possession down to 1274, and had then been wrongfully and forcibly dispossessed by the defendants, and, under those circumstances, he called upon the defendants to show by what right they had dispossessed the plaintiffs; and the defendants failing to show any such right, he declared that he would not enquire into the title of the plaintiffs; and in coming to that conclusion, he refers to a decision of this Court, which is to be found in 10 Weekly Reporter, page 102.

It may be quite conceded that the Judge's language in this case has been a little unguarded, or, at any rate, that he has not used exactly proper words to convey his meaning. If the Judge meant to say that possession, as a thing apart from title, was something which would give the plaintiffs a right to recover possession of their land, I do not think we should uphold him in that opinion; but I have no doubt that what the Judge meant to say in this case was "that the plaintiffs having shown possession down to 1274, I infer from the fact of possession a right to be re-placed in possession, that is, some title to the land; and I think it needless to enquire further into title, that is to say, to require documentary proof or specific proof of the mode of acquisition upon which that title was founded" Though not put in so many words, yet I think this was what the Judge meant, and I think he was right. I think he was also in accordance with the ruling of the case referred to from the 10th Volume of the Weekly Reporter.

We have been referred to another case in 9 Weekly Reporter, page 602, in which, under the circumstances stated in that case, a Division Bench refused to infer the title of the plaintiffs, and ordered the suit to be dismissed. I think that case was distinguishable from the present: and without saying whether I entirely concur in the opinion expressed in that case, I think it in no wise militates against the conclusion at which we have arrived in the present case.

The decision of the Lower Appellate Court will be affirmed with costs.

Markby, J.—I am of the same opinion. I take it that the cases fully establish this proposition, that where a plaintiff, who seeks to recover possession from the defendant, shows that he has been at some period peaceably in possession of the property which he claims, the most that that can do for him is to afford some evidence from which the Courts may infer title; and I am not aware that there is any conflict in the decisions of this Court upon that point:

certainly, there is none so far as the decisions which have been brought before us by the vakeel for the appellant are concerned.

The case in 10 Weekly Reporter is perfectly clear. There the plaintiff held under a purchase from a person who had been conclusively decided to have had no title. Of course, under those circumstances, his possession could avail him nothing, supposing, as it no doubt was in that case, that the possession had lasted less than 12 years; and the case referred to in 9 Weekly Reporter also I entirely concur in. That case simply lays down the proposition that possession by plaintiff can only be used as evidence of title. In this case, the Judge has only so used it. The plaintiff was admitted to be an aymadar, and to have been in possession of the land in dispute down to the year 1274; that the defendant was a talookdar; and that the defendant has recently turned out the plaintiff, who, up to that period, was peaceably in possession; and what I take the Court in substance to have said in this case is this, "Upon that state of "circumstances, if the defendant carries his "case any further than that, I shall assume "that the defendant had a title." In assuming that, I think, he was acting in perfect accord with the decisions referred to, and, I may say, I am not acquainted with any decision here or elsewhere that lays down a different proposition.

The 16th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Purchaser—Refund of purchase-money—Suit.

Case No. 1076 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 17th February 1869, reversing a decision of the Moonsiff of Chuprah, dated the 3rd September 1868.

Bissessur Pandey (one of the Defendants), *Appellant,*

versus

Bhugwan Doss (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

The rights and interests of a judgment-debtor having been sold in execution, the auction-purchaser, in proceeding to take possession was obstructed by one *D*. On this he filed a complaint under Section 269, Code of Civil Procedure, before the Civil Court, which found that, as *D* had been in possession for a long time, he could not properly be ejected. The auction-purchaser then sued to recover his purchase-money.

HELD that plaintiff's proper remedy was to bring a suit against *D* to establish the title of the judgment-debtor in the property; and that, not choosing to take advantage of that remedy, his suit must fail.

Glover, J.—THIS was a suit by the purchaser in execution of a decree of the rights and interests of Mussamut Sheoraj Koer to recover from the decree-holder the amount of the purchase-money paid to him, on the ground that the party whose rights and interests the plaintiff purchased has been found, in reality, to have no rights, and that, therefore, he, the plaintiff, has got nothing by his purchase, and is entitled to receive back the purchase-money. It appears that, after the sale was confirmed, which took place on the 30th November 1866, the plaintiff went to take possession of his purchase, and was then obstructed by one Deo Narain, who claimed to hold the land as his own property. On this, the purchaser filed a complaint before the Civil Court under Section 269 of the Code of Civil Procedure, claiming its assistance to get possession of his purchased property. The Sudder Ameen called upon the party in possession, and, as between him and the purchaser, found that, as Deo Narain was in possession of the disputed land, and had been so for a long time, it was not proper to eject him on the petition of the auction-purchaser; he added, however, that his decision confirming Deo Narain in possession would not be a proof, in any subsequent suit that might be brought, of that party's right and title to retain possession.

The Court of first instance considered that the plaintiff was not entitled to get back his purchase-money; that he had bought with his eyes open the right, title, and interest of Mussamut Sheoraj Koer: and that, if that right, title, and interest turned out to be nothing, he had only himself to blame.

The Principal Sudder Ameen, however, considered that the plaintiff was entitled to get back his money from the decree-holder, on the ground that the decree-holder had included what was the right of other parties in the schedule of properties said to be his judgment-debtor's, and that the plaintiff had

no opportunity and no means of detecting this fraudulent entry, and that, therefore, the decree-holder ought to refund the purchase-money.

It appears to us that the decision of the Principal Sudder Ameen was wrong. Under Section 269, under which Section the plaintiff applied to the Sudder Ameen, the Court had power to inquire into the matter of the complaint and pass "such order as was proper under the circumstances of the case." Now, the Sudder Ameen taking all these circumstances into consideration, refused to give the purchaser possession of the land on the ground that the objector had been for a long time in possession of it. Whether his order was a correct order or not, and whether the Sudder Ameen ought not to have gone further and looked also into the objector's right to retain possession, it is not for us to inquire. The order, whether right or wrong, was a final one and was not open to appeal. But the purchaser was not left without a remedy. He might, if he chose, have brought a suit against the party obstructing his entrance into the purchased property, to establish the title of the judgment-debtor in that property; and as he did not choose to do so, it appears to us that he has shut himself out from any other remedy. The order of the Sudder Ameen, as we already observed, decides nothing as to the right and title of the judgment-debtor in this particular property, so that for all that appears on the record it may be that there is some right still existing in that property belonging to the judgment-debtor, and that the purchaser might, if he had chosen to institute a suit under Section 269, have established that right and have got possession of what he had purchased. Instead of taking that course, he has sued to recover his purchase-money. Now, there is no Section of the law that we know of that enables him to recover it. Section 258, which has been quoted in support of the plaintiff's contention, refers, we are inclined to think, solely to cases in which a sale of immoveable property has been reversed on the ground of irregularity; but even if this Section were applicable to all sales that have been reversed, whether for irregularity or any other cause, it is clear that it cannot apply to the present case, inasmuch as here the sale has not been reversed; it remains uncancelled to this day.

We have been referred to certain cases published in the 1st and 6th Volumes, Weekly Reporter, and likewise to one quoted at page 366 of the 10th Volume of the Weekly Reporter, but all these decisions refer to cases in which sales have been set aside, and therefore have nothing in common with the present case. It seems to us, therefore, that as the plaintiff had by law a remedy and did not choose to take advantage of that remedy, and as there is no special provision in the law (the sale remaining uncancelled) by which he can recover his purchase-money, his suit must necessarily fail. We, therefore, reverse the decision of the Lower Appellate Court and decree this appeal with costs.

The 16th July 1869.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Responsibility of representatives—Liability of property—Rights of creditors.

Case No. 237 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 13th March 1869, reversing an order of the Subordinate Judge of that District, dated the 1st December 1868.

Ram Golam Dobey (Decree-holder), *Appellant,*

versus

Ayma Begum (Judgment-debtor), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory and *Moonshee Syud Ameer Ali* for Respondent.

When a defendant against whom a decree has passed in his representative capacity, has made payments in satisfaction of the decree to the full value of the property of the deceased which has come, or, but for the default of the defendant, might have come, to his hands, the decree can no longer be executed even although the decree-holder may be able to prove that the defendant still has in his possession property which originally belonged to the deceased.

If the heir of a deceased Hindoo or Mahomedan has sold to a *bonâ-fide* purchaser, property which he has inherited, he is responsible for the assets received: but the property cannot be followed in the hands of the purchaser.

Macpherson, J.—In this case, a decree was passed against the defendant, as representative of her deceased husband, for

some 3,000 odd rupees. She made (as the appellant acknowledges) various part-payments, amounting in all to Rupees 1,800. After she had made these payments, the appellant applied for execution by the attachment of a house (valued by the appellant himself at Rupees 520) which had belonged to the deceased.

The Subordinate Judge held that the whole estate which came to the defendant as representing her husband consisted of no more than Rupees 60 and the house which it was sought to attach; that the defendant was originally liable only to the extent of the Rupees 60 and the house, but that as she had paid the Rupees 1,800 without any stipulation that by such payment she should release the house, she could derive no benefit from the payment of the Rupees 1,800, and the attachment must issue.

On appeal, the Judge held, apparently upon no evidence whatever, that it must be presumed that the defendant paid the Rupees 1,800 under an express agreement that the house was to be released, and, therefore, that execution ought not to issue. He reversed the order of the Court of first instance.

The decree-holder appeals and contends, and we think rightly contends, that, in the absence of any evidence to prove that such was the case, the Judge was wrong in finding as a fact that the Rupees 1,800 were paid and received under a special agreement.

But we think that the conclusion arrived at by the Judge may very possibly be right upon another ground to which he does not allude. In our opinion, when a person against whom a decree has passed in his representative capacity, has made payments in satisfaction of that decree to the full extent of the property of the deceased which has come, or but for the representative's default might have come, to his hands, the decree can no longer be executed, even although the decree-holder may be able to prove that the representative still has in his possession property which originally belonged to the deceased. If a decree is passed against a person in his representative capacity, and he makes payments in satisfaction of that decree, it is a legal and reasonable presumption, until the contrary is proved, that these payments are made by him in the capacity in which alone he is liable to make them, *i. e.*, his capacity of representative. In the present instance, the estate in the defendant's hands which was available for the satisfaction of this decree was the house worth Rupees 520 and Rupees 60, the value of certain other property. If the defendant had held the decree-holder at arm's length and paid nothing, he could not have executed his decree save to the extent of Rupees 520 *plus* Rupees 60, or Rupees 580 in all. But the defendant has in fact (according to the finding of the Subordinate Judge) paid Rupees 1,800, being three times as much as she was under any legal obligation to pay. If she had sold the deceased's property in order to raise money to pay off this decree, so far as that property would go, the sale would have been good: and it is difficult to see why, if she has, in fact paid much more than the value of the property, she should not retain it and hold it as against this decree-holder just as if she had purchased it.

It is contended by the appellant that whatever may have been the total value of the assets received by the representative, or for which the representative was liable, and whether the representative has or has not, in fact, paid more than the value of those ass ts in part-satisfaction of the decree, the decree-holder is, by the express words of Section 203 of Act VIII. of 1859, still entitled to execute the decree against any property of the deceased which he can find. But it has already been decided, both as regards Mahomedans and Hindoos, that if the heir has disposed to a *bonâ-fide* purchaser of property, which he has inherited from a deceased person, a creditor cannot follow the property in the hands of the purchaser, but can only sue the heirs who are responsible to him for the assets they receive (10 Weekly Reporter 126; 2 Weekly Reporter 296; I. Agra Full Bench 72.) These cases show that the Courts do not put upon the words in Section 203, "it may be executed by the attachment and sale of any such property," the literal construction for which Mr. Twidale now contends. There is no doubt that by the general law, the representative is liable only to the extent to which he has received property from the deceased, or might have received it but for his default (*see* 8 Weekly Reporter, pp. 101 and 161); and to construe Section 203 in the manner contended for, would be to throw a new liability on representatives, the result of which would be that it would never be safe for them to pay off any decree. Their only safe course then would be to satisfy

no decrees, but merely to leave the property of the deceased untouched to be seized by the holders of decrees against the estate.

We think, therefore, that if the respondent in this case has really paid, in part satisfaction of this decree, a sum much beyond the value of the assets for which alone she as representative was liable, the order forbidding the issue of execution was right. But although the Court of first instance held that the defendant never got any assets save the house and some other property valued at 60 rupees, the Judge has expressed no opinion on this point. The appellant is clearly entitled to have the decision of the Judge upon this question; because, if the Judge should differ from the Subordinate Judge, and should find that the respondent, as representative, is responsible for assets in excess of the Rupees 1,800 which she has paid, then the appellant would be entitled to attach this house.

The case is remanded to the Judge that he may decide the question as to what property the respondent inherited from the deceased, and is now liable for in this suit. Execution ought to issue or not, according as the Judge does or does not find that the Rupees 1,800 already paid are more in amount than the value of the property of the deceased for which the respondent is accountable. The costs of this appeal will abide the result of the remand.

The 16th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Joint estate—Onus probandi.

Case No. 884 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 19th January 1869, reversing a decision of the Sudder Ameen of that District, dated the 30th December 1867.

Gunga Pershad Dutt (one of the Defendants), *Appellant,*

versus

Lokenath Nundee and others (Plaintiffs), *Respondents.*

Baboo Kishen Dyal Roy for Appellant.

Baboo Nuleet Chunder Sein for Respondents.

In a suit to recover possession of two parcels of land alleged to have been comprehended in one plot, on the ground that they had been held by plaintiff and defendant jointly, until by certain proceedings the former was virtually deprived by the latter of the usufruct, defendant's case being that the parcels were divisible into two distinct plots, one held by plaintiff and himself jointly, and the other by himself exclusively:

HELD that it was on the plaintiff to prove that the disputed parcel was a part of the land held jointly by him and the defendant.

Hobhouse, J.—WE think this case must be remanded to the Lower Appellate Court.

The plaintiff said he was the owner of a talook called Sookdel, and the defendant the owner of a talook called Ram Gopal, and he sued for possession of 2 poorahs of land comprehended, according to him, in one plot, on the ground that these two poorahs belonged to the two talooks equally and were held by him and the defendant jointly, until, by certain proceedings in the Revenue Court, the defendant virtually deprived him of any usufruct of the lands.

The defendant said that the two poorahs of the land in question were properly divisible into two plots with distinct boundaries; one plot consisting of 8 arrahs belonged, he admitted, equally to the two talooks, and was held by him and the plaintiff jointly. The other plot consisted of 1½ poorahs of land, and belonged to, and had been held by him, he said, exclusively as land of his talook Ram Gopal.

The issue between the parties material to the discussion before us is that noted in the first issue on the merits in the first Court, and that is to the effect whether the 1½ poorahs belonged to and were held exclusively by the defendant, as part of his talook Ram Gopal, or were they held by the plaintiff and the defendant jointly as lands appertaining to their two talooks held in common.

The first Court dismissed the suit altogether.

The Lower Appellate Court gave the plaintiff a decree.

In special appeal before us, it is urged that this decision is erroneous in law, because in arriving at it, the Lower Appellate Court has thrown the burthen of proof on the wrong party, that is to say, upon the defendant, instead of upon the plaintiff.

We think this contention is good. From the written statements on either side, it is clear that the defendant fully declared that the 1½ poorahs in dispute were a part of the *joint* lands of the two talooks held jointly by him and the plaintiff. It was, therefore, clearly on the plaintiff to prove, before any evidence on the part of the defendant need have been looked into, that the lands were joint and were jointly held by him and the defendant as alleged; and it seems to us beyond doubt that the Lower Appellate Court has thrown the *onus* wrongly on the defendant. The first Court, it must be remarked, had thrown out the plaintiff's case, had disbelieved it, had found it not proven, and if therefore the Lower Appellate Court had supposed that the *onus* was on the plaintiff to prove his case, we should have found that Court starting with the plaintiff's case, showing how it was proved, giving its reasons for differing in its judgment from the Court below, and then, after finding the plaintiff's case to be proved, showing that the defendant had not rebutted that case. But on considering the very lengthy judgment of the Lower Appellate Court, we find that it begins, continues, and ends in one unvarying tone as to the party on whom the burthen of proof ought to be placed. It begins by saying that when "the defendants allege "8 arrahs of land to be ijmalee, and claim "the remaining 1½ poorahs as being held by "them by partition along with their Ram "Gopal Mozoomdar, I am of opinion that "the *defendants should have proved* their "allegation of partition." The Court then goes into the evidence of the defendant. It considers that evidence in detail and repeatedly declares that that *evidence does not prove the defendant's case.* Treating of a decree, it says: "The aforesaid decree can-"not be held to prove the 1½ poorahs of land "now in dispute to belong distinctly to ta-"look Ram Gopal Mozoomdar." Treating of certain other evidence of the defendant, it says: "*Consequently, when the defend-"ants have not been able to prove by evi-"dence* that the disputed land has long been "partitioned, or that it was partitioned in "1271, then it cannot but be held that the "disputed land belongs jointly to both the "talooks;" and all that the Court says in the matter of the evidence given by the plaintiff, on whom the burden of proof really rested, is in the shape of a summary of the evidence, or rather it may be said, of a list of the evidence, and that is given in the 7th para. of the judgment, and with a remark appended thereto that it sees no reason to disbelieve it.

We can have no doubt that the Lower Appellate Court has fallen into an error of law in considering on whom the *onus* of proof rested, and that that error has materially misled the Court.

We therefore remand the case, directing the Lower Appellate Court to re-try the case after throwing the *onus* on the right party, *viz.*, the plaintiff.

As regards the question of the 8 arrahs, the only point for determination will be whether the defendant dispossessed the plaintiff of the same. If that is proved to the satisfaction of the Court, it will give the plaintiff a decree for possession of the 8 arrahs; and as regards the 1½ poorahs, the issue is whether the plaintiff has been in possession of those lands *ijmalee* with the defendants at any time within 12 years of suit.

The costs of this remand will follow the result.

The 19th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Survey-award—Evidence.

Case No. 906 of 1869.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Dacca, dated the 28th December 1868, reversing a decision of the Moonsiff of Naraingunge, dated the 31st July 1868.

Koylash Chunder Ghose (Plaintiff), *Appellant,*

versus

Raj Chunder Banerjee and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Bama Churn Banerjee* for Appellant.

Baboo Rash Beharee Ghose for Respondents.

An award by the Superintendent of Survey is not conclusive evidence of a contested right in a regular suit.

Bayley, J.—THIS special appeal must be dismissed with costs.

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The plaintiff sued to recover possession of five plots of land.

As to plots 1 and 2, plaintiff's case was that he held a survey-award in his favor. As to plots 3 and 4, that they were demarcated in his name without any objection on the other side; and as to plot 5, the plaintiff's prayer was that as it had been wrongly demarcated in the defendant's name, the mistake might be rectified. The plaintiff stated that all these plots belonged to his Mehal No. 8053, and gave certain definite dates of the plaintiff's dispossession, *viz.*, of plots 1, 4, and 5, up to Assin 1265; of plot 2 up to the end of Cheyt 1264; and of plot 3 up to the end of 1267.

The answer of the defendants was that the plaintiff's suit was barred by limitation, and that the lands, in fact, belonged to their talook.

The first Court gave the plaintiff a decree, but the Lower Appellate Court reversed that decision, and dismissed the plaintiff's suit.

Against this decision, the plaintiff appeals specially, and urges three grounds, which I state as taken down from the words of the pleader:—

1stly.—As to plots 1 and 2, that the award of the Survey Department is conclusive evidence of the plaintiff's possession within 12 years of suit;

2ndly.—That the Judge has not properly considered whether the plaintiff held the ijarah in the *benamee* of Issur Chunder, the dur-ijaradar; and

3rdly—That the Judge has not properly considered and understood the Ameen's report which found that the defendants held the property in the *benamee* of Issur Chunder after the expiry of the period of his dur-ijarah.

In respect of the *first* contention, two cases, one from Volume IX., page 348, and the other from Volume XI., page 509, Weekly Reporter, and Clause 4, Section 14, Regulation VII. of 1822, have been cited as supporting the plea of the special appellant.

But the case in Volume IX. has no bearing at all on this case. In that case, Mr. Justice Mitter and I merely held that where there is a slight variation in the date of ouster given in a pleading and the date proved in evidence, it was of no great consequence.

The *second* case quoted from Volume IX. does, no doubt, contain a *dictum* in the special appellant's favor; but as a *dictum* only, it is not of the force of a ruling and so binding.

Clause 4, Section 14, Regulation VII. of 1822, is misapplied. That Section has reference to Collectors making settlements where, in cases in which any complaint is made by any party of wrongful dispossession, the Collectors are declared competent to enquire into and decide the point summarily, which decision may be set aside by a regular suit in Court. The topographical position of the land as ascertained and defined by the survey authorities and the awards of the latter classes of officers, are in fact distinct from the acts of settlement mainly contemplated in Regulation VII. of 1822. The procedure and the functions of the survey and the settlements are so much akin, that it was considered that it would be convenient for the one authority to adopt the procedure of the other. I have never known it laid down as law, that an award by the Superintendent of Survey is conclusive evidence of a contested right in a regular suit. I consider this plea, therefore, to be quite untenable. This disposes of the question as regards plots 1 and 2.

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In this view of the case, I see no reason to disturb the judgment of the Lower Appeliate Court, and I would, therefore, dismiss this special appeal with costs.

Hobhouse, J.—I have a few words to add on the subject of the first objection taken in this case. I remark that this suit was based on the ground of three alleged acts of forcible dispossession in three certain years. On this point, the Lower Appellate Court has found as a fact that there is nothing like evidence to prove the allegation. At the first starting, therefore, it is clear that the plaintiff has failed to prove that there was any cause of action at all such as he set up, and I mention this because I would apply this finding to the first argument used in special appeal by the pleader for the special appellant. I would take it for granted that the survey authorities had jurisdiction to entertain a suit under the provisions of Clause 4, Section 14, Regulation VII. of 1822. Then the suit in this instance is said to have been on the part of the defendants, alleging that they had been forcibly dispossessed of plots 1 and 2, and claiming, therefore, to be put in possession.

As to the thakbust officer's decisions of the 26th Srabun and 29th Aughran 1165, they must, under the terms of the Section relied on, be held to have simply declared between the parties that the plaintiffs then, now defendants, have failed to prove the case set up by them, and must, on that ground, be held to have given a decision adverse to the defendants. Now, it is quite clear that this decision may be a right decision, and yet it seems to me that it cannot possibly be conclusive against the special respondents. They said they were dispossessed in 1265 of plots 1 and 2, but now it is quite clear on the plaintiff's own admission and on the finding of the Court below, that they were in possession at this very particular time. The decision, therefore, of the Survey Deputy Collector might be quite right and the fact of its being quite right is not only not inconsistent with, but it is even favorable to the defendant's case; but we are told that that decision is final as to possession. It seems to me, however, that the decision cannot, under the terms of the law on which it is said to have rested, be taken as a decision declaring any possession at all; it must be held to have declared only that the now defendant was not dispossessed forcibly in 1265, as he then alleged. Nor otherwise can we possibly consider this decision as conclusive, even if it could have determined the question of possession, in the face of the plaintiff's own allegation that it was as a fact incorrect.

The judgment of the survey authority would go to the effect that the plaintiff was in possession in Srabun and Aughran 1265, but the plaintiff himself admits that he was out of possession in 1264 of one plot, and the Courts find against him when he alleges dispossession in Aughran 1265 of the other plot; and the inference, therefore, is, that he was out of possession also of the second plot when the survey authority said he was in possession. It is quite clear that whatever may be the effect of this survey-decision, the only person who had any cause of complaint against it was not the defendant, but the plaintiff, and, therefore, even admitting that the survey authorities had jurisdiction to pass such a decision as it is contended they could pass under the law quoted, I quite concur with Mr. Justice Bayley that that decision cannot be considered conclusive evidence in this case of the plaintiff's possession at the time of the survey award.

I agree in dismissing the special appeal with costs.

The 16th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res-adjudicata—Section 2, Act VIII., 1859—Solehnamah.

Case No. 35 of 1869.

Regular Appeal from a decision passed by the Judge of Patna, dated the 5th September 1868.

Mussamut Syudoonissa (Plaintiff), *Appellant,*

versus

Feda Hossein and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Ashootosh Dhur* for Appellant.

Mr. C. Gregory, and *Baboos Sham Lall Mitter, Mohendro Lall Seal*, and *Moonshee Mahomed Yusuff* for Respondents.

In a suit to recover in virtue of a right of inheritance, a share of a deceased father's estate, from which plaintiff had been ousted in 1858:

HELD that as plaintiff had brought a suit in 1853, in which she claimed the same properties as belonging to her father's estate, and had accepted and acted upon the decree then passed, which excluded the property in question from her claim, her present suit was barred by Section 2, Act VIII., 1859; and further that she could not claim the property on the ground of a solehnamah by which it was admitted and declared that the property belonged to her father's estate, when it had been already decided in the former suit that it ought not to appertain to that estate.

Kemp, J.—THE plaintiff is the appellant before us. Her suit has been dismissed by the Judge on the ground that it was barred under the Statute of Limitation. After hearing the arguments of the pleaders at great length, we have come to the conclusion that this suit must be dismissed, but not on the ground on which the Judge has dismissed it.

The plaintiff sued to recover possession of a 3 annas 9 pie share in the 16 annas or entire estate of Moonshee Ashuk Ali, deceased, father of the plaintiff. It is stated in the plaint that the cause of action arose on the 28th September 1858, when the Sessions Judge held a roobakaree under color of which the defendants ousted the plaintiff, and when the plaintiff's right and title were disturbed and interfered with. The suit of the plaintiff is brought after more than nine years from the cause of action.

To proceed with the plaint, it is stated that the suit is based "on a right of inherit-

ance derived from the plaintiff's father." The schedule appended to the plaint shows the claim to be for a 3 annas 9 pie share of the properties involved in the suit; and in the written statement, para. 5, it is stated that the suit is brought "under a right of inheritance derived by the plaintiff from her father and mother." In para. 6 of the grounds of appeal to this Court it is stated that "your petitioner's suit was for possession on the ground of ancestral right." Again, in the same para., it is said, "your petitioner's right "as heir, and her possession of a portion of "her ancestor's estate, is not disputed by the "defendants." It is, therefore, clear to us from the plaint, from the written statement, and from the grounds of appeal of the plaintiff, that she based her suit on a right of inheritance to a share in her father's estate. It is clear that she did not sue under the alleged solehnamah of the 14th November 1854; for under that arrangement, admitting that it was executed, a point which is disputed, she would only be entitled, not to any share in the estate of Moonshee Ashuk Ali, but to a fifth part of the properties which were to be divided under the alleged solehnamah. Now, in the plaint, she does not sue for one-fifth of the properties under that alleged solehnamah, but most distinctly for a 3 annas 9 pie share of the entire estates of Moonshee Ashuk Ali, her deceased father; and this is the share under the Mahomedan Law she would be entitled to.

It appears that, in September 1853, this plaintiff brought a suit in the Supreme Court, and claimed the properties which form the subject of the present suit as belonging to the estate of her father Ashuk Ali Khan. The matter was referred to the Master of that Court to report upon, and his report most distinctly shows what estates belonged to Ashuk Ali Khan, and what to Ameer Hossein. The Schedule A annexed to the report of the Master shows the estates belonging to Ashuk Ali Khan, and Schedule B the estates belonging to Ameer Hossein. The decree of the Supreme Court of the 6th September 1853 distinctly excluded the estates belonging to Ameer Hossein, and the plaintiff obtained a decree with reference to the estate of Ashuk Ali alone. That such was the case is clear from the admission of the plaintiff herself in her plaint, in which she states that the estates of Ameer Hossein were excluded and set apart from the decree. Her present suit, therefore, to obtain a share in the estate of Ameer Hossein in the face of the decree of the Supreme Court, dated the 6th September 1853, and which decree she accepted and acted up to by putting it in execution, must be dismissed as barred under Section 2 of Act VIII. of 1859.

It has been contended by the pleader for the appellant that the solehnamah of the 14th November 1854 altered and modified the decree of the 6th September 1853, and that, by that document, namely, the solehnamah, the estates of Ameer Hossein were declared and admitted by the heirs of Ashuk Ali Khan and Ameer Hossein to belong to the estate of Ashuk Ali Khan; and as the title of the appellant was not created by that solehnamah, but already existed under the Mahomedan Law of Inheritance, the solehnamah explaining and modifying as it does the decree of the 6th September 1853, gives the appellant a fresh cause of action, and takes her suit out of the provisions of Section 2 of Act VIII. of 1859.

We think that this contention is quite untenable. The plaintiff, we have already shown, distinctly proceeds on the footing that her suit is not under the solehnamah, but under the right of inheritance. The plaintiff in right of inheritance is entitled to no share in the estate of Ameer Hossein, and it having been already decided in a suit to which she was a party in September 1853; and in which suit she claimed the estates, the subject-matter of this suit, as appertaining to the estate of Ashuk Ali, that they did not do so, she cannot now in a suit based on a right of inheritance to a share in the estate of Ashuk Ali Khan claim those estates. We, therefore, are of opinion that the suit of the plaintiff in its present shape must be dismissed.

The decision of the Judge dismissing her suit is affirmed, and this appeal dismissed, with costs payable by the plaintiff, appellant, including the costs of the other defendants, the representatives of Gobind Singh.

As the case has been disposed of upon the cross-appeal taken by the defendants, respondents, it is only necessary to add that the cross-appeal is decreed.

The 17th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Bond-debts with security of land—Small Cause Court jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Mozufferpore, dated the 28th June 1869.

Ram Shewuk Sahoo, *Plaintiff,*

versus

Futto Roy, *Defendant.*

In a suit for money due on a bond in which the payment is secured by mortgage of immoveable property, the Judge of a Small Cause Court is competent to try whether any debt is due upon the bond or not; but he cannot declare whether or not the particular land mentioned in the bond is charged for the payment of the debt, nor can he attach the land in execution of the decree.

Reference.—THE plaintiff sues the defendant for Rupees 56 due on a bond for money lent. The payment of the money was secured by mortgage of mouzah Morooah Huree Ram, the property of the debtor.

At the trial of the suit, the defendant denied the execution of the bond, and objected to the jurisdiction of this Court upon two grounds:—

1stly.—The plaintiff's claim for money due on a bond the payment of which was secured by mortgage of immoveable property is not cognizable by the Small Cause Court.

2ndly.—That the Court of Small Causes has no power to declare the property hypothecated liable.

As it appeared to me that the Small Cause Court is competent to receive, try, and determine all suits for money due on bond, if the claim does not exceed Rupees 500, I gave judgment for the plaintiff subject to the decision of the Hon'ble High Court on the questions:—

1st.—Whether or not the claim for money due on a bond in which the payment was secured by mortgage of an immoveable property is cognizable by the Small Cause Court?

2nd.—If it be maintainable, whether or not the Small Cause Court can decree the claim and order the payment to be secured as stipulated in the bond?

I am of opinion that the suit is cognizable by the Small Cause Court for the following reasons:—

The plaintiff's claim is to recover the money, principal and interest, due on the bond, and the only question at issue with regard to fact is the genuineness of the bond which no other Court than that of Small Causes is competent to decide upon.

Section 12, Act XI. of 1865, ordains:—"Wherever a Court of Small Causes is constituted under this Act, no suit cognizable by such Court shall be heard and determined in any other Court having jurisdiction within the local limits of the jurisdiction of such Court of Small Causes."

This Section clearly and distinctly prohibits the ordinary Civil Courts to take cognizance of a claim for money due on a bond or other contract which, by the provisions of Section 6 of the Act, is determinable in a Court of Small Causes. It is admittedly, therefore, the province of the Small Cause Court to adjudicate upon the question of fact arising in a case to recover money lent. The wording of Section 6, Act XI. of 1865 (claim for money due on a bond), gives an unqualified meaning of the bond, and it must be taken to include all bonds for money lent without restriction. On the other hand, the Section has unambiguous restrictions, namely, I., balance due on partnership; II., legacy or claim under will; III., damages for personal injury; IV., rent issuing out from land—whence it can be fairly construed that the Legislature never meant to qualify a bond for money lent, if the payment of the money be secured by mortgage of any property. The mortgage under consideration is a collateral security of the debt, and does not come in the category of *mortuum vadiram,* dead pledge, which makes the mortgagee's estate in the land absolute on the non-payment at the time limited.

In India all pledges are known by the name of mortgage, and in the case of one of the pledges, it has been ruled by the Hon'ble Court, dated 17th September 1866,

Weekly Reporter, Volume II., that a Small Cause Court has power to decide upon the question of payment secured by mortgage of debtor's property. I do not, therefore, understand how the jurisdiction of Small Cause Courts shall be barred in the case of a bond by reason of the payment of the money having been secured by mortgage of debtor's property.

As to the second point, I observe that, when a Statute gives a Court jurisdiction over a class of cases, it impliedly gives such Court, unless strictly prohibited by law, power to grant due relief which the plaintiff seeks in the case.

In the case before me, if the decision of the law be in favor of my jurisdiction as to the first point to receive and try a bond-suit of this nature, the second point, which is incidental to the primary question, must also be answered in the affirmative, or, in other words, it will be found the law impliedly gives me also power to declare that the payment shall be secured as stipulated in the bond.

The precedent, dated 18th January 1868, Weekly Reporter, Volume V., page 23, in the case of Ram Gopal Shaha *versus* Ram Gopal Shaha and others, relied upon by the defendant, appears to have no bearing on this case.

In the case adverted to, a third party disputed the title of the debtor in the property mortgaged, and hence it was held that a question of title, which arose between plaintiffs and a stranger not a party to the contract, does not come within the class of cases contemplated in Section 6, Act XI. of 1865. But in the case under review no such title did arise, nor can it ever arise on the part of the debtor himself.

The plaintiff's case, it is clear, involves only one question of fact, and the finding on the fact will, without question, govern the second point, which relates to the security of payment of the money due on the bond.

I deem it also right to notice that the debt of a contract, which the Small Cause Court has power to try, will, by order of the decree, be merged into debt of a decree, and hence the decree ought to be complete and perfect to give full effect to the contract.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court is correct in his opinion that he is competent to try whether any debt is due upon the bond or not; but he cannot declare whether or not the particular land mentioned in the bond is charged for the payment of the debt, nor can he attach the land in execution of the decree (*See* Section 20).

The 17th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Judge having shares in a Bank

Reference to the High Court by the Recorder of Moulmein, dated the 28th June 1869.

The Bank of Bengal, *Petitioner*,

versus

Golam Azim, *Opposite Party*.

A Recorder under Act XXI. of 1863, being the holder of Bank of Bengal shares, has power to dispose of a suit to which the Bank is a party, in a case of necessity, as when the Commissioner also has shares in the Bank.

Reference.—I HAVE made the order in this case for the execution of a decree of the Recorder's Court of Rangoon by attachment of property within the jurisdiction of this Court, intimating at the time I did so that I should submit the point I then mentioned, by way of reference under Section 22 of the Recorder's Act.

The application was unopposed. In making the order, however, it occurred to me that exception might possibly be taken to it from the circumstance that I happen to be at present a holder of Bank of Bengal shares; and as the question may possibly be raised in some future suit, I am anxious to obtain the benefit of their Lordships'

opinion upon it under Section 22 of Act XXI. of 1863.

The principle laid down in *Dimes* versus *Grand Junction Canal Company*,* that any personal interest would incapacitate a Judge from dealing with a case, is, I believe, as fully acted upon in the High Court of Calcutta on its original side (which prescribes the practice of this Court) as at home. I remember, indeed, an instance in which a Judge of the High Court (I think Mr. Justice Phear) declined to hear a case, in which the Calcutta Steam Tug Company was a party, on this ground.

There are, no doubt, stronger reasons for the adherence to the principle of the rule in India than at home, inasmuch as, in addition to the functions of a Court in determining points of law, an Indian Judge has to perform the duty of a Jury at *nisi prius* in determining questions of fact.

The position of the Bank of Bengal may possibly be considered under ordinary circumstances as exceptional and different in more than one degree from merely local speculations; but the principle involved is unquestionably the same, and I apprehend that, in the event of any case coming before the High Court at Calcutta, in which the Bank of Bengal and the Bank of Bombay were the parties to the suit, interest would incapacitate a Judge who was the holder of this particular species of stock.

On the general question of incapacity from interest, the qualification with which Lord Cranworth in *Ranger* versus *The Great Western Railway Company*† enunciated the principle of *Dimes* versus *The Grand Junction Canal Company*, *viz*, that "the decision of a Judge made in a cause in which he has an interest is, in case of necessity, unimpeachable," would seem specially applicable to the case of the Recorder's Courts in British Burmah. The illustration given by His Lordship was that of an action brought against all the Judges of the Common Pleas in a matter over which they had exclusive jurisdiction. This, of course, is a much stronger case than that in which a Judge disposes of a case in which he has only a subordinate interest.

The Bank of Bengal may, I think, so far as its ordinary litigation in Burmah is concerned, be looked on more in the light of a national institution than of an ordinary commercial speculation; and the infinitesimal extent to which any cases in these Courts are likely to affect the Bank, and consequently the personal interest of any particular shareholder in it, would seem to leave it, if expediency is once allowed to enter into the question, competent to the Recorder to decide generally any case in which the Bank is concerned.

I should notice as affecting the question of expediency that, by Section 48 of the Recorder's Act, suitors are not absolutely without an alternative in the event of the Recorder being from any cause disqualified to dispose of a case. That Section provides that—"If there shall, for the time being, "be no Recorder, or if the Recorder of any "of the said Courts shall at any time from "sickness, or from being absent on leave, or "other cause, be unable to attend to the du-"ties of his office, it shall be lawful for the "Commissioner of the town wherein such "Court is situate, to sit in such Court, and "to exercise all the powers vested by this "Act in the Recorder."

The question I would submit is this:—

Whether a Recorder under Act XXI. of 1863, being the holder of Bank of Bengal shares, is incapacitated from disposing of cases to which the Bank of Bengal is a party?

My own opinion on the point inclines, as I have above intimated, to the rule based on the expediency aspect of the question, and the conviction that no failure of justice can be apprehended from the personal interest of the Judge. Some stress appears to have been laid in the case of *Dimes* versus *The Grand Junction Canal Company* on the fact of the Judge's interest not having been known at the time of the argument of the case. Possibly, a declaration of interest by the Recorder at the time of hearing might be sufficient. It would follow almost as of course that the Recorder would, in cases of the kind not appealable, submit the decision of any point of law he considered at all doubtful to their Lordships by way of reference.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the learned Recorder was right, and that he had power to make the order. This was a case of necessity, the Commissioner also having shares in the Bank (See 3 House of Lords cases 787).

* 3 H. L. cases 759.
† 5 H. L. cases 88.

The 17th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Widow's interest—Competent security—Legal necessity — Reversioner's rights.

Case No. 155 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Patna, dated the 6th April 1869.

Mussamut Phool Koer *alias* Kunhya Koer (Judgment-debtor), *Appellant,*

versus

Dabee Pershad (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Kalee Kishen Sein* for Appellant.

Messrs. G. C. Paul, C. Gregory, and *R. E. Twidale,* and *Baboos Kishen Succa Mookerjee* and *Boodh Sein Singh* for Respondent.

A judgment-debtor, who had been permitted to retain possession of disputed property pending an appeal to England on furnishing security for mesne-profits and costs, deceased, and his widow offered her life-interest in his estate as such security.

HELD that, as her interest was only temporary, it could not be accepted as competent security, and that, as she was under no legal necessity to carry on the appeal to the Privy Council, and did not do so for the benefit of the estate, she could not bind the estate as against the reversioner for the purpose of raising the necessary funds.

Glover, J.—THIS was an application on the part of Mussamut Phool Koer, appellant to the Privy Council, to have the security given by her late husband Luchmun accepted.

The decree-holder, Dabee Pershad, objected to its sufficiency, on the ground that the widow, who was the person now offering security, had only a life-interest in the estate.

It appears that Luchmun, the judgment-debtor, was allowed to retain possession of the disputed property, an 8-annas share of an estate, pending appeal to the Privy Council, on furnishing security for mesne-profits and costs to the amount of Rupees 80,000.

Luchmun offered the property now in question; but before the requisite enquiry under Regulation XVI. of 1797 was complete, he died, and his widow, who is carrying on the appeal to the Privy Council, wishes to have the sufficiency of the security offered by her late husband tested, and, if approved, accepted.

The Subordinate Judge has held that the widow is the person now offering security, and that, as she has only a temporary interest in the property, she cannot offer it as competent security.

We think that this order is substantially correct. We understand the Subordinate Judge to mean, not that the widow cannot offer her interest as security, but that that security, not being a permanent one, is insufficient for the purpose contemplated; and this objection is reasonable, for the widow might die at any time, and then, if the appeal to England failed, what would become of the security for wassilat and costs? They could not be a burthen on the property, which would go to the reversionary heir intact, the widow having no right of alienation.

It has been argued by the appellant's pleader that Luchmun's security-bond bound the estate just as much as a mortgage would have done. Had the security been approved and accepted by the Civil Court before Luchmun's death, there might have been some question as to how far the property was burthened, but in this case the security-bond has never been accepted. It is part of an inchoate contract only, which the other party has not accepted, and which remains, therefore, incomplete and infructuous.

We must put aside the husband's security altogether and look to the widow's; and can it be said, under the circumstances of this case, that the security offered is such as any Court could reasonably accept?

All that the widow has, and consequently all that she could pledge, is the yearly income of the estate—an income that she may lose at any moment.

A faintly pressed argument was put forward by Mr. Allan that the appellant's action being one of necessity, the Hindoo Law would allow her to bind the estate as against the reversioner for the purpose of raising the necessary funds. This argument appears to us altogether untenable. In the first place, the necessity is not such an one as is contemplated by the provisions of Hindoo Law, the appellant being under no necessity and under no moral obligation to take her husband's case before the Privy

Council. In the next, she is not doing it for the benefit of the estate, seeing that the reversionary heir happens to be the other co-sharer in the estate and the respondent in the appeal to the Privy Council now proposed to be made.

There is, of course, nothing to prevent the widow from taking advantage of the Court's order allowing her husband to retain possession of the property pending appeal to England, if she can furnish the necessary security, but no Court would be justified in accepting what has now been offered.

The appeal is dismissed with costs.

The 17th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Putneer—Holding on consent.

Case No. 235 of 1869.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 6th November 1868, affirming a decision of the Subordinate Judge of that District, dated the 27th July 1868.

Kishore Bullubh Mitter and others (Defendants), *Appellants,*

versus

Bistoo Chunder Ghose (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Rajendronath Bose* for Appellants.

Baboo Woomesh Chunder Banerjee for Respondent.

By permitting a putneedar to take a quantity of land in addition to what is already held by him in putnee, and by receiving rents from him for such additional land for a series of years, a proprietor cannot, in the absence of any kubooleut from the putneedar, or verbal agreement giving him the extra land in perpetual lease, be held to be debarred from resuming possession.

Bayley, J.—The plaintiff in this case sued the defendants, special appellants, for a 2-annas share of a village called *Lohai* in Lot Koolhanda.

It appears that the original proprietors of the estate were one Pran Kissen in the proportion of six-sixteenths and one Bissumbur Biddiabhoosun in the proportion of the remaining ten-sixteenths. Pran Kissen, it is admitted, sold to the plaintiff's vendor the 6 annas, and the plaintiff's vendor sold the same to the plaintiff in 1258. The plaintiff was thus the admitted malik.

The lot consisted of six villages, and in the time of the plaintiff's predecessor the defendants took a putnee of five villages including *Lohai.* The sixth village, *Shikarpore,* appears to have been taken in putnee by the said Biddiabhoosun.

In May 1862, a butwarrah took place under the orders of the Collector. Under this butwarrah, 8 annas of *Lohai* was allotted to the plaintiff in lieu of his 6-annas share in the other five villages. The plaintiff thus got two annas more in that one village, and nothing in the other.

The defendants' case is that, under the arrangement made after the butwarrah, they lost 6 annas in the five villages, and took possession of 8 annas, that is, of the 2 annas *extra* in *Lohai.*

The real question to be decided is on the proper construction to be put upon the pleadings and in some respect upon judgments of the two Courts.

The point is whether the plaintiff is entitled to recover the extra 2 annas of village *Lohai* by reason of there being no implied contract with the defendants that they should hold those extra 2 annas under the contract on a perpetual lease, or did the plaintiff only consent to the defendant's holding the extra 2 annas determinable at the plaintiff's option?

Looking to the contents of the plaint and the answer, on which we have had very full arguments by the pleaders, I consider that there is no indication whatever in either of those documents of a contract for a perpetual lease between the parties. The statement is as vague as it can be on the part of the defendants as to how they got their possession; but the real tenor of their plea is this, that, as they held possession for six years, and the plaintiff received rents for those years, he was now debarred from suing by reason of his implied consent to their holding possession. That this was the view taken by the parties in the Courts below is clear from the facts: *firstly,* that there was no issue, direct or indirect, to my mind, as to there being any implied contract, and admittedly there is no evidence to show that there was any such contract. It is

not contended that the ordinary kubooleut which is usual to be given for a putnee was ever given, nor has any attempt been made to show that there was any verbal agreement to the effect that the plaintiff transferred the extra 2 annas or any part of it in perpetual lease.

It is contended that there are portions of the judgments of the first Court and of the Lower Appellate Court referring to wassilat which speak of the putnee-right as one acquired by a title from implied contract, but those passages refer to what the right would be to wassilat if the circumstance of possession showed that any such right existed. I think the Lower Appellate Court was quite right in holding that the question of title by contract or agreement was never raised in the pleadings before the first Court. It is stated that, even if this be so, there is no finding by the Lower Appellate Court on the case as adjudicated by the first Court; but looking to that paragraph of the Lower Appellate Court's judgment which precedes the following words, I think that the whole case, as tried by the first Court, has been considered by the Lower Appellate Court. The words to which I refer are: "I consider that "there is no reason to interfere with the "finding of the Lower Court in so far as it "declares the plaintiff entitled to resume "possession of the 2-annas share claimed in "this suit." These words follow a clear and a full statement of the pleadings, and refer distinctly to the holding being only one upon the plaintiff's consent.

I would also remark that no *bonus* was given for the extra 2 annas which was beyond the original 6 annas of the butwarrah, and that would probably have been given, according to the usual practice, if there was any agreement between the parties to give a perpetual lease of the putnee character.

On the whole, I cannot, either in the pleadings or in the judgment of the first Court, find that the defendants entered into any contract to hold the putnee in perpetuity, and I think, therefore, the plaintiff was entitled to the verdict given him by the Courts below.

I would dismiss this special appeal with costs.

Hobhouse, J.—I am of the same opinion. I think that the point before us is a very narrow one.

The special appellant now informs us that his case before the Courts below was this, *viz.*, that in May 1862, the plaintiff had permitted him to take 2 annas in addition to the 6 annas he already held of the village Lohai, and to include it as a part of the putnee-lease under which the defendant admittedly originally held 6 annas of Lohai, together with the other 6 annas of four other villages. In fact, the defendant would say that his occupation of the additional 2 annas of Lohai was a part of an express contract by which the 2 annas were to be considered as a part of his original putnee-lease. The Lower Appellate Court, and, I may say, both the Courts below, state that this was not the defendant's case. The Lower Appellate Court says that this was not the case set up by the defendants in their pleadings, nor in their conduct of the case in the first Court. The question is whether the Court has committed an error in law in so construing the defendant's case, and I agree in being unable to say that the Court has done so.

The defendants do not in so many terms set up in their written statement the case that they would now set up. Neither did they, as far as I can understand their conduct, by their pleadings in the first Court set up any such case. They wanted to retain possession no doubt, but they stopped short of making exactly that contention, and setting up exactly that case on which alone they could successfully remain in possession; and it is quite clear to me that their whole contention in the first Court was, when they found the retention of possession hopeless, to get rid of as much of wassilat as they could. They have succeeded in that endeavour, and I think they must be content with that success.

I agree in dismissing this appeal with costs.

The 17th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Tenant and under-tenant—Assignment of rent—Set-off.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 24th June 1869.

Deanut Mundul, *Plaintiff*,

versus

Bussunt Moyee Dossia and others, *Defendants*.

Plaintiff held an under-tenure within a jote jumma held by *B* within *D's* zemindary, and, under an assignment from *B*, paid to the zemindar *D* a sum of money as rent due by *B* to *D*. Ultimately *D*, ignoring such payment, recovered the rent from *B* by a separate suit in which no plea of payment was raised; and the latter again recovered his due from plaintiff by a separate suit in the Deputy Collector's Court.

HELD that an action was not maintainable in the Small Cause Court against the zemindar-defendant *D*.

HELD that, in the absence of any authority from *B* to plaintiff to set off his payment to *D* against the rent due to *B*, the Collector had no jurisdiction to try whether *B* owed the plaintiff a sum equal to the rent; and that the Judge of the Small Cause Court was competent to try whether the plaintiff did pay money for the use of *B* at *B's* request, and, if so, to give plaintiff a decree for the same.

Reference.—THIS is a clear case, and I have not, therefore, entered into the merits of it, as on the face of the plaint it appears to me that the action, as laid, is not maintainable. The plaint states that in Bailadangah and Malladangah, within the zemindary of Bussunt Moyee Dossia, Radha Churn Roy, Chunder Coomar Roy, and Kally Prosunno Roy, defendants, Prosunno Moyee Dassia, widow of the late Gooroo Dass Biswas, and Shoshee Mookhee Dassia, widow of the late Koonjo Beharee Biswas, hold a jote jumma, within which plaintiff holds an under-tenure of Rupees 36, and that under an assignment or *barat* from the Biswas defendants, plaintiff paid Rupees 139-8-4 to the zemindar-defendants as rents from 1268 to 1271 due by the Biswas defendants to the zemindar-defendants; that ultimately the zemindar-defendants, ignoring such payment, recovered the rent from the Biswas defendants by separate suit, and the latter again recovered their due from plaintiff by separate suit. Hence plaintiff, being liable in twice payment, brought a suit in the Moonsiff's Court against the present defendants, and obtained a decree for Rupees 182-0-6, but this decision on the appeal of the zemindar-defendants was reversed on the 15th March 1869 as being one cognizable by the Small Cause Court. The question, therefore, arises, whether the suit is maintainable against any, and, if any, which, of the defendants.

In the suit brought by the zemindar-defendants against the Biswas defendants, it does not appear that any plea of payment was raised; but in the suit brought by the Biswas defendants against plaintiff, the plea of payment under the assignment or *barat* was raised, and the Deputy Collector who tried that case, whilst holding that the payment was proved, at the same time held that the assignment or *barat* had not been proved; he therefore gave leave to the plaintiff, at the conclusion of his judgment, to sue the zemindar-defendants, in the following words:

"জেহেতু মালিক জমিনের কমকারকের জবানবন্দীতে
"দর্শীয় রসিদের খাজানা ফেরত পাওয়ার জন্য আইনমু-
"জাই মালিক জমিনের নামে নালিষ করিতে পারে."

and the present suit is the result.

If the plaintiff had been properly advised, he would have appealed against the decision of the Deputy Collector, and, no doubt, the Appellate Court would have set matters to right. As it is, I have simply to see whether the suit as laid is maintainable against any, and, if any, which, of the defendants.

The District Judge, on the appeal of the zemindar-defendants, in one part of his judgment says: "If Gooroo Dass directed "plaintiff to pay his (plaintiff's) rent to "Huronath Roy, and then, denying that he "had done so, sued plaintiff for his rent "and got a decree, the money which plaint-"iff paid must be looked on as a loan to "Gooroo Dass, an action for which is cogni-"zable by the Small Cause Court." In another part he says: "I fail to see how "plaintiff has a cause of action against Huro-"nath Roy at all, for he voluntarily went "and paid him the rent of his tenant "Gooroo Dass, and when Huronath sued "Gooroo Dass, neither he nor Gooroo Dass "appears to have objected that any payment "had been made." And, finally, he says: "But whether he has a cause of action or "not, the case is cognizable by the Small "Cause Court, and I therefore reverse the "Moonsiff's order, and decree this appeal "with costs."

I fail to see how the District Judge makes out that the money which the plaintiff paid to Huronath Roy under the *barat* or assignment must be looked upon as a loan to Gooroo Dass, for the plaint says that it was paid at the request of Gooroo Dass, and the action, if maintainable against Gooroo Dass, would be an action for money paid, and not for money lent. I also fail to see how he says that any objection could have been raised by the plaintiff in that case as to the alleged payment, as he was no party in that suit, and could not have come in as an intervenor. Under the provisions of Act X. of 1859, I also think that the District Judge might have gone further, and said that the action was not maintainable against Gooroo Dass Roy on the plea of *res judicata*.

Now, the plaint says that it was at the request or in pursuance of the *barat* or assignment of the Biswas defendants that plaintiff paid Rupees 139-8-4 to the zemindar-defendants; consequently the ingredients necessary for the maintenance of an action for money had and received against the zemindar-defendants is wholly wanting in the present case, for they were entitled to the money, and it was neither paid to them under ignorance of the law or ignorance of the facts, nor on a consideration which has failed, nor was it obtained by fraud, oppression, or extortion, and there is no such allegation to be found in the plaint. Therefore, the present action against the zemindar-defendants is not maintainable. As regards the Biswas defendants, the action against them is also not maintainable on the plea of *res judicata*.

The plaintiff's suit has accordingly been dismissed with costs, contingent on the opinion of the Hon'ble the Judges of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We think that the Judge of the Small Cause Court is right in holding that the plaintiff cannot recover from the zemindar, but that he is wrong in holding that the plaintiff cannot recover from the Biswas defendants on the ground that the matter was *res-judicata* by the Collector.

All that the Collector had jurisdiction to try was whether the rent remained due from the plaintiff to the defendants Biswas, which involved the question whether the plaintiff was authorized by those defendants to pay part of his rent to the zemindar, or to pay a certain amount to the zemindar, and to deduct or set off the amount from or against the rent due by the plaintiff to them. The Collector found that the plaintiff had paid the money to the zemindar, but that he was not authorized to set it off or to deduct it from the rent due from him to the defendants Biswas; and in the absence of that authority, the Collector had no jurisdiction to try whether the defendants Biswas owed the plaintiff, for money paid by him for their use, a sum equal to the rent due by him to them. The Judge of the Small Cause Court is competent to try whether the plaintiff did pay money for the use of the defendants Biswas at their request; and if he find in the affirmative, I think the plaintiff will be entitled to recover against the Biswas defendants, even if it should appear to the Judge of the Small Cause Court that the plaintiff had a right to deduct or set off the amount from or against the rent, for the defendants in such case would not be at liberty to avail themselves of the defence that the amount ought to be set off against the rent, inasmuch as they would be guilty of a fraud in so doing after having recovered their rent in the Collector's Court by asserting that the plaintiff had no right to deduct the amount paid for their use.

Mitter, J.—I concur.

The 20th July 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Principal and surety—Liability (joint and several)—Delay in suing—Interest.

Case No. 269 of 1868.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 14th September 1868.

Mahomed Roheemooddeen (one of the Defendants), *Appellant,*

versus

Indoor Chunder Jowhuree (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Ashootosh Chatterjee and *Umbicca Churn Bose* for Respondent.

Where two parties are jointly and severally liable under the terms of a bond, the principal may be sued for the amount due with interest, notwithstanding that a decree has been obtained for the same sum against the other party.

The creditor is not bound to bring his action to suit the convenience of the debtor, and may, in such a case as the above, defer bringing his suit to the last moment the law allows.

Loch, J.—THE defendant, appellant, with one Dyal Chand, gave plaintiff a bond for Rupees 1,500 borrowed from him on 27th April 1866, and another bond for a further sum of Rupees 2,500 on 1st May 1866. Plaintiff brought an action against the parties in the High Court, Original side, in Calcutta, as Dyal Chand lived within the original jurisdiction of that Court. He obtained a decree against Dyal Chand with leave to bring a separate suit in the proper Court against the other defendant, Roheemooddeen. He accordingly brought the present action to recover the principal with interest from the debtor, amounting to Rupees 8,743, and obtained a decree in the Court of the Subordinate Judge.

An appeal has been preferred by the defendant, on the ground that plaintiff, having already obtained a decree against Dyal Chand, could not bring a separate action for the same sum against him. As, however, under the terms of the bonds, the parties were jointly and severally liable to the plaintiff, he is entitled to bring his present suit to recover from the defendant, who is the principal in the transaction, the sum due from him with interest.

A second objection is taken that the decree against Dyal Chand obtained in 1866 was for the sum of Rupees 7,883, that by delaying to bring his action till 1868 the interest had accumulated, and that plaintiff could not claim from defendant a larger sum than that decreed against the other defendant.

I do not think this objection is of any force. Plaintiff was not bound to bring his action to suit the convenience of his debtor. He might have deferred it to the last moment that the law allowed a suit to be brought. He did, however, bring a suit against the two parties who had executed the bonds, and having obtained a decree against one, with leave to proceed against the other, the defendant in this case, in the proper Court, the defendant, if he wished to avoid being charged with interest, should have paid his debt or made some arrangement with his creditor. I do not think the defendant is entitled to be relieved of any part of the interest claimed.

A cross-appeal was preferred on the point of interest, it being urged that the Lower Court should have awarded interest at the rate mentioned in the bond to the date of decree. Looking, however, at the law, we think the order passed by the Subordinate Judge was correct, and we dismiss both appeals with costs.

Mitter, J.—I concur with my learned colleague in dismissing this appeal. As to the objection taken by the plaintiff under Section 348, I feel some doubts; but taking into consideration all the facts and circumstances of the case, and looking also to the exorbitant rate of interest claimed, namely, 60 per cent., I would not like to interfere with the Judge's decision.

The 20th July 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Possession for 12 years—Title.

Case No. 1937 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 27th April 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 11th January 1867.

Rajah Burodakant Roy (one of the Defendants), *Appellant,*

versus

Prankristo Parooe (Plaintiff) and others (Defendants), *Respondents.*

Baboo Debendro Chunder Ghose for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

As between private owners contesting *inter se* the title to lands, the law has established a limitation of 12 years; after that time it declares not simply that the remedy is barred, but that the title is extinct in favor of the possessor.

Loch, J.—THE plaintiff sues to recover possession of a julkur in the River Bhyrub

of which he alleges he obtained a lease from Gunga Pershad Parooe. The julkur is said to be situated in the lakheraj lands of Mowla Buksh; that it was let to, and held from many years by, Soroop Chunder Parooe, whose right and title were sold in execution of a decree and purchased by Gunga Pershad. Plaintiff, after being in possession for some time, was evicted on 15th Cheyt 1253 by the defendants who prevented his catching fish.

The defendants claim to hold the julkur from Rajah Buroda Kant Roy, and deny the plaintiff's right to the julkur, as also the charge of having ousted him.

Both Mowla Buksh and Rajah Buroda Kant Roy appeared in Court, and were made parties to the suit, and the conclusion come to by both the Lower Courts, on the evidence of witnesses produced by the plaintiff, was that, though the fisheries of the Bhyrub River might originally have been settled with the Rajah as shown by papers from the Collector's office, yet he had been out of possession of the julkur in dispute for more than twelve years, and that possession was with the plaintiff and his lessors during that period; and though the Rajah was now in possession by some means or other, he was not entitled to retain possession as against the plaintiff.

In special appeal, it was urged that plaintiff had failed to make out any title either in himself or his lessors; that, as the Rajah had now recovered possession, the fact of plaintiff's possession for more than 12 years gave him no title to the property; that adverse possession for more than 12 years, while it barred the remedy, did not extinguish the right, and could not confer title upon the plaintiff, and therefore the Lower Courts were wrong, on mere proof of possession for upwards of 12 years, in giving him a decree as if he had proved a title.

The documentary evidence adduced by plaintiff cannot be used against the defendant, as he was no party to the suit of 1835, in which Soroop Chunder Parooe obtained a decree for this julkur, but the fact of plaintiff's lessor's possession and of the Rajah's dispossession for more than twelve years has been satisfactorily proved, in the opinion of the Lower Courts, by the evidence of witnesses.

It is said that twelve years' adverse possession merely bars the remedy, but does not affect the right, and does not confer title on the opposite party. We have very high authority in support of the contrary opinion. In the case of Shib Chunder Doss *versus* Shib Kishen Banerjee, reported at page 70 of Boulnois' Reports, Volume I., Chief Justice Peel remarks: "In my opinion, the weight "of authority is in favor of the position, that "though a law in terms limits the suit only "as to immoveable property, it in effect gives "the possessor, who is protected against out-"standing claims founded on original rights, "the property as against those persons as "well as the possessor. It is undoubtedly the "law in all the Courts in the Mofussil, and "has long been so, that, after twelve years' "adverse possession, no exception applying "to the case, and when all claimants are "barred in those Courts as to the suits, the "occupant has title, and may confer title." And again he remarks: "At no time in our "law could a tortious entry be made the "foundation of a remitter, or be available to "revive a right which once existed, but "against which effluxion of time had set "up a bar in favor of long possession;" and Colvile, *J.*, in the same case: "But the "subject of the suit is immoveable proper-"ty, and the necessary effect of the law "which takes away the remedy in that "locality is to give a title in that locality "to the adverse possessor."

But we have the authority of the highest Court in support of the same doctrine. In the case of Gunga Gobind Mundul *versus* The Collector of the 24-Pergunnahs,* reported in Volume XI, page 2, Moore's Indian Appeals, their Lordships of the Privy Council remark: "It is of the utmost conse-"quence in India that the security which "long possession affords should not be "weakened. Disputes are constantly arising "about boundaries and about the identity "of lands. Contiguous owners are apt to "charge one another with encroachments. If "twelve years' peaceable and uninterrupted "possession of lands, alleged to have been "enjoyed by encroachment on the adjoining "lands, can be proved, a purchaser may take "that title with safety; but if the party out "of possession could set up a sixty years' "law of limitation, merely by making com-"mon cause with a Collector who could "enjoy security against interruption, the "true answer to such a contrivance is the "legal right of the Government to its "rent; the lands are owned by others; as "between private owners contesting *inter* "*se* the title to lands, the law has estab-

* 7 W. R. 21.

"lished a limitation of twelve years; after "that time, it declares, not simply that the "remedy is barred, but that the title is ex-"tinct in favor of the possessor."

It was remarked by the pleader for the special appellant that this expression of opinion of their Lordships was an *obiter*. I am unable to view it in this light. The question of limitation was before their Lordships in that suit, and one of the parties appears to have endeavoured to evade the usual Law of Limitation by inducing the Collector to come forward on the part of Government, and was thus able to plead sixty years in answer to the plea of limitation set up by the opposite party.

The judgment of the Court below appears to me to be correct. I, therefore, dismiss the special appeal with costs.

Mitter, J.—I concur.

The 20th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Contribution—Cause of action—Limitation.

Case No. 941 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 1st February 1869, affirming a decision of the Subordinate Judge of that District, dated the 18th June 1868.

Ram Kristo Roy (Plaintiff), *Appellant,*

versus

Muddun Gopal Roy and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Hem Chunder Banerjee* for Respondents.

In a suit for contribution by the manager of a joint family, on the ground that plaintiff had borrowed money and applied it in the payment of certain joint family-expenses, and that he had borrowed again to pay off the first loan, and had liquidated the second loan from his private funds:

HELD that plaintiff's cause of action arose from the date on which he had made payments on account of the joint estate; and, not having sued within six years of that date, he was out of Court.

Hobhouse, J.—THIS was a suit for contribution.

The plaintiff alleged that, in the year 1267, he was the manager of a joint family of which the defendants were members; that, on the 21st Assin of that year, he borrowed 1,000 rupees as such manager, and applied the money in the payment of certain joint family-expenses; that the person from whom he borrowed the money got a decree against him and was about to execute it when, on the 25th Magh 1271, he (plaintiff) again borrowed a sum of money, and paid off the original debt; that then the second creditor got a decree against him for the second loan, and that he paid off that decree out of his own private funds on the 30th Assin 1273. He, therefore, sued his partners for contribution, laying his cause of action, as stated in his plaint, on the 25th Magh 1271.

The defendants, amongst other pleas, urged that the suit was barred by the application of the Statute of Limitation, and upon that point both the Courts below have dismissed the plaintiff's suit.

The Lower Appellate Court, in delivering judgment, does so in these terms, *viz.*: "The cause of action in cases of contribution "has been more than once held to accrue from "the date the shareholder pays the common "charge from his own funds.

"In this case, it is argued that the first "loan was made by plaintiff as agent of the "estate. If this had been so, it is not to be "supposed he would have allowed execution "to be taken out against himself only. There "is no doubt that a loan of Rupees 1,000 "was incurred by him in his private capa-"city, and if, as he states, it was in order "to pay moneys for the common expenses "of the joint family, his right of action "accrues from the date he incurred that "liability. This suit is clearly barred by "limitation."

In special appeal, it is urged that this decision is erroneous in law, inasmuch as, upon the facts of the case, the plaintiff's cause of action accrued when he had actually paid the money, and it is said that he paid the money on the 30th Assin 1273. This contention differs a little from the contention in the Courts below, because there the cause of action was laid on the 25th Magh 1271, and here it is attempted to be laid in Assin 1273; but whether it is 1271 or 1273, the plaintiff would be equally out of time, and we need not, therefore, discuss this difference of contention.

The pleader for the special appellant relies on two cases which will be found, one at page 159, Volume II., and another at page 134, Volume III., Weekly Reporter. These cases seem to us simply to result in this maxim, *viz.*, that in suits for contribution, the cause of action accrues on the date on which the sums of money which are sought to be recovered were *paid*. We are quite ready to adopt this maxim, but adopting it, we still think that the plaintiff is not in time.

The question to be determined is as to *when*, in this particular instance, the moneys in question were paid? Were they paid in 1273 as contended for by the plaintiff, or were they paid in 1267 as contended for by the defendants. This is, of course, a question of fact, and we think that the Lower Appellate Court has substantially found that fact against the plaintiff; and even if the Court had not so found it, we think that the plaintiff has found it for himself. He said in his plaint that in the year 1267, he had borrowed the 1,000 rupees in question; but he said more than this. He said that in that same year he had paid away those moneys, and he filed an account which purported to show how and when it was that those moneys had been paid on account of the joint estate. Therefore it seems to us that, upon the plaintiff's own showing, he so paid those moneys in 1867, and that his cause of action, therefore, arose on that date.

It is, however, contended that, when the plaintiff borrowed the moneys in 1267, he borrowed them, not in his own private capacity, but as manager of the joint family. This again is obviously a question of fact, and on that question the Lower Appellate Court has not only substantially, but has distinctly, found against the plaintiff. The Court says: "There is no doubt that that "loan of Rupees 1,000 was incurred by him in "his own private capacity," and we are not shown that this is not a good finding of fact upon the evidence on the record.

The case cited for the defendants from page 29, Volume VII., Weekly Reporter, is, we think, in point, and shows that, whether the Lower Appellate Court was right or wrong in the exact grounds on which it based its decision, that decision is not erroneous in law. The payments were, to our minds, admittedly made in 1267, and the plaintiff, not having sued within six years of that date, was out of Court.

We dismiss the special appeal with costs.

The 21st July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Review—Deputy Collector's order—Ex-parte hearing—Section 58, Act X., 1859.

Case No. 41 of 1869 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Tipperah, dated the 30th November 1868.

Ali Azim (one of the Defendants), *Appellant,*

versus

Ram Manick Roy (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

On application by a defendant for the review of an *ex-parte* judgment by a Deputy Collector, on the ground of non-service of notice, the suit was ordered to be re-placed on the file, and a notice was issued to the plaintiff that a day had been fixed for the re-hearing of the case, and intimating that, if he had any objections, he might make them on that day. The plaintiff appeared on the day fixed; but failed to show that the notice had been served on the defendant.

HELD that the admission of the review was not a contravention of Section 58, Act X., 1859.

Bayley, J.—THE plaintiff in this case was a purchaser, on the 3rd August 1865, of the rights and interests of William Francis Campbell in an ijarah in Pergunnah Sabek Ruttunnuggur, Chukla Roshunabad, for a period of seven years commencing from 1273 and going on to 1279 Tipperah Era, in Pergunnah Sabek Ruttunnuggur, Chukla Roshunabad.

The defendants are alleged and admitted to be dur-ijaradars to the plaintiff.

The plaintiff's case is that the defendants had taken a dur-ijarah from the former ijaradar Campbell, for the annual jumma of Rupees 17,545; that, after his (plaintiff's) purchase of the ijarah-rights, he continued to receive from the defendants the said sum of Rupees 17,545 as rent; that in 1277 T. E., the zemindar of the said Chukla, having granted three droons of land appertaining to the aforesaid dur-ijarah mehal under two talookdaree leases to one Oseem-ooddeen Moonshee, addressed a letter to the plaintiff to the effect that the sum of Rupees 134-3-10, as the mofussil-jumma of the said land, might be annually deducted from the ijarah-jumma from 1277; that

he (plaintiff) also addressed a letter to the defendants, dur-ijaradars, to the effect that the said sum of Rupees 134-3-10 might. from 1277, be annually deducted from the jumma of Rupees 17,545; that Rupees 12,678-12-3 on account of the rent for 1277 T. E. was paid on different dates by challans, and Rupees 500 as pledged deposit, the two amounting to Rupees 13,178-12-3; that there is thus a balance of Rupees 4,211-15-11 as principal and Rupees 1,171-6-6 as interest—the total amounting to Rupees 5,383-6 annas 8 pie due to him (plaintiff) from the defendants. The plaint was verified by one Surrut Chunder Deb as the plaintiff's agent.

The suit was originally decreed *ex parte* on the 16th July 1868. On the 18th September 1868, the agent for the defendant Ali Azim made the following defence:—

1stly.—That the *ex parte* decree had been obtained by the plaintiff in collusion with the peon, and on a false return of the service of summons, and without any knowledge of the defendant.

2ndly.—That the sum of Rupees 3,361 was on the 7th Pous 1277 T. E paid as rent by the defendant for 1277, and was entered on the said date as deposit in the serishtah of the Rajah, and that out of the said sum the sum of Rupees 1,517-12-3 had been credited, and Rupees 1,843-3-9 not credited, and therefore this latter sum and the interest thereupon, calculated at Rupees 258-1, had been improperly sued for by the plaintiff.

3rdly.—That the defendant had tendered to the plaintiff the rent for each month according to instalment from Assar to Kartick, on the 30th of each month, but that the plaintiff would not receive the sum. Consequently, the plaintiff was not entitled to receive the interest for the aforesaid period, which was consequently unjustly demanded, at Rupees 476-0-11.

4thly.—That the plaintiff having granted to Oseemooddeen Moonshee certain lands in talooka tenure in Mouzah Bathaniah, the sum of Rupees 480, being the rent on account of those lands, should have been deducted from the jumma, and not Rupees 134-3-10, which was merely the sum allowed by the plaintiff; and, lastly, that the defendant Syud Muzzufur Hossein was quite a disinterested party, and was collusively made by the plaintiff a party to the suit.

The Deputy Collector gave the plaintiff a decree.

Against this decision, there is a regular appeal before us by the defendant Ali Azim on the merits and a cross-appeal by the plaintiff on the question of jurisdiction; that is to say, the plaintiff appeals on the ground that the Deputy Collector had no power to revive the case after it had once been decreed *ex parte*, inasmuch as he did not act up to the provisions of Section 58, Act X. of 1859. Now, what the Deputy Collector did was this. On the application of the defendant's agent for the revival of the case on the ground of non-service of notice, and information of the suit having only reached defendant by the Nazir proceeding to sell the property, the Deputy Collector passed an order directing that the case be revived (পুনরায়-স্থাপন, literally *re-placed*), be registered, and notice given to the defendant, that the sale be stayed, and the plaintiff informed that 19th October is the day fixed for the hearing of the case. That notice was issued on the 18th September, and it contained an intimation that, as the suit had been revived, if the plaintiff had any objections thereto, he might make them on the 19th October, the day fixed for the hearing. The plaintiff did appear on the 25th November, and asked for the examination of the defendant as a witness to the fact that he did really receive notice of the suit. The defendant was, accordingly, examined, and no question was put to him as to whether he received the notice or not. On this ground, I might dismiss the cross appeal, because the plaintiff literally had every opportunity to show from the defendant's own mouth that the notice was duly served on him, but he in no way availed himself of the opportunity which he himself asked for and received.

Irrespective, however, of this, the terms of Section 58 do not show that the Deputy Collector was wrong. No doubt, there may be objection to the use of the word ("পুনরায়-স্থাপন," *re-placed*) in the order of the Lower Court, but the terms of Section 58 are not that the Deputy Collector cannot replace a case without previously summoning the opposite party to appear and be heard on his objections to the revival; but the terms are that "*no decree shall be reversed or altered without previously summoning* the adverse party to appear and be heard in support of it." Now, it is not attempted to be shown that the order I have quoted contained any order for reversal or alteration of any decree. On both the grounds, therefore, I think that

the plaintiff's cross-appeal should be dismissed.

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Hobhouse, J.—I think that the points in issue in the appeal before us are reducible to very distinct and definite contentions, and can be decided in each case on evidence which is on each point sufficient for conviction.

As to the point of law on which the cross-appeal of the special respondent is based, the argument is that the Lower Court admitted a review of its *ex-parte* judgment by reviving the suit, and setting aside its first judgment, without giving the special respondent an opportunity of being heard. The provision in Section 58 simply declares that "no decree shall be reversed or altered "without previously summoning the adverse "party to appear and be heard in support "of it." Now, it is clear upon the record in this case that, although the first Court revived the suit upon an *ex-parte* proceeding of the defendant, yet in that proceeding the defendant was put upon his oath, and after that proceeding a day was fixed, *viz.*, the 19th October, on which the plaintiff was to be permitted to appear to show cause against the admission of the review; and he was not only to be permitted to appear, but, as a matter of fact, he did appear on the 25th November, and he thereupon showed cause against the admission of the review, that is to say, he averred that no review was admissible because notice had been served on the defendant in the original case.

In support of that averment, he depended on the evidence to be given by the defendant when summoned. The defendant was summoned, he was examined on oath in the presence of the plaintiff, and the plaintiff then altogether neglected to attempt even to establish the case upon which his objection to the admission of the review was based. It is clear, therefore, that the decree was not reversed in this case without previous notice being given to the plaintiff to show cause in support of it.

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The 21st July 1869.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Intervention under Section 77, Act X., 1859—Right of suit—Issues.

Case No. 99 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 23rd October 1868, affirming a decision of the Moonsiff of Naraingunge, dated the 30th November 1866.

Raj Chunder Ghose and another (Defendants), *Appellants,*

versus

Joy Chunder Dutt and others (Plaintiffs), *Respondents.*

Baboo Mohendro Lall Mitter for Appellants.

Baboos Nubo Kishen Mookerjee, Bama Churn Banerjee, and *Kalee Mohun Dass* for Respondents.

Where a suit by the purchaser of an alleged lakhiraj tenure for rent from his under-tenant was thrown out by the intervention of the superior landlord under Section 77, Act X., 1859: HELD that all that the plaintiff had to do in a regular suit brought by him in consequence, was to prove that he was entitled to the rent from the under-tenant. It was not necessary for him to prove that his land was valid lakhiraj.

Jackson, J.—THE ground of special appeal taken here is, that the plaintiff did not prove in proper form the ancient document on which he relied in proof of his lakhiraj title, and that the Subordinate Judge has erroneously declared that document to have come from the proper custody, there being no evidence of the fact.

No doubt, if the plaintiff in this case were bound to make out a valid lakhiraj title, something more would have been necessary than he appears to have done in the way of setting up the document on which that title depended. I quite go with the decision referred to in 10 Weekly Reporter 1, which shows that it is necessary to do more than to file a document in Court, and to contend that, as an ancient document, it proves itself.

In this case, however, it appears to me, that the plaintiff was not required to prove anything of the kind. His case was that he had purchased the land in question from

a party who had held possession of it for many years, without payment of rent to the superior landlord, and who held it under a grant. Shortly after his purchase, he brought a suit for rent against an under-tenant of this land. In that suit, the defendant before us intervened and succeeded in establishing, to the satisfaction of the Collector, that he, and not the plaintiff, had been in the receipt and enjoyment of the rent. Thereupon the plaintiff's suit for rent was dismissed, and he brought this suit, as allowed by Section 77, Act X. of 1859, to establish his right.

If this meant that, as a consequence of that Act X. decision, the plaintiff was bound affirmatively to make out his title to hold this land as lakhiraj, the consequence would be extremely disastrous for all persons in his position who held lakhiraj land within the limits of a zemindary; because nothing would be easier than for the zemindar to intervene in a rent-suit, and, by giving some sort of evidence, to induce the Collector to throw out the suit for rent, and thereby put the lakhirajdar into the disadvantageous position of making out as plaintiff a title which he could much more easily defend.

It is clear to me that all the plaintiff had to do in this case was to prove that he was entitled to the rent from his under-tenant. In order to do that, he need not go so far as to prove that his land was valid lakhiraj. I think that the possession for many years on the part of his vendor and himself, in accordance with an alleged grant, is quite sufficient to entitle him to a decree in this case.

It is also contended that the Court below omitted to find that the plaintiff had purchased this land. I think the plaintiff is dispensed from proving this, and the Court below from finding it, by the recitals of the defendant's own written statement which speak of the plaintiff's vendor, and thereby sufficiently admit the fact that he had acquired this property by purchase.

I think the special appeal must be dismissed with costs.

Mitter, J.—I concur with my learned colleague in dismissing this appeal. I express no opinion as to whether evidence of proper custody is indispensably necessary for the reception of an ancient document which cannot be proved by the testimony of the attesting witnesses. It is clear that that point does not arise in this case.

The 21st July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ejectment—Damages—Issues.

Case No. 1102 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 6th March 1869, reversing a decision of the Moonsiff of that District, dated the 25th July 1868.

Gobind Chund Juttee (Defendant), *Appellant,*

versus

Mun Mohun Jha (Plaintiff) and another (Defendant), *Respondents.*

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Baboos Mohesh Chunder Chowdhry, Bama Churn Banerjee, and *Bhowanee Churn Dutt* for Respondents.

In a suit by a lessee to recover damages on account of dispossession, on the allegation that his lessors had fraudulently given a second lease to another party, and that, with the exception of a specified sum collected by himself, the remaining collections for the year had been made by the lessors, and that he was entitled to recover those collections:

HELD, with reference to the footing on which plaintiff sued, that it was not for the Judge to assess damages, but to find on the allegation that the lessors had collected the year's rents with the exception of a given sum.

Kemp, J.—THIS was a suit to recover damages on account of dispossession from the village of Khundrukh. The plaintiff alleged that his lessors had fraudulently given a second lease to one Kantoo Jha, and that, with the exception of 31 rupees 9 annas, the plaintiff was unable to collect anything on account of the year 1271. The plaintiff does not sue for the recovery of damages with reference to the fact of his not having been put in possession, but he sues on the allegation that, with the exception of Rupees 31-9, the remaining collections for the year 1271 were made by his lessors, and that, therefore, he is entitled to recover them from the lessors.

The Judge has given the plaintiff a decree against his lessors, finding on the evidence that the plaintiff, the lessee, had not collected more than 31 rupees 9 annas of the rents for 1271.

In special appeal, two grounds have been taken by the pleader for the special appellant: first, that, with reference to a compromise come to between the plaintiff and Kantoo Jha, the plaintiff could not sue the special appellants for damages for the previous years; and, secondly, that the Judge has not found whether the lessors, the special appellants, collected the rents of 1271 or not, and that, as the plaintiff sued on the allegation that his lessors had collected the rents of 1271 *minus* Rupees 31-9, there ought to have been a finding on that point.

On the first ground of special appeal, we think that the special appellant has no ground for his contention. The compromise between the plaintiff and Kantoo Jha does not, on reference to that compromise which has been read to us, and which is embodied in a petition, appear to us to have any reference to any claim of the plaintiff to back rent. It appears that the lessors of the plaintiff had given a lease to Kantoo Jha after leasing the property to the plaintiff, and that the two lessees were disputing in Court as to who was to have possession. On the question of possession, they came to a compromise in this way—that for the remaining term of the lease, that is, for 1272, the plaintiff was to hold possession over 10 annas and Kantoo Jha over 6 annas. There was no compromise with reference to any claim of the plaintiff to the back rent of 1271.

On the second point of special appeal, we think that the Judge, on the plaintiff's allegation as contained in his plaint, ought to have found whether the lessors, the first set of defendants, collected the rents for 1271 or not. It has been said for the special respondents that the plaintiff sued his lessors under Clause 6, Section 23 of Act X. of 1859, in an ejectment-suit, and got a decree to the effect that he had been illegally dispossessed, and that there was no appeal by the lessors from that finding which had become final, and as it was already found that the lessors by their wrongful act had dispossessed the plaintiff, the Judge in assessing damages was justified in giving the plaintiff the sum claimed by him, *minus* the 31 rupees 9 annas already collected. Had the plaintiff sued on the footing that he was entitled to damages owing to the wrongful act of the lessors, then it would have been for the Judge to assess the right measure of damages; but as he sued on the distinct allegation that his lessors had collected the rents for 1271 *minus* 31 rupees 9 annas collected by the plaintiff himself, we think that there must be a finding on that allegation.

The case must, therefore, be remanded to the Judge for that finding. Costs to follow the result.

The 22nd July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Public rights—Civil Courts—Jurisdiction.

Case No. 174 of 1869.

*Application for review of judgment passed by the Hon'ble Justices L. S. Jackson and Markby, on the 5th May 1869, in Special Appeal No. 3094 of 1868.**

Pearee Lall and others (Plaintiffs), *Petitioners,*

versus

Mr. E. G. Rooke (Defendant), *Opposite Party.*

Messrs. J. W. Montriou and *M. L. Sandel* for Petitioners.

Baboo Juggadanund Mookerjee for Opposite Party.

A Civil Court has no jurisdiction to inquire into a public right *per se, i. e.*, abstractedly and otherwise than as collaterally to a suit arising out of a private injury.

Jackson, J.—It appears to me that we ought not to alter the judgment complained of in this case. It is now pointed out to us by the learned Counsel who appears for the petitioner that the order of the Magistrate

* 11 W. R. 434.

was not passed under Section 38, but Section 320 of the Code of Criminal Procedure. That Section is in these words: "If a "dispute arise concerning the right of use "of any land or water, the Magistrate within "whose jurisdiction the subject of dispute "lies may enquire into the matter; and if "it shall appear to him that the subject of "dispute is open to the use of the public, "or of any person, or of any class of per-"sons, the Magistrate may order that pos-"session thereof shall not be taken or re-"tained by any party to the exclusion of "the public, or of such person, or of such "class of persons, as the case may be, until "the party claiming such possession shall "obtain the decision of a competent Court "adjudging him to be entitled to such ex-"clusive possession."

Now, if we accept the argument of the learned Counsel, that the effect of a decision by the Magistrate under Section 320 is to alter the position of the parties in respect of their remedies in the Civil Court, or in respect of their right to bring an action, and if we take the finding, as we must take the finding of the Court below in respect of the facts, then we find that this was a piece of land of which the plaintiff claimed to be entitled to the exclusive use. He denied that the public or any persons had any right whatever in any way to make use of the land in dispute. The Magistrate found, and the Civil Court has also found, that he was not entitled to such exclusive use, and that the public were entitled to walk over that road, and to use it as a footpath. That being the case, I think the Magistrate's order was perfectly right, namely, that he was quite right in ordering that the possession should not be taken or maintained by the plaintiff to the exclusion of the public, until the party claiming such possession shall obtain a decision adjudging him to be entitled to such possession.

Then what is the decision which the plaintiff would have to obtain for the purpose of getting rid of the effect of that order? The Section shows that it was a decision adjudging him to be entitled to such exclusive possession. It is quite clear that the Court could not adjudge him to be entitled to such possession. The Court could, indeed, say that the suit was groundless; that the public was entitled to the right of way, a right to walk over that land; and that the Court could not deprive the public of that privilege. But if any person should go beyond the right which was found, that is, the right which the public had to walk over that land, and should take his carts over the land in dispute, and the plaintiff should be endamaged thereby, the plaintiff would have a right of action against such person for the trespass. I still think that the Civil Court, in trying this suit, went beyond its jurisdiction, and made an improper order.

I also think that we could not take the course suggested by the learned Counsel, namely, of correcting the error in point of form committed by the Lower Appellate Court, and confirming merely its finding upon the issues, because neither of the issues was the issue contemplated by Section 320; nor do I think was the Lower Court competent to try the issue whether the road in the first was or was not a public road.

For these reasons, I think our decision was right, and we ought not to interfere with it. This application must, therefore, be refused with costs.

Markby, J.—I am of the same opinion. My judgment in the former case in no way proceeded upon any distinction between Section 308 and Sections 318 and 320 of the Criminal Procedure Code. It proceeded entirely upon this ground, to which I still adhere, that the Civil Court has no jurisdiction to enquire into a public right *per se*. As ancillary to an enquiry whether a person has been injured in his private capacity, it may enter upon such an enquiry; but abstractedly and otherwise than as collaterally to a suit arising out of a private injury, a Civil Court has no jurisdiction to enquire into a public right; and on this ground, and this ground alone, I would refuse this application.

Nor can I imagine by any possibility how such a suit as this can be looked upon as a proceeding to set aside the order of the Magistrate, and in some way or other to question the rightness or wrongness of the Magistrate's order. I must own that I do not understand such a suit, nor do I think that any such suit is contemplated or created by the Sections of the Code of Criminal Procedure which have been referred to.

The 21st July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Sale in execution—Confirmation—Appeal.

Case No. 189 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 5th February 1869.

Pootee Begum (Judgment-debtor), *Appellant,*

versus

Maharanee Indurjeet Kooer (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuff for Respondent.

A party holding a decree against certain heirs having attached certain property, and applied to have it sold in execution, objection was made to the sale by the judgment-debtors who claimed it as their personal property. Their objections were overruled, and the property ordered to be sold, on which two out of three parcels were sold. The objectors then appealed to the High Court; but before the appeal came on for hearing, the sale was confirmed. The Court, in ignorance of the sale and confirmation, remanded the case with a view to a determination of the title of the objectors. The Subordinate Judge passed no order as to the two parcels actually sold, but declared that evidence might be gone into as to the third. From this decision an appeal was laid.

HELD that, the sale having been confirmed, it could not be set aside, but that, before the third parcel was sold, the issue referred to the Lower Court by the remand-order should be tried.

Macpherson, J.—MAHARANEE INDERJEET KOOER, having a decree against the heirs of Kajee Hossein Ali Khan (in their representative capacity), attached certain property, and applied to have it sold. Mussamut Pootee Begum and others objected to its being sold, on the ground that the property was their personal property, and never had belonged to Kajee Hossein Ali Khan, and was not liable to be attached under the decree against them as his representatives.

On the 15th September 1866, the Lower Court overruled the objection, and ordered the property to be sold.

On the 17th of September, the sale actually took place as regards two out of the three parcels which had been attached and ordered to be sold.

On the 17th December, Mussamut Pootee Begum appealed to the High Court against the order of the 15th September, overruling the objections to the sale.

On the 29th of December, the sale was confirmed, apparently, without further objection on the part of Pootee Begum.

On the 10th February 1867, the appeal came on before us; and in ignorance of the fact that the property had actually been sold and the sale confirmed, we remanded the case to the Lower Court, saying that Pootee Begum was entitled "to have the "question determined whether the property "now seized in execution came to her from "her father or from her husband." We added: "If she received it from her hus-"band, it cannot, under the terms of the "decree, be sold in execution, as that de-"cree is against her as one of the repre-"sentatives of her father, and the execu-"tion of that decree is limited to property "of the father found in the hands of the "representatives."

On the 25th of March 1867, the record of the case was returned by the High Court

to the Lower Court; but the actual order of remand did not reach the latter Court until the 23rd of July.

The judgment-debtor, having got the case remanded, appears to have gone to sleep on the matter. Although the decree-holder seems to have taken certain intermediate proceedings for the purpose of executing her decree in another zillah—that of Patna—we cannot discover that any step was taken by the judgment-debtor until the 12th of August 1868, when she filed an *ism-nuvisi*. Next, we find that, on the 24th November 1868, the Subordinate Judge fixed the 9th of December for the trial of the case, and carrying out the remand-order; that the case was taken up on the 28th and 31st December 1868 and the 5th January 1869; and that judgment was given on the 5th of February last.

The judgment is very rambling and confused, and in many parts almost unintelligible. The practical result is that the Subordinate Judge says that, as regards the two parcels actually sold before the former appeal to the High Court was filed, and the sale of which was confirmed before the date of the remand-order, it is of no use to inquire whether these parcels were or were not legally liable to be attached and sold. The Subordinate Judge says that the sale, having taken place and having been confirmed, cannot be set aside by him in the absence of express orders from the High Court, and that, in remanding the case, we gave him no such orders. The Subordinate Judge passes no order as to the two parcels actually sold, but declares that the judgment-debtor is at liberty to go into evidence as to the third parcel, which has not yet been sold.

As the Subordinate Judge, in the course of his judgment, says that the judgment-debtor has gone into evidence as to all the three parcels, it does not appear very clearly why, instead of at once deciding the question of fact as to the third parcel, he merely says that evidence may thereafter be gone into as to that. Further, we observe that the Subordinate Judge says that the pleader for the judgment-debtor stated that in the memorandum of appeal to the High Court notice that two of the parcels had actually been sold was given to the Judges of that Court but a reference to the memorandum shows that that statement is untrue, and that there is not in it the remotest allusion, direct or indirect, to any sale having taken place.

The judgment-debtor now comes before us again, appealing from that portion of the Subordinate Judge's decision in which he declines to act as to the two parcels the sales of which have been confirmed. The ground of appeal is that the Lower Court ought to have carried out the remand-order, and to have decided the issues raised as to each of the several parcels of land attached and ordered to be sold.

For the respondent, it is contended that it has been decided by the Full Bench in the case of Sheikh Wahid Ali *versus* Mussamut Jemaye (9 Weekly Reporter, page 1, Full Bench) that no appeal will lie in a case such as this; and further, that the former order of this Court was (according to that decision) wrong even as regards the property unsold.

I think there is no doubt that, as regards the parcels which have been sold, and the sales of which have been confirmed, the decision referred to is conclusive, and therefore that this appeal must be dismissed with costs. It is quite clear that, the sale having been confirmed (and so long ago as December 1866), it cannot now be set aside on an application of this sort.

But the decision of the Full Bench in Wahid Ali's case does not affect the question

as to the parcel which has not yet been sold, which is in a wholly different position from the other two parcels.

There have been great and unaccountable delays in disposing of this case in the Lower Court. If the matter has not been already decided on its merits by the Subordinate Judge, he is directed to take it up *at once out of its turn*, and, fixing an early day, to dispose of it finally with the least possible delay.

The sale is not to be proceeded with until such time as the Subordinate Judge shall have tried the issue referred to him, and shall have decided that the property could legally be attached as having been inherited from the appellant's father. If the Subordinate Judge shall hold that it could not be legally so attached, the order of the 15th September 1866, so far as it relates to the unsold parcel, must be set aside.

The 22nd July 1869.

Present :

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Plaint and decree on different grounds.

Case No. 970 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 30th January 1869, affirming a decision of the Moonsiff of Jamalpore, dated the 24th December 1867.

Annobee Chowdhrain (one of the Defendants) *Appellant,*

versus

Gendoo Turrufdar and another (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Shushee Bhoosun Sein* for Appellant.

Baboo Nuleet Chunder Sein for Respondents.

In a suit for possession, where plaintiff came into Court upon his mowrosee jote, based on a pottah at a fixed jumma which was not proved, the Lower Appellate Court was held to have erred in law in decreeing to him a statutory right of occupancy under Section 6, Act X., 1859.

Bayley, J.—I AM of opinion that the judgments of the Lower Courts in this case must be reversed.

The only ground of special appeal is that, whereas the plaintiff did not set forth any claim to the statutory right of occupancy provided by Section 6, Act X. of 1859, but simply came into Court upon his mowrosee jote based on a pottah of 1254, the Lower Appellate Court has erred in law in decreeing to the plaintiff a right of occupancy under the Section cited—that being a right which he never set up.

There is a cross-appeal by the special respondent to the effect that there is secondary evidence sufficient to show the validity of the pottah under which the plaintiff came into Court, and the Lower Appellate Court did not consider that evidence, and it is also urged that the Lower Appellate Court has not distinctly found that the mowrosee pottah was not proved.

I have carefully considered the plaint as the best evidence showing what the plaintiff claims. In it the plaintiff clearly sets forth that he seeks to recover possession and damages on account of a mowrosee jote held under a pottah of 1254 at a mowrosee kaemee jumma, that is to say, a fixed jumma of Rupees 54 odd, of which he had been dispossessed by the zemindar making a settlement with another party, and he required a declaration of his right under the title set forth by him as above. There is nothing to my mind in the plaint at all indicating, either as an alternative plea or in any other way whatsoever, that the plaintiff for one moment thought of claiming the statutory right of occupancy under the provisions of Act X. of 1859.

Then comes the question whether, although the plaintiff did not claim the right of occupancy, the Lower Appellate Court erred in law in decreeing it to him. The only argument that struck me as of any weight was that, whereas a plea of possession from 1254 up to the date of dispossession in 1271 would include a declaration of possession within the last 12 years of that period, the plaintiff might not in that sense be possibly supposed to have raised the question of statutory right under the provisions of Section 6, Act X. of 1859.

When, however, we look to the plaint and the whole course of the pleadings and the evidence adduced to support the plaintiff's case, it appears to us that he

wholly sought to recover possession by proving that a mowrosee jote was given him by a pottah of 1254, which was for a fixed mokurruree kaemee jumma of 54 rupees. In support of his contention, the pleader for the special appellant cites the cases reported at pages 163, 301, and 552, Volume XI., Weekly Reporter. All these cases, especially the first and last, seem to me to bear upon the point at issue, and support the plea of the special appellant.

On the other hand, the case relied on by the Lower Appellate Court and by the special respondent, in Volume X., Weekly Reporter, page 130, is one in which, from the judgment of the learned Chief Justice, it is quite clear that *acquisition under a right of occupancy* was a part of the *substance* of the plaint. The special respondent cites another case, at page 360, Volume X, Weekly Reporter, but that is a case in which the defendant pleaded his possession for 12 years against the plaintiff, and it was held that possession was a good title unless some superior title was proved to justify the ouster.

The other case cited from Volume XI., page 365, was one not so much of title as of evidence of title, that is to say, where a title was set up under a grant, and where it was held that the party was at liberty to prove his title by other means, if he failed to prove the sunnud. I think, therefore, that on this point of law the weight of authority is in favor of the special appellant's contention.

In regard to the pleas taken by the special respondent in cross-appeal, I think in the first place that the Lower Appellate Court does substantially find that the evidence brought by plaintiff to support his case of the mokurruree pottah was not proved, and that, in fact, plaintiff failed to support his case, and when we refer to the judgment of the Court in the original vernacular, it is still more clear that it is the permanent mowrosee right set up by the plaintiff, which is held by the Lower Appellate Court to be not proved.

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On these grounds, I think that the judgments of the Lower Courts should be reversed and the plaintiff's suit dismissed with all costs.

Hobhouse, J.—I am of the same opinion. I think, upon a proper construction of the plaint and of the contention between the parties, as they themselves distinctly understood it in the first Court, that the plaintiff's claim was this, *viz.*, to obtain possession of a certain mowrosee jote by establishing his *kaemee* mokurruree title under a pottah. That seems to me to be clearly the meaning of the plaint, and that was beyond doubt the real point at issue before the first Court. I think, therefore, that the Lower Appellate Court, being a Court of appeal, had no right to introduce an entirely new element of title into the plaintiff's case—a title on which the parties had not fairly joined issue, and had not, therefore, full opportunity of adducing evidence, and that the Lower Appellate Court was not justified in determining the case in the plaintiff's favor on this new title.

On the question of the cross-appeal

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I agree in holding that the judgments of both the Lower Courts should be reversed, and the plaintiff's suit dismissed with costs of all the Courts.

The 22nd July 1869.

Present :

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Accretions—Right of Government—Inconsistent claims.

Case No. 1095 of 1869.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 18th February 1869, affirming a decision of the Officiating Additional Subordinate Judge of that District, dated the 24th August 1868.

Mooktakeshee Debea (one of the Defendants), *Appellant,*

versus

The Collector of Burdwan (Plaintiff), and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

A chur *B*, formed by gradual accretion to an estate (Mouzah *B*), was resumed by Government, who successively made temporary settlements for it with the

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putneedar of Mouzah *B*, and finally with the zemindar. While the second settlement was in force, another chur formed, and dispute arose between the putneedar of *B* and the putneedar of an adjoining Mouzah *D* as to its ownership. Three suits were brought by the latter, claiming the second chur as an accretion to his estate, in all which suits he was successful, and in one of which Government was a party. Government then sued to set aside the decrees in the two suits in which it was not a party, and for possession of the land in dispute, and it was found in that suit that the land was contiguous to chur *B*, and not to Mouzah *D*. HELD that Government, having a right to revenue but not to actual possession, could have no *locus standi* as plaintiff in such a suit.

HELD, with reference to the previous proceedings in which chur *B* was said to be a chur contiguous to the estate *B* and in respect to which the right of the proprietor to a settlement was recognized, that Government could not be allowed to set up a claim to the chur as an *island* to which it was entitled under Clause 3, Section 4, Regulation XI. of 1825, such claim not having been made in the plaint, and not appearing in the issues.

Jackson, J.—THE ground of special appeal which disposes of this whole case is that the plaint on which Government came into Court disclosed no cause of action whatsoever, and ought, for that reason, to have been at once rejected; and that the state of facts found by the Lower Appellate Court, upon which its decision is based, is one neither in accordance with the case which the Government made nor with the record.

It seems to me that this ground of special appeal is almost unreservedly established. The Government's case was this, that the land in dispute, consisting of 355 beegahs, formed a portion of something called Chur Bikihaut, which is described as a gradual accretion to an estate Mouzah Bikihaut in the Pergunnah of Huxelee, such accretion having commenced in the year 1837, or, at least, having come to notice in that year, and having continued for a series of years afterwards; that this chur was resumed by the Government by proceedings under Regulation II. of 1819; that temporary settlements have one after another been made by the Government, first, with one Khetturmonee Dassee (on the refusal of the zemindar to accept a settlement), and, at last, with the zemindar himself; that the defendant, putneedar of Daihaut, another talook held under the Maharajah of Burdwan, brought actions against the putneedar of Bikihaut, and recovered decrees by means of which she had entered into possession of the land in dispute; and that, consequently, Government was by that means dispossessed, and claimed to have a cause of action arising out of such possession accruing at the date of the decree.

It seems to me very clear that, upon that statement of facts, the Government, having made a settlement, whether temporary or permanent, of the land in dispute, had a right to the revenue arising from that land, and in case of default, recover the revenue by sale of the property, but had no right whatever to the actual possession of the land: and it seems almost needless to say that Government could have no *locus standi*, as plaintiff, to ask the Court to set aside judgments in suits to which Government was no party, and by which it could not possibly be affected.

Then it is contended that, whatever the facts stated in the plaint may have been, the Lower Appellate Court has found as a fact that the Government had an interest in this land, and was, in some sense, entitled to the possession by reason of such land being an island, and, as such, coming within the provisions of Clause 3, Section 4, Regulation XI. of 1825.

Looking at the allegations of Government in this case, and looking at the proceedings, not on one or two occasions, but repeatedly before the resumption-officers and the settlement-officers, in which this chur is described, not as an island, but as *sunglugm chur*, that is, a chur contiguous to the estate of Bikihaut and in respect of which the right of the proprietor of Bikihaut to a settlement is distinctly and unequivocally recognized, it is very difficult to understand how any Court dealing with the facts could have found that this chur was an island, and, consequently, as an island at the entire disposal of the Government.

We should not probably be at liberty, or at any rate we might have some difficulty in going into that question of fact, but I apprehend that it is not necessary for us that we should do so, because, whether found or not, that is a case wholly distinct from the case the Government came into Court with, and one, therefore, which it should not be allowed to establish. The plaint which contains the whole allegation on behalf of Government (no written statement having been filed) did not describe the land as an island. It never set up the right of Government to it as a separate property or as a thing to which Government was absolutely entitled. The land was described as being a chur contiguous to the estate of Bikihaut, and one of which the Government had parted with the possession, and had given a settlement to the zemindar.

wholly sought to recover possession by proving that a mowrosee jote was given him by a pottah of 1254, which was for a fixed mokurruree kaemee jumma of 54 rupees. In support of his contention, the pleader for the special appellant cites the cases reported at pages 163, 301, and 552, Volume XI., Weekly Reporter. All these cases, especially the first and last, seem to me to bear upon the point at issue, and support the plea of the special appellant.

On the other hand, the case relied on by the Lower Appellate Court and by the special respondent, in Volume X., Weekly Reporter, page 130, is one in which, from the judgment of the learned Chief Justice, it is quite clear that *acquisition under a right of occupancy* was a part of the *substance* of the plaint. The special respondent cites another case, at page 360, Volume X, Weekly Reporter, but that is a case in which the defendant pleaded his possession for 12 years against the plaintiff, and it was held that possession was a good title unless some superior title was proved to justify the ouster.

The other case cited from Volume XI., page 365, was one not so much of title as of evidence of title, that is to say, where a title was set up under a grant, and where it was held that the party was at liberty to prove his title by other means, if he failed to prove the sunnud. I think, therefore, that on this point of law the weight of authority is in favor of the special appellant's contention.

In regard to the pleas taken by the special respondent in cross-appeal, I think in the first place that the Lower Appellate Court does substantially find that the evidence brought by plaintiff to support his case of the mokurruree pottah was not proved, and that, in fact, plaintiff failed to support his case, and when we refer to the judgment of the Court in the original vernacular, it is still more clear that it is the permanent mowrosee right set up by the plaintiff, which is held by the Lower Appellate Court to be not proved.

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On these grounds, I think that the judgments of the Lower Courts should be reversed and the plaintiff's suit dismissed with all costs.

Hobhouse, J.—I am of the same opinion. I think, upon a proper construction of the plaint and of the contention between the parties, as they themselves distinctly understood it in the first Court, that the plaintiff's claim was this, *viz.*, to obtain possession of a certain mowrosee jote by establishing his *kaemee* mokurruree title under a pottah. That seems to me to be clearly the meaning of the plaint, and that was beyond doubt the real point at issue before the first Court. I think, therefore, that the Lower Appellate Court, being a Court of appeal, had no right to introduce an entirely new element of title into the plaintiff's case—a title on which the parties had not fairly joined issue, and had not, therefore, full opportunity of adducing evidence, and that the Lower Appellate Court was not justified in determining the case in the plaintiff's favor on this new title.

On the question of the cross-appeal

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I agree in holding that the judgments of both the Lower Courts should be reversed and the plaintiff's suit dismissed with costs of all the Courts.

The 22nd July 1869.

Present :

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Accretions—Right of Government—Inconsistent claims.

Case No. 1095 of 1869.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 18th February 1869, affirming a decision of the Officiating Additional Subordinate Judge of that District, dated the 24th August 1868.

Mooktakeshee Debea (one of the Defendants), *Appellant,*

versus

The Collector of Burdwan (Plaintiff), and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

A chur *B*, formed by gradual accretion to an estate (Mouzah *B*), was resumed by Government, who successively made temporary settlements for it with the

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putneedar of Mouzah *B*, and finally with the zemindar. While the second settlement was in force, another chur formed, and dispute arose between the putneedar of *B* and the putneedar of an adjoining Mouzah *D* as to its ownership. Three suits were brought by the latter, claiming the second chur as an accretion to his estate, in all which suits he was successful, and in one of which Government was a party. Government then sued to set aside the decrees in the two suits in which it was not a party, and for possession of the land in dispute, and it was found in that suit that the land was contiguous to chur *B*, and not to Mouzah *D*. HELD that Government, having a right to revenue but not to actual possession, could have no *locus standi* as plaintiff in such a suit.

HELD, with reference to the previous proceedings in which chur *B* was said to be a chur contiguous to the estate *B* and in respect to which the right of the proprietor to a settlement was recognized, that Government could not be allowed to set up a claim to the chur as an *island* to which it was entitled under Clause 3, Section 4, Regulation XI. of 1825, such claim not having been made in the plaint, and not appearing in the issues.

Jackson, J.—THE ground of special appeal which disposes of this whole case is that the plaint on which Government came into Court disclosed no cause of action whatsoever, and ought, for that reason, to have been at once rejected; and that the state of facts found by the Lower Appellate Court, upon which its decision is based, is one neither in accordance with the case which the Government made nor with the record.

It seems to me that this ground of special appeal is almost unreservedly established. The Government's case was this, that the land in dispute, consisting of 355 beegahs, formed a portion of something called Chur Bikihaut, which is described as a gradual accretion to an estate Mouzah Bikihaut in the Pergunnah of Huxelee, such accretion having commenced in the year 1837, or, at least, having come to notice in that year, and having continued for a series of years afterwards; that this chur was resumed by the Government by proceedings under Regulation II. of 1819; that temporary settlements have one after another been made by the Government, first, with one Khetturmonee Dassee (on the refusal of the zemindar to accept a settlement), and, at last, with the zemindar himself; that the defendant, putneedar of Daihaut, another talook held under the Maharajah of Burdwan, brought actions against the putneedar of Bikihaut, and recovered decrees by means of which she had entered into possession of the land in dispute; and that, consequently, Government was by that means dispossessed, and claimed to have a cause of action arising out of such possession accruing at the date of the decree.

It seems to me very clear that, upon that statement of facts, the Government, having made a settlement, whether temporary or permanent, of the land in dispute, had a right to the revenue arising from that land, and in case of default, recover the revenue by sale of the property, but had no right whatever to the actual possession of the land: and it seems almost needless to say that Government could have no *locus standi*, as plaintiff, to ask the Court to set aside judgments in suits to which Government was no party, and by which it could not possibly be affected.

Then it is contended that, whatever the facts stated in the plaint may have been, the Lower Appellate Court has found as a fact that the Government had an interest in this land, and was, in some sense, entitled to the possession by reason of such land being an island, and, as such, coming within the provisions of Clause 3, Section 4, Regulation XI. of 1825.

Looking at the allegations of Government in this case, and looking at the proceedings, not on one or two occasions, but repeatedly before the resumption-officers and the settlement-officers, in which this chur is described, not as an island, but as *sunglugm chur*, that is, a chur contiguous to the estate of Bikihaut and in respect of which the right of the proprietor of Bikihaut to a settlement is distinctly and unequivocally recognized, it is very difficult to understand how any Court dealing with the facts could have found that this chur was an island, and, consequently, as an island at the entire disposal of the Government.

We should not probably be at liberty, or at any rate we might have some difficulty in going into that question of fact, but I apprehend that it is not necessary for us that we should do so, because, whether found or not, that is a case wholly distinct from the case the Government came into Court with, and one, therefore, which it should not be allowed to establish. The plaint which contains the whole allegation on behalf of Government (no written statement having been filed) did not describe the land as an island. It never set up the right of Government to it as a separate property or as a thing to which Government was absolutely entitled. The land was described as being a chur contiguous to the estate of Bikihaut, and one of which the Government had parted with the possession, and had given a settlement to the zemindar.

The plaintiff is not at liberty to depart from the allegations with which he has come into Court, and set up entirely a new case which he never set up in the Court of first instance or in the Lower Appellate Court.

I think that the objection taken by the defendant now before us is one which was sufficiently obvious on the face of the plaint and the pleadings below. I think, moreover, that it was taken with sufficient distinctness in the grounds of appeal before the Zillah Judge. It is, therefore, not raised here for the first time, nor is it an objection which ought to take the plaintiff by surprise. I consider, therefore, that the Judge was wrong in going into the facts as he has done, and in giving the plaintiff a decree, or in affirming the judgment of the Subordinate Judge. I think his judgment must be set aside, and also the judgment of the Court of first instance, and the suit ought to be dismissed with costs.

Markby, J.—As I understand this case, it is this. In the year 1837, a chur now known as chur Bikihaut, formed in the River Hooghly. In respect of this chur, in the year 1841, the Government took proceedings for the purpose of assessing the revenue. A settlement was first offered to the zemindar of Mouzah Bikihaut, but his terms being exorbitant the Government settled for 10 years with the putneedar of that mouzah; treating the chur and describing it in the settlement as an accretion to his putnee estate of Mouzah Bikihaut, to which the putneedar was entitled under Clause 1 of Section 4 of Regulation XI. of 1825. The chur received a separate number, which would, no doubt, be important for purposes of description, but in no way affects the rights of the parties under the above-mentioned Regulation. The revenue was settled again for 10 years in 1851, this time with the zemindar; and again the property is described as "contiguous to Mouzah Bikihaut." Lastly, the revenue was settled in 1861, and in like manner the description of the land is as "adjoining Mouzah Bikihaut."

Whilst the second settlement was in force, another chur formed, and a dispute arose between the putneedar of Bikihaut and the putneedar of the adjoining Mouzah Daihaut as to the ownership of this chur. Three suits were brought by the putneedar of Daihaut, in one of which Government was made a party, in the other two, not. In all three cases, the putneedar of Daihaut was successful, and established that the land was an accretion of his mouzah, and as such the putneedar of Daihaut is now in possession of it.

The present suit is brought by the Collector of Burdwan on the part of the Government; and, looking to the quarter whence it proceeds, the plaint is certainly a very remarkable document. It states the cause of action to be the result of the two suits mentioned above, in which Government was not a party, and it asks for possession of the lands to which those suits relate. It also asks that the decrees in those suits may be set aside, and it is added that, if that be done, there will then be no difficulty in getting rid of the decree in the suit in which Government was a defendant, by means of a review. In this plaint, the property is described as an accretion to "the resumed Chur Bikihaut." The putneedars of Mouzah Bikihaut and of Mouzah Daihaut are both made defendants, but the putneedar of Bikihaut warmly espouses the cause of Government.

It is obvious that the above plaint, so far as it asks to set aside the decrees, and treats them as a cause of action, can hardly be characterized otherwise than as absurd; and I am very much inclined to think that it is a bad plaint altogether as not stating any cause of action. But if it is good at all, it can only be as a plaint which seeks to recover possession of the land mentioned; the Government, therefore, must prove their title to the land.

It has been found in this case (contrary to the findings in all the three suits mentioned above), that the land in dispute formed contiguously to the estate Chur Bikihaut, and not contiguously to the Mouzah Daihaut, and, of course, this finding for the present purpose must be accepted. But that finding alone will not entitle the Government to possession. It does not give them an interest in the land of any description whatever. But a theory has been started in this case and supported before us by the Government Pleader, which, I own, has taken me somewhat by surprise. Notwithstanding that Chur Bikihaut has been over and over again described in documents to which Government was a party as "contiguous to the bank of the River Hooghly," as "adjoining" and as "contiguous" to Mouzah Bikihaut, and transactions entered into on that footing for the last 25 or 30 years, it is now asserted that Chur Bikihaut origin-

ally came into existence as an island, that it is an altogether independent estate, separate and distinct from Mouzah Bikihaut, and that Government are entitled, under Clause 3 of Section 4 of Regulation XI. of 1825, to take exclusive possession of it with all its accretions.

How this suggestion, which was not made in the plaint, and does not appear in the issues, first came to be made, we have been unable to discover. The Government, however, did, it appears, call some witnesses who stated that the Chur Bikihaut originally formed as an island.

There is not the slightest suggestion that any deception was practised on the Government, or that Government was in any way misled in making the settlements of 1841, 1851, and 1861. And this being so, it seems to me that it would be the most flagrant violation of good faith on the part of Government, were it now to set up rights in distinct opposition to those three transactions. Nor do I find it possible to believe that this was the right on which this suit was intended to be based by Government. Had it been so, the putneedar of Bikihaut, instead of being a friendly defendant, would inevitably have been the strongest opponent of the claim. Moreover, had that been the object of the suit, Government would have claimed, not this small portion only, but the whole of Chur Bikihaut. I think the Lower Courts were altogether wrong in entering into the question whether the Chur Bikihaut was an island or not. I think this was not the case put forward by the Government, and that if it had been put forward, it ought not in the face of the transactions of the last 25 years, to have been entertained.

But it is contended that, even if the Government are debarred from going into this question, it has a right to bring a suit in order to have an inquiry, and to have it declared to what estate the island in question is an accretion. I am, however, clearly of opinion that the Government can bring no such suit. The right of Government in the case of such an accretion as this must be now held to begin and end in the right to assess revenue, and I think Government was bound for that purpose to accept the result of the litigation between the owners of the respective mouzahs, and to settle the revenue with the person who was then declared to be the owner.

Of course, I am not to be understood as saying that if there has been any fraud or unfair dealing by which Government has been misled into making a settlement of Chur Bikihaut under Clause 1 of Section 4 of Regulation XI. of 1825, instead of claiming possession under Clause 4, the Government may not now assert their rights in a suit properly framed for that purpose.

I think, therefore, the decrees of the Lower Courts should be reversed, and the suit dismissed with costs in this Court and the Courts below.

Some observations were made in the course of the argument casting imputation upon Government for their conduct in this case, and for myself I cannot help observing that, whatever the proceedings on the part of Government may, in fact, have been (and I do not wish to express any doubt that they have been taken with all the care and deliberation which the occasion demanded), yet, as they have been presented before us, they appear to be rash, careless, and, I must also add, scarcely consistent with good faith. And I think it falls within the scope of our duty to draw attention to the fact, which cannot but be an important one for the consideration of Government itself.

The 22nd July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ex-parte judgment—Appeal— Sections 111 and 125, Act VIII., 1859.

Case No. 1060 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 15th December 1868, affirming a decision of the Subordinate Judge of that District, dated the 14th March 1867.

Joy Prokash Singh and others (Defendants), *Appellants,*

versus

Meghraj Singh *alias* Gunga Singh (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellants.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

Where defendants, summoned under Section 41, Act VIII. of 1859, did not appear on the day fixed for them to appear and answer, and their reasons for non-attendance not having been considered sufficient, they were not allowed to appear in the case :

HELD that the Court of first instance was justified in disposing of the case in their absence, and that Section 125, Act VIII., 1859, contemplates a case in which a party appears by pleader who has appeared at the proper time.

HELD that the Lower Appellate Court was right in refusing to hear an appeal from that decision.

Kemp, J.—THE question for decision in this appeal is whether the defendants, special appellants, whose suit was decided *ex-parte* in the first Court, could be heard in appeal in the Lower Appellate Court. The Judge has held that, under Section 111 of Act VIII. of 1859, the appeal cannot be heard, and has dismissed the defendant's appeal.

The grounds of special appeal are that the Judge is wrong in law in holding that the appeal was inadmissible, and that, as the defendants' pleaders were present when the case was decided in the Court of first instance on the 14th of March 1867, the Judge ought to have heard the appeal.

After hearing the argument on both sides, we are of opinion that the Judge's decision is correct, and that this appeal must be dismissed.

It is clear to us that the defendants were summoned under Section 41 of Act VIII. to appear and answer the claim on a day specified. They did not appear on the day fixed for them to appear and answer, and therefore they did not comply with the provisions of Section 109 of the same Act, which enacts that the party shall be in attendance in person or by pleader, and that the suit shall then be heard. Various petitions were put in by the defendants excusing their non-attendance, which was attributed by them partly to sickness and partly to some of them having gone on pilgrimage. These excuses were considered insufficient, and on the evidence which they submitted to prove that their non-attendance was not wilful, and was unavoidable, the Principal Sudder Ameen held that they had not proved the sufficiency of the reasons assigned by them, and refused to allow them to appear in the case. Such being the case, and no appearance having been put in by the defendants such as is contemplated by the law, and as on a subsequent day which was fixed for the hearing of the case they had not previously assigned good and sufficient cause for their non-attendance, we think that the Court of first instance was justified in disposing of the case in their absence. It has been said in the course of the argument that two pleaders were present at the time of the decision of the case, and that therefore the Court might have examined these pleaders orally under the provisions of Section 125, and thereby ascertained the question in issue, and that the Principal Sudder Ameen ought to have heard these pleaders, and on his not doing so, an appeal to the Judge will lie against his decision disposing of the case *ex parte*. We think that this contention might have had some weight in it if it had been shown that a previous appearance under the law by the defendants, or through their pleaders, had been entered, for Section 125 contemplates the case of a suit, at the first hearing or at any subsequent hearing, in which a party appears by pleader, that is, a party who has appeared at the proper time.

We therefore think that the Judge was right in refusing to hear the appeal, and we dismiss the special appeal with costs.

The 23rd July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Principal and Agent.

Case No. 73 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 28th December 1868.

The Agra Bank Limited (one of the Defendants), *Appellant,*

versus

Dabee Pershad (Plaintiff), *Respondent.*

Mr. G. C. Paul for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

The manager of a factory, who had executed a bond in respect of sums owed by him on account of factory-expenses, having left the service of the proprietor of the factory, an *ex-parte* decree was obtained on the bond against another manager. But as there was nothing in the decree to connect the judgment-debtor (the manager) with his principal (the proprietor), it was held that the decree could not be executed against the property of the proprietor.

Glover, J.—THE plaintiff in this case, a mahajun of Durbhangah in Zillah Tirhoot,

sued for a declaration of his right to bring to sale in execution of a decree an 8-annas share of two Indigo Factories, Hathoree and Bhagonee, by setting aside a miscellaneous order passed under Section 246 of the Civil Procedure Code, whereby the property was released from attachment on the intervention of the Agra Bank, the mortgagees in possession.

The plaintiff's case is that the manager of the Anar Indigo Factory (the property of Mr. Prestwitch), Mr. Argles, owed him various sums on account of factory-expenses, amounting to Rupees 17,748, and executed a bond in respect of them on the 5th of January 1865.

Plaintiff sued on this bond, not Mr. Argles (who is said to have left Mr. Prestwitch's service in the interim), but another manager, Mr. Smith, and got an *ex-parte* decree against him, and in execution of that decree attached and endeavoured to sell the property now in dispute.

The defendant, the Agra Bank, took various objections to the sufficiency of the plaintiff's cause of action, and alleged the Bank to be in possession as mortgagee (from a date anterior to the plaintiff's attachment) from a Mr. Shurburn, to whom Mr. Prestwitch had assigned his 8-annas share of the disputed properties. They denied, moreover, that the equity of redemption, supposing Mr. Prestwitch to have it, was a right that could be sold in execution.

The Subordinate Judge decided that Mr. Prestwitch's rights in the factories, Hathoree and Bhagonee, could be sold in execution of the plaintiff's decree, subject to the Bank's lien.

The Agra Bank appeals against this order.

It appears to us unnecessary to go into the grounds of appeal at length, inasmuch as it seems clear that the plaintiff's suit discloses no ground of action against Prestwitch, and that the decree obtained by him cannot affect Prestwitch's property.

The bond on which the plaintiff afterwards got the *ex-parte* decree is said to have been executed by Argles. The bond itself has not been produced, and there is nothing on the record to show that it was executed by Argles as agent of Prestwitch for moneys advanced for the benefit of the latter. In the only place where Argles's name is mentioned, namely, in the heading of the decree against Smith, it is recorded without any addition or qualification; and for anything that appears on this record, the debt might have been a personal one due by Argles himself.

In the decree obtained on the bond given by Argles, there is nothing to connect Smith with the transaction in respect of his principal, Prestwitch. The decree is to all intents and purposes a personal one against Smith, Prestwitch not having been made a defendant in the suit.

Had Prestwitch been sued in the name of his agent, Smith, a decree against Smith as agent for Prestwitch might have bound the principal; but as the plaintiff has brought his suit, he has no decree against Prestwitch, and cannot execute it against any of his property. (Glencott *versus* Sree Gopal, 9 Weekly Reporter 254.)

The bond given by Argles would not, so far as the facts are disclosed in this record, allow the plaintiff to sue Smith; nor could a decree against Smith bind Prestwitch, who was not made a party to the suit. The plaintiff may, if he be so advised, bring his suit in a proper form and get a decree against Prestwitch, if he can show that the liability was incurred by that person's agent for his (Prestwitch's) benefit, but the present suit must fail.

We therefore reverse the decision of the Court below, and allow this appeal with costs on the respondent.

The 23rd July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Report of Serishtadar—Civil Court Ameen—Evidence.

Case No. 924 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 22nd January 1869, reversing a decision of the Moonsiff of Raojan, dated the 7th January 1868.

Goluck Chunder Kool (Plaintiff), *Appellant,*

versus

Dookhee Ram and others (Defendants), *Respondents.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Brojo Pershad Bose for Respondents.

The report of a serishtadar after local investigation cannot be legal evidence, unless it is shown that no Civil Court Ameen was available for the duty in the district.

Bayley, J.—THIS special appeal must be dismissed with costs.

The plaintiff's case was that the property in suit was granted under a deed of gift by one Sunaka to her daughter Renuka; that the latter sold the property to the plaintiff; and that the plaintiff was thus in possession under his purchase until he was dispossessed by the defendants.

The defendants denied the deed of sale set up by the plaintiff, and claimed the land as theirs by right of heirship.

The first Court gave the plaintiff a decree after a local investigation by its serishtadar.

The Lower Appellate Court has reversed that decision, and held, *firstly*, that the deed of gift under which the plaintiff's vendor is alleged to have acquired her title was a fabrication; *secondly*, that the deed of sale to the plaintiff by such vendor was also a fabrication; and, *thirdly*, that the plaintiff was never in possession, and was not ousted by the defendants. The Lower Appellate Court accordingly dismissed the plaintiff's case.

The plaintiff appeals specially, and urges three grounds—

1stly.—That the report of the serishtadar whom the first Court deputed for local investigation has been wrongly held by the Lower Appellate Court to be no evidence in this case;

2ndly.—That, in connection with that view of the serishtadar's report, the evidence of the witnesses taken by the serishtadar has not been considered by the Lower Appellate Court; and

3rdly.—That at least the plaintiff's claim ought to have been decreed with regard to the share of the defendant Ram Soondur, who admitted the plaintiff's claim.

On the first plea, we think that, until it can be shown by the pleader for the special appellant, which is not done in this case, that no ordinary Civil Court Ameen was available in the district, the report of the serishtadar could not be legal evidence in the case, and the Lower Appellate Court was right in not treating it as evidence.

The words of Section 180, Act VIII. of 1859, are that, in cases in which the Court may deem a local investigation necessary, the Court may "issue a commission to *an "officer of the Court appointed to execute "commissions*, or, *if there be no such offi-"cer*, to any suitable person directing him "to make such investigation, and to report "thereon to the Court." There is nothing, however, in this case to show that there was no officer of the Court appointed to execute such commissions available, and the first plea, therefore, taken by the special appellant is untenable. It follows from this that the second plea in special appeal, which refers to the evidence taken before the serishtadar, is also untenable; and here we would remark that the objection of the special appellant in the second ground of special appeal, *viz*, that the Lower Appellate Court has not considered the evidence of the witnesses, is inconsistent with his objection on the same ground in the same petition of special appeal, that the Lower Appellate Court has misconstrued that evidence, for it is difficult to understand how the Lower Appellate Court could have misconstrued the evidence which it did not consider.

On the third point, we observe that the plaintiff does not allege that the defendant Ram Soondur disputed his title or dispossessed him, and the Lower Appellate Court finds as a fact that he (Ram Soondur) did not dispossess the plaintiff. There was, therefore, no cause of action against the defendant Ram Soondur, and consequently there could be no decree against him.

In this view, we dismiss this special appeal with costs.

The 23rd July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Fraud—Technical objections—Ex-parte decree—Section 111, Act VIII., 1859.

Case No. 347 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 9th November 1868, reversing a decision of the Officiating Sudder Ameen of that District, dated the 30th December 1867.

Ram Lochun Soor and another (Plaintiffs), *Appellants*,

versus

Nittya Kalee Debia and others (Defendants), *Respondents*.

Baboos Sreenath Banerjee and *Gopeenath Mookerjee* for Appellants.

Baboo Motee Lall Mookerjee for Respondents.

In a suit for possession by right of foreclosed mortgage, plaintiff having obtained a decree which was *ex parte* against one of the defendants (*A*), the Lower Appellate Court found as a fact, on the appeal of the defendants, that the mortgage-transaction was *benamee* and collusive (the defendant *A* having been a sharer in the fraud), and dismissed the claim.

HELD that plaintiff could not in special appeal be allowed, under the finding of the Lower Appellate Court, to urge that his suit should not have been dismissed as against the share of *A*, on the technical ground that *A* had not appealed.

No legal decree can be passed *ex parte* without a Court being satisfied of the due service of the summons.

Bayley, J.—IN this case the plaintiffs, appellants before us, sued for the recovery of possession of certain lands by right of foreclosed mortgage. This mortgage, the plaintiffs alleged, was given by one Bhugwan and Anundo on the 7th Bhadro 1262. Neither Bhugwan nor Anundo disputed the plaintiff's mortgage in the Lower Courts, though they were made defendants Nos. 1 and 2, but one Nittya Kalee Debia appeared claiming as a purchaser of the rights and interests of Bhugwan through one Juggobundhoo on the 21st Cheyt 1273, and stating that she purchased all except a 2-annas share which had been purchased by Rheedoy and Pauchcowree.

The first Court gave the plaintiff an *ex-parte* decree as against the defendant Anundo, and a decree as against the other defendants, the representatives of Bhugwan, the Lower Court finding the plaintiff's claim on his mortgage-deed good.

The parties who appealed against this decree were Nittya Kalee, Pauchcowree, and Rheedoy.

The Lower Appellate Court, on appeal, found as a fact that the whole mortgage-transaction was simply a benamee and a collusive transaction. The Court, therefore, decreed the appeals of Nittya Kalee, Pauchcowree and others, and dismissed the plaintiff's suit *in toto*.

Against this decision, the plaintiff appeals specially, and urges that as the plaintiff got a decree *ex parte* against Anundo, against which Anundo made no appeal, and his widow, who was his representative, Unnoda, did not object, the plaintiff's suit should not have been dismissed as regards the share of Anundo.

Now, in this case there is a clear finding of fact that the plaintiff and Bhugwan and Anundo were all acting in fraud; and for my own part, I have grave doubts whether, under such circumstances, the plaintiff can say, as he now does: "True, I am a party sharing in fraud with Anundo, but as a technical matter of procedure, Anundo has not appealed; let me, therefore, have a decree against my co-adjutor in the fraud." I do not think the plaintiff is entitled to urge any such plea; but, irrespective of this, I think that there is clearly an error in the first Court's proceeding in giving an *ex-parte* decree at all as against Anundo.

Section 1:1 of Act VIII. of 1859 enacts: "If the plaintiff shall appear in person or by a "pleader, and the defendant shall not appear "in person or by a pleader, and *it shall be* "*proved to the satisfaction of the Court that* "*the summons was duly served*, the Court "shall proceed to hear the suit *ex parte*." Now, there is not the slightest evidence in this case that the Court was satisfied that the summons was duly served. It is clear, therefore, that no legal decree could be passed *ex parte* without the Court being satisfied of the due service of notice. Thus, as there was no *ex-parte* decree against Anundo in the legal sense of the term, there can be no force in the contention of the special appellant. It is true that the ground was not urged below, but we are competent by law to take up and decide a point on our own motion when in the exercise of our judicial discretion we think it proper to do so; and looking to the fraudulent character of the transaction as found by the Lower Appellate Court, I think it a right exercise of judicial discretion not to allow such points to be raised and decided against the plaintiff under such circumstances.

In this view, I would dismiss this specia appeal with costs.

Hobhouse, J.—As I understand the material facts of this case, they are these:—

The property in dispute belonged to two persons, Bhugwan and Anundo. The plaintiffs sued on the ground that they had obtained a mortgage of the property from these two persons. The Lower Appellate Court has found as a fact that the mortgage was a transaction perpetrated by the plaintiffs and the alleged mortgagors in fraud of certain other defendants, and has dismissed the plaintiff's suit altogether.

In special appeal it is urged that, although this judgment is a good judgment so far as regards the share of Bhugwan, which was the sole share found to have been sold to the other defendants, the special respondents, it is not good as regards the share which originally belonged to Anundo. I do not say that the Lower Appellate Court was right in the ground upon which it bases its decision on this point; but I have no sort of doubt that in a case of this kind, where the whole suit is found to have been based on fraud, it is our duty to see more closely than in any other case that, if the plaintiff gets any decree at all, he gets a decree which has a good legal foundation. In reading over the judgment of the first Court and looking at the issues laid down in that judgment, it is quite clear to me that there was really no contention in the first Court between the plaintiffs and the defendant, the representative of Anundo. There is no issue affecting him, and the only remark made so far as he is concerned is that he was silent, and it was clearly only as an after-thought, when the plaintiffs found that they could not hope to succeed in the case which they originally set up as regards the mortgage to the original shareholders, that they fell back on that part of the case which affected Anundo, one of the shareholders. I say, in such a case we are bound to see when there was a decree in the first Court, that that decree was a good decree in law.

Now, in the first place, the Court does not seem to have given any *ex-parte* decree at all; but it is admitted that, if it gave any decree, it was an *ex-parte* decree; and in order that it might have jurisdiction to give such a decree, it was bound, as Mr. Justice Bayley has pointed out, to have it proved to its satisfaction that summons was duly served on the defendant, that is, the representative of Anundo. There was no issue on this point; there was no decision on this point; and we are not shown that there was any evidence on this point; and this being so, I hink we are bound to hold, when the first Court gave a decree against Anundo's representative, that it gave a decree which it had no jurisdiction to give. There was then, in reality, no legal decree outstanding of the first Court against the representative of Anundo; and this being so, I agree in upholding the judgment of the Lower Appellate Court, and in dismissing the plaintiff's case *in toto*.

The 23rd July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Cross-decrees—Set-off—Section 209, Act VIII., 1859.

Case No. 232 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 8th March 1869.

Shib Chunder Sircar (Judgment-debtor), *Appellant,*

versus

Juggut Indur Bunwaree Gobind Bahadoor (Decree-holder), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Juggadanund Mookerjee for Respondent.

S had against *M* in the Rungpore Court a decree for costs which he removed for execution to the Court of Beerbhoom. On this *M* applied to the latter Court under Section 209, Act VIII., 1859, for stay of execution pending the decision of another suit which he had brought against *S*.

HELD that, on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum.

Jackson, J.—THE order of the Court in this matter appears to be incomplete rather than erroneous. The facts are these. Shib Chunder Sircar had a decree against the Maharajah of Beerbhoom in the Rungpore Court, which he removed for execution to the Court of Beerbhoom. That was a decree for 1,678 rupees, being costs due to him in a suit in which the Maharajah had failed. The Maharajah applied to the Court under the last Clause, Section 209 of the Civil

Procedure Code for stay of execution, pending the decision of another suit which he had brought against Shib Chunder. An order was made, accordingly, to stay execution. That second suit was decided in the Maharajah's favor, and on the 11th of September 1865, an order was made by the Zillah Judge, on the ground that the decree in favor of the Maharajah was larger than that of Shib Chunder, striking off Shib Chunder's case in execution. The Maharajah has now applied for execution of his decree, and claims, it appears, the whole amount of that decree. But Shib Chunder also has made a fresh application in the Rungpore Court to execute his decree; and that application has been referred to the Court in Beerbhoom, which, therefore, has the two cases in execution before it.

The execution-question before the Judge, and now before us, is, on what principle the adjustment of these two decrees should be made, and the moot point is, how far Shib Chunder is entitled to interest? The decree of the Maharajah, it appears, does not bear interest except on certain costs of an unsuccessful appeal made to the High Court by Shib Chunder. It seems to me that the order made by the Judge of Beerbhoom in September 1865 was not in accordance with the provisions of Section 209; that, on the execution of Shib Chunder's decree being allowed to proceed on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much only as should remain after deducting the smaller sum, such smaller sum being at the same time entered on the decree for the larger sum.

I think, therefore, that the Court ought then to have found, and that the Zillah Court must now find, what was due on that date on the decree of Shib Chunder, including interest down to that date; and that, if, on comparing that, and the amount due on the Maharajah's decree, anything should be found to be due to Shib Chunder, he should now be allowed to execute his decree for that amount with interest down to date of realization. But if, on that account being taken, the amount due should be found to be in the Maharajah's favor, he will be entitled to receive that amount, but without interest; but he should be allowed to recover that amount with interest from the date that the amount was found to be due, but not in excess of the costs recoverable from him by the decree of the High Court.

Markby, J.—I am of the same opinion.

The 23rd July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Ejectment — Jurisdiction — Sections 78 and 153, Act X., 1859.

Case No. 1020 of 1869 under Act X. of 1859

Special Appeal from a decision passed by the Judge of Tipperah, dated the 5th February 1869, reversing a decision of the Deputy Collector of that District, dated the 7th December 1868.

Trilochun Chunder Roy (Plaintiff), *Appellant,*

versus

Komul Majhee (Defendant), *Respondent.*

Baboo Banee Madhub Roy for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In a suit for arrears of rent as on joint-tenancy and for ejectment and damages, in which plaintiff's agent amplified the claim by stating specifically that the suit for ejectment was brought under Section 78, Act X. of 1859, and no question was raised as to jurisdiction by the defendant who lost the case:

HELD that the suit involved a claim under Section 78, and that an appeal would lie under Section 153.

Bayley, J.—WE think that this appeal should be dismissed with costs.

The plaintiff's suit was for arrears of rent as on joint tenancy *and for ejectment* and damages.

The plaintiff's agent amplified the plaint by distinctly stating specifically that this suit for ejectment was brought under the provisions of Section 78, Act X. of 1859.

The defendant's case was that he held the lands separately under a separate settlement, and was, therefore, not liable to the plaintiff's claim.

The first Court did not lay down any precise issue on the question of ejectment,

but did try the question as to whether the liability of the defendant existed or not, with reference to the separate title that the defendant set up to the plaintiff's claim on a joint possession.

In the first Court, the plaintiff's claim was decreed in modification of his claim.

The plaintiff, it appears, was satisfied with that decision, and did not appeal.

The defendant, however, appealed to the Lower Appellate Court, and that Court decreed the defendant's appeal. It found on the evidence that there was no separate settlement between the plaintiff and the defendant, and the judgment then goes on: "I can find no-"thing to be called evidence which shows "what land the defendant holds and at what "rate." The Lower Appellate Court, therefore, reversed the decision of the Deputy Collector, and dismissed the plaintiff's suit.

The plaintiff appeals specially, and urges two grounds before us—

Firstly—That the Lower Appellate Court was wrong in entertaining the appeal, because it had no jurisdiction, the claim being below 100 rupees, and the first Court not having determined any question relating to any title or any interest in land as between parties having conflicting claims thereto.

Secondly—That the Lower Appellate Court was wrong in holding that there was no trace of a separate settlement, when there was ample evidence on the record on which the Lower Appellate Court might have given the plaintiff a decree.

The *first* plea, we may observe, has been taken for the first time in this Court. There was no question raised at all when the plaintiff got a decree in the first Court that that decree was without jurisdiction. The defendant was then the appellant before the Lower Appellate Court, and the plaintiff, as respondent, had therefore every opportunity to raise the plea. The question being, however, one of jurisdiction, we take it up in the present shape.

A case reported at page 41, Volume X., Weekly Reporter (Phear and Hobhouse, JJ.), is cited by the pleader for the special appellant in support of this contention, and is at first sight somewhat in point, as the Judges in that case proceeded on the fact of no issues being framed and no adjudication come to distinctly on the point of title to land; but here, whilst the agent of the plaintiff amplified the plaint, *i. e.*, stated the subject-matter of suit as a claim distinctly for ejectment, and added that it was under the provisions of Section 78, and when the plaintiff got a decree in the first Court, and no question was raised as to jurisdiction by the defendant who lost the case, we think that the suit may really be considered as involving a claim under the provisions of Section 78, Act X. of 1859, and therefore under Section 153, Act X. of 1859, an appeal would lie. Moreover, it appears that the question of title had been fully gone into by both the Courts below, *viz.*, whether the property was held jointly or separately.

On the *second* plea, we would observe that, by saying that there is no trace of evidence, the Judge substantially meant to say that there is no evidence from dakhillahs, chittahs, &c., on the record sufficiently credible and trustworthy to justify a decree in the plaintiff's favor on the basis thereof. This is a conclusion of fact and a matter of credibility and of the weight due to evidence, and not a point of error in law with which we can interfere in special appeal.

We, therefore, dismiss this appeal with costs.

The 23rd July 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Rent-suit—Security for rent—Jurisdiction—Huq-i-zemindary.

Case No. 1415 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 17th April 1869, affirming a decision of the Assistant Collector of that District, dated the 19th January 1869.

Jowahur Lall and others (Defendants), *Appellants,*

versus

Sultan Ali and others (Plaintiffs), *Respondents.*

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Baboo Khetturnath Bose for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondents

The fact that a sum of money was deposited by the lessee with the lessor as security for the payment of the rent does not remove a suit for rent from the jurisdiction of the Revenue Courts.

A claim for *huq-i-zemindary* is not cognizable under Act X., 1859.

Macpherson, J.—We think there is no want of jurisdiction on the part of the Lower Courts to deal with this case, because, although the transaction is said to be one of zur-i-peshgee, it is clear that it is not in the nature of a mortgage. The lessor received from the lessee the sum of Rupees 250 upon the execution of the lease; but that sum was not received by way of an advance or loan, but merely as a deposit by way of security for the due payment of the rent reserved. Although the Courts might not have had jurisdiction to deal with the case under Act X. of 1859, if the transaction were one of mortgage, we see nothing in the fact of this sum being deposited by way of security for the rent which removes the transaction from the provisions of Act X.

It appears, however, that the plaintiff has got a decree, not only for the arrears of rent due to him after giving credit for the Rupees 250 he held in deposit, but also for a further sum called *huq-i-zemindary*. It appears to me that, under Act X., all that the plaintiff is entitled to recover is the rent reserved by his lease, together with such interest as may be due thereon; and I think that the decree ought to be altered by striking out all that has been allowed as *huq-i-zemindary*, and interest upon that sum. In all other respects the decree of the Lower Appellate Court is affirmed, and the appeal is dismissed. I am of opinion that it ought to be dismissed with costs, inasmuch as the objection as to the *huq-i-zemindary* was not taken by the appellant either in the Courts below or in his written grounds of appeal filed in this Court.

Glover, J.—I also think that this special appeal should be dismissed with costs for the reasons given by Mr. Justice Macpherson. It appears to me quite clear, under all the circumstances of the case, that the document on which the plaintiff sued was an ordinary lease, and that the suit was properly brought in the Revenue Court.

The 24th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Usufructuary mortgage—Reserved rent—Jurisdiction—Limitation.

Case No. 912 of 1869.

Special Appeal from a decision passed by the Judge of Sarun, dated the 31st December 1868, affirming a decision of the Subordinate Judge of that District, dated the 18th April 1868.

Sheo Golam Singh and others (Defendants), *Appellants,*

versus

Roy Dinkur Dyal and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter, Mohesh Chunder Chowdhry, and *Doorga Dass Dutt* for Appellants.

Baboos Kallee Mohun Dass, Hem Chunder Banerjee, and *Bama Churn Banerjee* for Respondents.

Plaintiff had borrowed money on security of a zur-i-peshgee lease of property which, after some years, he sued to redeem by payment of an alleged balance claiming credit for hukajiree of the hypothecated land owing to him for the intervening period.

Held, that even if hukajiree was rent, the fact of there being a reserved rent would not alter the essential character of the arrangement which was admittedly one of an usufructuary mortgage.

Held that the words of Section 25, Act X., 1859, imply that a suit by a zemindar to recover a rent reserved on land which has been let out on a zur-i-peshgee lease should be brought in a Civil Court.

Held that, even if the remedy sought by plaintiff involved in its details different jurisdictions, yet, as it was in itself one, he was justified in bringing his suit in the Civil Court where alone he could obtain substantial relief.

Held that limitation could not for the first time be raised in special appeal.

Glover, J.—The plaintiff in this case gave a zur-i-peshgee lease of an 8-annas share of Mouzah Gunghana to the defendant on the 19th June 1861, and he brought this suit in 1867 to redeem his property by payment of what he alleged to be the balance of the zur-i-peshgee loan still due, *viz.*, Rs. 4,739-12-3. He claimed to have credit given him for various large sums which the mortgagee owed him as hukajiree of the hypothecated

land from 1861 to 1867, but which had not been paid.

The defendants alleged that the hukajiree had been duly paid year by year, and that more than the original amount of the mortgage-debt was still due, they having paid the entire amount of the hukajiree agreed on, whereas part of the land had been diluviated, and the hukajiree to be paid thereby rateably lessened.

Both the Courts below disbelieved the defendant's story about the diluvion and the payment of the hukajiree, and gave the plaintiff a decree for possession on his depositing Rupees 4,804-14-9—the amount still due to his mortgagee.

Three grounds of objection are taken in special appeal—

(1)—That the plaintiff had no cause of action, he not having tendered payment of the mortgage-money in full according to his agreement;

(2)—That the Civil Court had no jurisdiction to set off the sums claimed as hukajiree, such sums being in the nature of rent and only recoverable in a Revenue Court; and

(3)—That a large portion of the claim to hukajiree was barred by limitation.

None of these objections were taken at any time in the Courts below. They admittedly make an entirely new case for the special appellant, but it is contended on his behalf that, as the objections involve points of jurisdiction, they can, in accordance with several rulings of this Court, be taken up at any time.

The first of the grounds appears to me wholly untenable. The Subordinate Judge, who tried the suit in the first Court, considered that there was a cause of action to the plaintiff, and the defendant never contested that finding. On the contrary, he accepted it, and admitted that the plaintiff had ground for bringing his suit, by pleading to that suit as brought, and traversing the plaintiff's allegation as to non-payment of the hukajiree. It seems to me, therefore, that the special appellant is not now entitled to set up an entirely different state of things, or to deny in the last Court of appeal what he had virtually admitted in the Court of first instance and in the Lower Appellate Court.

In support of the second objection, it is argued that what the plaintiff asks for in this suit is credit for the rent of the land which was reserved to him by the mortgage-deed, and that the Civil Court had no jurisdiction to award what was, to all intents and purposes, rent.

Now, in the first place, it is a matter of considerable doubt as to whether hukajiree can be considered as rent. A Division Bench of this Court, in the case of Hyder Buksh *versus* Hossein Buksh, 4 Weekly Reporter 103, has held that it cannot so be considered. But if it be in its primary sense rent, I doubt whether, under the circumstances of this case, it cannot be held to have been claimed as such. The plaintiff does not ask the defendant to pay him his rent, but wishes to have credit given him in account for sums which the defendant ought to have paid him, but did not. And, moreover, the fact of there being a rent reserved would not alter the essential character of the arrangement between the parties, which was admittedly one of usufructuary mortgage, or excuse the mortgagee from giving an account; and if he was bound to give an account, on what pretence could he refuse to give credit to his mortgagor for the hukajiree, which he ought to have paid long before?

It appears to me also that the words of Section 25 of Act X. of 1859 imply that a suit by a zemindar to recover a rent reserved on land which has been let out on a zur-i-peshgee lease should be brought in a Civil Court, when there are disputes between the parties as to the amount of rent reserved, payable or paid. I understand the Section to make a wide distinction between a zur-i-peshgeedar and an ordinary tenant, and to restrict the action of the Court in respect of the former; and if a zur-i-peshgeedar be not a tenant in the sense of Act X., how can he be sued for rent under that Act?

But, even were it to be granted that hukajiree is purely rent, and that in this case it represented rent, and rent only, and that the defendant was in the position of a tenant, still the plaintiff would, it appears to me, have been justified in bringing his entire suit in the Civil Court as a Court of competent jurisdiction.

It has been frequently ruled by this Court that where a plaintiff seeks for a remedy which, although one in itself, involves in its details different jurisdictions, he is allowed to bring his suit in the Court that can give him substantial relief, although a portion of the thing claimed may be

derivable by itself in another Court. Thus a Civil Court can try a case of ejectment and mesne-profits, although the Revenue Courts have jurisdiction to hear and determine ejectment-suits; and a plaintiff is allowed to go where he can at once get a complete remedy, and is not obliged to institute two separate suits. Similarly, has it been held (Juggut Tara Chowdhrain *versus* Rajah Protap Chunder Singh, 3 Weekly Reporter, p. 155) that a suit for the ascertainment and demarcation of a shikmee talook is cognizable by a Civil Court, notwithstanding that it includes a claim for the assessment of rent thereon. The same principle is laid down in Juggo Mohun Sahoo *versus* Monee Lall Chowdhry, 11 Weekly Reporter 542, and also in the case of Rajah Neel Monee Singh *versus* Unnoda Pershad Mookerjee,* 1 Bengal Law Reports, Full Bench Rulings, 93, and there are many other similar rulings.

Now, in the case before us, the plaintiff sued to redeem his land by paying the amount of zur-i-peshgee money still due. To make out his case, it was necessary for him to show that certain sums of reserved rent had been retained by the defendant and applied to the reduction of the mortgage debt. And the Civil Court was the only one that could declare the mortgage satisfied, and give the plaintiff back his land. The only Court, in short, that could give the plaintiff any substantial relief was the Civil Court, and on the authority of the rulings above quoted, I think that there was no want of jurisdiction in the Subordinate Judge to try the case.

The third ground of appeal seems to be disposed of by the ruling of the Full Bench in the case of Payne *versus* Constable (1 Ben., Original Side, p. 49), in which it was laid down that limitation was not a question of jurisdiction. All the preceding rulings which allowed questions of limitation to be pleaded for the first time in special appeal, proceeded on the supposition, that limitation involved a question of jurisdiction and might therefore be taken up at any stage of the case.

If therefore limitation be not a question of jurisdiction, then under Section 350 of the Civil Procedure Act, the special appellant has no case, it having been found as a fact that the defendant never paid the sums reserved to the plaintiff.

I think that all grounds of special appeal fail, and that this special appeal should be dismissed with costs.

Kemp, J.—I concur in dismissing this special appeal. The points taken in special appeal were not raised below, and, on the whole case, I concur in rejecting them as untenable.

The 26th July 1869.

Present :

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Possession—Title — Parol agreement—Registration—Section 48, Act XX. of 1866.

Case No. 3132 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 25th August 1868, reversing a decision of the Moonsiff of that District, dated the 30th June 1868.

Salim Shaikh (Plaintiff), *Appellant,*

versus

Boidonath Ghuttuck (Defendant), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

The only presumption which a Judge, as a *matter of law*, is absolutely bound to make in favor of a person in possession, is that he is in lawful possession; for any purpose beyond this, possession is only evidence, to be taken conjointly with the other evidence (if any), by which it is sought to establish or impugn the title.

Though a purchaser under a parol agreement may, in some cases of immoveable property, and in all cases of moveable property, rely upon his title against the former owner, that title will not avail him in any case against a rival registered purchaser whether the property be moveable or immoveable.

By a "declaration" as distinguished from an "agreement," in Section 48, Act XX. of 1866, is meant a declaration of his wishes by the owner with reference to his property not amounting to a contract, and which the maker is at liberty to recall, whereas by an "agreement" is meant something which, if correct in point of form, is binding on the maker.

HELD that the strict provisions of the Registration Act as to registration do not apply where possession of the thing to be transferred is given by the owner to the transferree.

HELD that, as a general principle of law, the fact of obtaining possession affects the title, and has in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title.

Markby, J.—THE plaintiff in this case sued to recover two small plots of land which

* 10 W. R. 41.

we may for convenience call plot No. 1 and plot No. 2. His case was that he obtained a pottah for the two plots from the zemindar on the 16th Bysack 1275, and got into possession, but that he was ousted by the defendant on the 2nd Joist in the same year.

The defendant alleged that he had been continuously in possession for upwards of 12 years of plot No. 1, and that he had thereby acquired a right of occupancy therein. He also alleged that he obtained in 1273 from the zemindar, for a consideration, a verbal grant of the plot No. 2 in perpetuity at an annual rent, subject however to enhancement.

The zemindar denied that he had granted plot No. 2 to the defendant in perpetuity, but he said that he had granted him the two plots for five years and three years respectively, which periods expired in 1274.

There was no doubt about the plaintiff's pottah, which was registered. The Moonsiff found that the defendant had not been 12 years in possession of plot No. 1, but he found that the defendant's allegation that the zemindar had settled plot No. 2 with him in perpetuity was true. Accordingly, he gave the plaintiff a decree for possession of plot No. 1 only, and dismissed his suit in respect of plot No. 2.

Both parties appealed with regard to plot No. 2, the Lower Appellate Court says that, inasmuch as the defendant was in possession both before and after the grant of the pottah to the plaintiff, "the party seeking for an "ejectment from that possession must first "prove that the possession held by the "defendant was under a temporary settle-"ment. But the record shows that the "plaintiff, appellant, has been very weak on "that point."

This appears to me to be an extremely unsatisfactory mode of disposing of this issue of fact. A person in possession of property ought to be presumed to be in lawful possession until the contrary be shown; but this is, I believe, the only presumption which a Judge *as matter of law*, is absolutely bound to make. For any purpose beyond this possession is only *evidence*, to be taken conjointly with the other evidence (if any) by which it is sought to establish or impugn the title. The Principal Sudder Ameen seems to me to have entirely overlooked this distinction. He appears to think that he was bound as a matter of law, to presume every thing in favor of the defendant in possession. In this, I think, he was wrong. It was admitted that the defendant was only a tenant. There was evidence, on the one hand, that his tenancy had expired, and, on the other, that his tenure was perpetual. In this state of things, the possession of the defendant was only one of the elements to be taken into consideration in determining whether or no the defendant had, as he alleged, obtained a grant in perpetuity. That this was the true mode of considering the question seems to me clear, and I think it is in accordance with the decisions reported in the 10 Weekly Reporter, 477, and 11 Weekly Reporter, 301. It appears to me, therefore, that at present the question whether the zemindar had granted these lands to the defendant in perpetuity has not been tried.

It is said, however, by the plaintiff, respondent, that we ought not to remand the case for the trial of this issue, because, even if the defendant established the grant to himself in perpetuity, this verbal grant cannot prevail against the plaintiff's pottah which is registered; and Section 48 of Act XX. of 1866 is relied on. That Section provides that "all instruments duly registered under "this Act, and relating to any moveable or "immoveable property shall take effect against "any oral agreement or declaration relating "to the same property."

It would certainly appear, applying ordinary principles of construction to these words, that as against the holder under a registered title, the holder under a title derived from a parol agreement would be in all cases defenceless. If the case falls within Sections 17 and 49, the parol agreement cannot be given in evidence. If the case falls within Sections 18 and 49, the parol agreement is of no avail. And unless some distinction can be discovered which is not at first sight apparent, the purchaser, no matter whether of an article of food at a shop over the counter or of a piece of land worth Rupees 10,000, under a parol agreement, has, against a subsequent registered purchaser, a defective title.

The consequences of such a construction need hardly be pointed out. Probably no one who has purchased any of the ordinary articles of daily use or consumption since 1866, would be able to make out a safe title to them, nor would it be possible to acquire a safe title to the most trivial thing imagin-

able without the expensive and troublesome formality of a registered instrument.

I think it quite impossible that the Legislature intended the Act to apply to such cases as these, and it is, therefore, necessary to search for some distinction which will enable us to escape from this conclusion. The choice seems to me to be between these three courses: either (1) to hold that when possession is delivered, the strict rules laid down in the Registration Act do not apply; or (2) to put some limit upon the words "declaration or agreement" in Section 48; or (3) to make some distinction between moveable and immoveable property.

The most obvious—perhaps the most satisfactory—distinction would have been the almost universally recognized one between the modes of acquiring moveable and immoveable property. I may observe that the consideration whether or no this distinction exists, does not bear directly upon the question before us, because the distinction, if any, is in favor of moveable property, and this is the case of an interest in immoveable property. But it bears generally upon the interpretation of the Act. For, to my mind, it does not involve any absurdity to require in all cases a registered written instrument to complete the title to immoveable property, so that, if this distinction could be established, there would be much less difficulty in carrying out in their integrity the provisions of the Act. But it so happens that, contrary to usual principles, a distinction between the modes of acquiring moveable and immoveable property is not recognized by general Hindoo Law, which requires the same formalities for the acquisition and transfer of all kinds of property. We must, therefore, look for the distinction to the Act itself. But though the Act makes a broad distinction between the necessity of registration of moveable and immoveable property in Section 17, it distinctly excludes any such distinction in Section 48. Though, therefore, a person may, under a parol agreement in some cases, at any rate, of immoveable property, and in all cases of moveable property, rely upon his title against the former owner, this title will not avail him in any case against a rival registered purchaser, whether the property be moveable or immoveable.

Next, what is the proper sense to be attributed to the words "declaration or agreement" in Section 48? With regard to the first of these words, I imagine that by a *declaration* as distinguished from an *agreement*, is meant a declaration of his wishes by the owner with reference to his property, not amounting to a contract, and which the maker is at liberty to re-call; whereas, by an "agreement" is meant something which, if correct in point of form, is binding on the maker. And the question seems to be this, whether under the words "agreement or declaration" in Section 48, the Legislature intended to include all the documents which *must* or *may* be registered under Sections 17 and 18. If I adhere to the ordinary and (as I should say) correct meaning of the words, I come to the conclusion that they did include all such documents. Every document there specifically mentioned is either a "declaration" or an "agreement," and a division of documents into "declarations" and "agreements" does appear to be a tolerably correct and complete one. It has, indeed, occurred to me, that it is just possible that the word "agreement" may have been meant only to refer to that kind of agreement which was as yet entirely unperformed—that kind of agreement which English writers sometimes call "executory." Such a construction is not altogether without precedent. Some such restricted meaning has been put upon the word "agreement" in the English Statute of Frauds by the decision of the Court of Queen's Bench in Donellan *versus* Read, Volume III., Barnwall and Adolphus's Reports, 899. But that decision, though long acted on, has, I think, generally been considered to do violence to the words of the Statute.—(*See* Smith's leading cases, 5th Edition, Volume I., page 284.) And I am bound to say, I do not understand upon what reasoning it is founded. I think, therefore, the word "agreement" in this Section must bear its ordinary meaning.

There yet remains the first of the three alternatives which I mentioned above, namely, to hold that the strict provisions as to registration do not apply where possession of the thing to be transferred is given by the owner to the transferree. It is true that there is nothing in the words of the Act which expressly authorizes such a distinction; but, on the whole, I cannot help thinking that it must have been intended. It would be very strange, if just when the Law Commissioners were reporting that the provisions of the English Statute of Frauds, which require contracts to be in writing, were "not suited to the habits and present

condition of the people in India," that the Legislature here should pass a Registration Act which makes, not only a writing, but a registered writing, necessary for every transaction relating to an interest in land or goods of whatever value, which would be a Statute of Frauds for India going far beyond the Statute of Frauds in England in its requirements, and extending over all the ordinary transactions of daily life. I think the Legislature cannot have intended the provisions of Sections 17, 18, and 48, to apply to cases of transfer of an interest in moveable property where the transfer is followed by putting the transferree in possession; and if they do not apply to this case when the subject of transfer is moveable property, neither do they apply to a similar case where the subject of the transfer is immoveable property.

It certainly seems that this view is not altogether in accordance with that which has been taken by another Division Bench when discussing the Registration Act of 1864 in a case reported in 10 Weekly Reporter, page 231. In that Act there does not appear to be any clause precisely similar to Section 48 of the Act of 1866; but Section 68 of the Act of 1864 is similar to Section 50 of the Act of 1866, giving priority to registered deeds over unregistered ones even in cases where the registration is not compulsory. And upon that Section, Phear and Hobhouse, *JJ.*, held that a registered bill of sale must prevail over a prior parol sale, although the purchaser had obtained possession under the latter. They say, "The parol contract can-"not rank higher than an 'instrument,' and "it seems to us that whether possession was "had under the first instrument, namely, "the first parol contract of sale, or not, is "immaterial so far as regards the operation "of the Act. *The possession does not "affect the title. It only shows that the "person had succeeded in obtaining enjoy-"ment of the property under his title.*"

I confess that this view seems to me hardly in accordance with the view expressed by Steer and Phear, *JJ.*, in a case reported in 4 Weekly Reporter, page 50, where those Judges are reported to have held that Act XIX. of 1843 does not apply to a case when enjoyment has actually taken place under the first deed; and, with great respect, I must say that I am unable to assent to the proposition that, as a general principle of law, "possession," that is, as I understand it, the fact of obtaining possession, does not affect the title. I have, indeed, generally understood that the delivery of possession is not considered absolutely necessary to the acquisition of title under modern Hindoo Law. The Privy Council have recently expressed a doubt upon this point.—(*See* 2 Bengal Law Reports, 117, Privy Council.)* But however this may be, there is, I think, no reason for saying that, under modern Hindoo Law, possession may not sometimes complete an otherwise defective title.

The acquisition of possession has in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. Under the Roman Law, it was absolutely essential—*traditionibus et usucapionibus non nudis pactionibus rerum dominia transferuntur*—and this is what a Roman lawyer considered as the *natural*, by which he meant the *universal*, mode of acquiring property. The same notion prevailed, and still prevails to a greater or less extent, in every country in Europe. The French Code recognizes it emphatically in the phrase "*enfait de meubles la possession vant titre.*" The necessity in some cases of delivery of possession in order to complete title is also, as is well-known, recognized by the Mahomedan Law. And there is no ground for saying, as far as I can see, that its effect is ignored by the Hindoo Law. On the contrary, I imagine the title of a purchaser from a person who is not the true owner, which, under certain circumstances *is*, or certainly *was*, recognized by the Hindoo Law (*see* Jugganatha's Digest, Book II., Clause 2, Section II., para. 48), depended entirely on possession. In the Mitakshara, Chapter III., Sections 3 to 6 of the portion contained in the work of W. H. Macnaghten, there is a very elaborate discussion on possession, and in Section 6 there occurs this passage: "It has been shown that possession "when accompanied by a title, is evidence "of right; but lest it should be supposed "that a title without possession affords equal "proof, it is declared 'where there is not "the least possession, there the title is not "weighty.' Such is the intent. With "whatsoever title there is not the least "occupancy, in that title there is no suffi-"cient weight." These passages seem to me to show that, even in Hindoo Law, by obtaining possession, a man not only obtained enjoyment under his title, but that he went through a ceremony which in some cases was highly efficacious in completing his title.

Moreover, the decisions on the earlier Registration Act of 1843 appear to me to be

* Rajah Saheb Perladh Singh, 12 W. R., p. 6.

capable of reconciliation only on the view that the acquisition of possession has the effect of completing an otherwise defective title. Some of the decisions on that Act in which the unregistered transactions have been supported rest upon the ground that the earlier Act only applies when the rival claimants are both purchasers or donees, or both mortgagees, and not when one is a purchaser and the other a mortgagee. That is the ground of the Full Bench decision of the High Court in 5 Weekly Reporter 61, and the decision of the late Sudder Court of the 25th September 1852. But in two cases—one reported in 1 Hay 261, and the other decided on the 29th May 1869, by Kemp and Glover, JJ. (Special Appeal No. 520 of 1869*) —it has been held that a registered deed of sale will not prevail against an unregistered sale or gift of prior date. In both these cases, however, the first purchaser had got into possession, and that fact is relied upon in the judgments. Upon this ground, and upon this ground alone, as it appears to me, these judgments can be supported. There is also the decision in 4 Weekly Reporter to which I have already alluded. On the other hand, in a case† reported at page 197, 1 Bengal Law Reports, Appellate, it was held that a title derived from a registered mortgage was, under the Act of 1843, a better title than that derived from a previous mortgage which was unregistered. This last, I must say, seems the only possible interpretation of that Act, if it applies; and in the case in 1 Bengal Law Reports, it did apply, because the first mortgagee had *not* obtained possession.

The result is that, in my opinion, the case ought to be remanded for a decision upon the question whether the zemindar granted to the defendant plot No. 2 in perpetuity; and that, if he did so, effect ought to be given to the grant notwithstanding the subsequent registered pottah.

With regard to plot No. 1, the finding of the Lower Appellate Court is also unsatisfactory. The first Court had found that the defendant's allegation of a right of occupancy by 12 years' possession had not been proved. The defendant appealed against the decision, and the Principal Sudder Ameen reverses this part of the Moonsiff's decision, but his finding is most indefinite. He merely says that "the evidence produced by the defendant in support of his possession is conclusive enough." But there was no dispute about the defendant's having been in possession; the dispute was as to *how long* he had been in possession, and the Principal Sudder Ameen ought, before reversing the decision of the Moonsiff, to find distinctly that the defendant had been 12 years in possession, and had been so under such circumstances as to give him a right of occupancy.

I think, therefore, that the case ought to be remanded for a re-trial of the two questions which I have pointed out.

Jackson, J.—I concur.

* 11 W. R., 559.

† Proladh Misser, Appellant, 10 W. R. 291.

The 26th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Objection under Section 246, Code of Civil Procedure—Attaching creditor's right of action.

Case No. 200 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 5th December 1868, affirming a decision of the Moonsiff of that District, dated the 15th June 1868.

Chintamonee Sein (Plaintiff), *Appellant,*

versus

Issur Chunder Chunder and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

When the same property is attached in execution of different decrees, and all the attachments are removed in consequence of the claim of an objector under Section 246, Act VIII., 1859, it is not necessary for each attaching creditor to bring a separate suit. If one of the creditors brings a suit against the objector, and therein sets up the right of ownership of the original judgment-debtor, he effectually gets rid of the claim of the objector, and leaves the road open for other parties having a lien upon the property.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court is erroneous. The suit relates to certain property which belonged originally to one Alla Hafez. This person mortgaged the property in question to Banee Madhub on the 12th Aughran 1268. Immediately afterwards, that is to say, on the 12th Pous, he mortgaged the same property over again to Issur Chunder, and Issur Chunder, it seems, had

no notice of the first mortgage. Both mortgagees brought suits against Alla Hafez; and got decrees for the money advanced, respectively, with a declaration that the property was liable to be sold in satisfaction of their decrees, and they both subsequently attached the property.

Pending the attachment, one Dhone Kisto preferred a claim, and that claim was allowed under Section 246 of the Code of Civil Procedure. Banee Madhub, who after this sold his rights to the present plaintiff, Chintamonee, took no steps immediately to get rid of this order; but Issur Chunder, the other mortgagee, did bring a suit within one year, and got the claim of Dhone Kisto set aside, and established the rights of the judgment-debtor. He then proceeded to have the property sold under his own decree, and he purchased it himself. Banee Madhub's vendee, Chintamonee, now brings this suit in his turn against Issur Chunder, to have it declared that the property may be sold in satisfaction of his earlier lien. This suit has been thrown out by the Courts below, not on the ground that, as alleged by Issur Chunder, the mortgage-transaction between Banee Madhub and Alla Hafez was one of a fraudulent character, but on the ground that Banee Madhub, by omitting to bring any suit within one year after the allowance of Dhone Kisto's objection, had lost his right of lien upon the property, and was effectually concluded by that order.

It does not seem to me that the terms of Section 246 have the effect of completely barring any party against whom an award is given under that Section, whatever circumstances may afterwards happen. I do not think that, if this property had been attached by several creditors, and all those attachments had been removed in consequence of the claim of Dhone Kisto, it was necessary for each attaching creditor to bring a separate suit; but I think that, when one of those creditors brought a suit against the objector, and in that suit set up the right of ownership of the original judgment-debtor, he effectually got rid of the claim of the objector, and left the road open for other parties having a lien upon the property. I think, therefore, that the present plaintiff, who represents the earlier mortgagee, is not debarred by his omission to bring a separate suit under Section 246, but that he is quite competent to maintain his present contention against Issur Chunder, and to enforce the lien which he had upon that property under the mortgage effected by Alla Hafez. I think, therefore, that the decision of the Court below must be set aside with costs.

Markby, J.—I am of the same opinion.

The 26th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Mortgage—Evidence—Sections 17 and 49, Registration Act.

Case No. 174 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 10th June 1868.

Nilambur Singh and others (Defendants), *Appellants,*

versus

Futteh Chund Shahoo (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Mr. J. S. Rochfort for Respondent.

So far as a *bye-wil-wufa*, or deed of conditional sale, is a mortgage, it creates an interest in immoveable property, and its registration is compulsory under Clause 2, Section 17 of the Indian Registration Act; but, so far as it is a covenant or agreement for the re-payment of the money lent on a particular day, it is not an instrument requiring registration, and it is admissible in evidence notwithstanding the provisions of Section 49.

Norman, J.—THIS was a suit to recover 5,500 rupees, with interest at 2 per cent. a month from the 2nd of Assin 1274.

The facts established by evidence are that the defendants borrowed Rupees 5,500 from the plaintiff, to receive which defendants Nilambur, Permanund, and Bhiknath executed a deed containing an agreement that they would repay the principal and interest at 2 per cent. per month in the month of Srabun in the Fuslee year 1274, and in the event of non-payment thereof would sell Mouzah Bhowaneepore and other properties to the plaintiff. The defendants denied the execution of this instrument of conditional sale before the Registrar, and consequently, as the instrument could not be registered, the plaintiff sued to recover back the money with interest.

The Principal Sudder Ameen held that the instrument, as a *bye-bil-wufa*, or deed of conditional sale, was one which it was necessary to register. In that view we do not concur. So far as it was a mortgage or deed of conditional sale, it no doubt created in the mortgagee an interest in the immoveable property to which it relates, and therefore, under Section 17, Clause 2, registration was compulsory. But so far as it is a covenant or agreement for the re-payment of the money lent on a particular day, it is not an instrument which requires registration; and therefore, in such character and for such purposes, it is, in our opinion, admissible in evidence notwithstanding the provisions of Section 49.

The cases of Woodoy Chand Jana *versus* Nitye Mundul, 9 Weekly Reporter, page 111, and Gobind Pershad *versus* Nandoram,* 1 Bengal Law Reports, App., 192, are in point. We must, however, express our dissent from the proposition that the instrument in the case last cited did not directly create a right in immoveable property, or as such requires registration.

As regards the three appellants Nilambur, Permanund, and Bhiknath, the appeal must be dismissed with costs.

As regards the defendant Joynath—he alleges that he was an infant at the time of the execution of the bond. The bond was, in fact, not executed by him, but by his brother Bhiknath in his name. The Principal Sudder Ameen finds, first, that it was not proved that he was a minor at the time of the execution of the deed, and then determines that as, if he had been a minor, he would have been bound by the acts of his elder brother Bhiknath as his guardian, so, whether minor or not, he is bound in the present case. Possibly, he may have been bound if the mortgage had been regularly completed. But the respondent's vakeel admitted that he could not show that Joynath was a party to, or in any way bound by, the wrongful acts of the defendant Bhiknath. The result will be that the suit, as against Joynath, must be dismissed without costs.

The decree of the Lower Court will therefore be modified. The plaintiff will recover from the defendants Nilambur, Permanund, and Bhiknath 5,500 rupees, with interest at 2 per cent. per month from the 2nd of April 1874 to the date of this decree of this Court, with costs both in this Court and the Court below, and interest at 2 per cent. on the amount of the decree.

* Gopal Pershad, Appellant, 10 W. R. 252.

The 26th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Reviews—Fresh evidence—Section 335, Act VIII. of 1859.

Case No. 27 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of East Burdwan, dated the 27th July 1868, affirming a decision of the Moonsiff of that District, dated the 28th March 1867.

Beharee Lall Nundee and another (two of the Defendants), *Appellants,*

versus

Troyluckho Moyee Burmonee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Where a Lower Appellate Court admitted a review with the object of taking into consideration a material issue which it had omitted to consider at the trial:

HELD that, having admitted the review on grounds independent of fresh evidence, it was competent for the Court, under Section 355, Act VIII. of 1859, to admit fresh evidence, if required, to enable it to pronounce a satisfactory judgment, or for any substantial cause.

Markby, J.—IN this case, the plaintiff sued to establish her right as a co-sharer in certain property. She obtained a decree in the first Court, but this decree was set aside on appeal. The plaintiff then applied for a review on the ground that a material issue in the case had not been decided; that through inadvertence a certain document had not been brought to the notice of the Court on the argument on the appeal; and that she was now ready to produce additional evidence in support of the same issue. Notice was given to the defendant; and after hearing the parties, the Judge made the following order:—

"This day the petition for review came "to be argued before me. It appears from "the original judgment that the Court did "not express any opinion on the point as "to whether the sale impugned was held "in a private manner, as alleged by the "plaintiff, or not. This, no doubt, is a de-"fect which ought to be rectified by review.

"Again, a certain *challan* which was in the "record has not at all been noticed in the "judgment. The pleader for the plaintiff "says that it altogether escaped him to "bring it to the notice of the Court. The "plaintiff has also filed copies of certain "other petitions, with the present petition, "to show that the defendant talookdar was "perfectly aware that she was an 8-annas "co-sharer of the tenure. I think it right "to ascertain the point of fraud or no fraud "with reference to the said documents. "The review is accordingly admitted to "try the said two points."

When the case was heard in review, the Judge reversed his former decision and affirmed the original decree.

From this decree the defendant has now appealed, and the first substantial objection which he has made is, that the Judge was wrong in admitting the review without assigning any reason why the additional evidence was not produced at the trial.

It appears to me, however, on reading the above order, that the object of the review was to take into consideration a material issue which the Court had omitted to consider. Why the Court had omitted to consider it is not very clear, but I am not prepared to say that this was not a legal ground for reviewing a judgment.

It is still, however, argued that the Appellate Court had no power to admit the fresh evidence. That clearly was so under Section 376, because it is admitted that no reason was assigned before the Judge on the application for review why the evidence was not produced at the trial.

But there being sufficient grounds for admitting the review independently of the fresh evidence, I think the question as to the admissibility of that evidence turns on Section 355. I do not think the Judge admitted the review in order to admit the fresh evidence, but having admitted the review thought it proper that the fresh evidence should be received.

Section 355 provides that the Appellate Court may admit fresh evidence, if the evidence is required to enable it to pronounce a satisfactory judgment, or for any other substantial cause. The latter part of the Section says: "Provided that, whenever "additional evidence is admitted by an Ap-"pellate Court, the reasons for the admis-"sion shall be recorded in the proceedings "of such Court."

The Privy Council have held, as seems to me they must hold, that this Section does not make the act of the Judge in recording the reasons for receiving the evidence "a "condition precedent to the reception of "the evidence" (Sutherland's Privy Council Judgments, page 68); but this Court has nevertheless held in some cases (10 Weekly Reporter 228 and 378) in special appeal that the evidence has been improperly received and has on that account set aside the decision. I imagine that these cases rest upon the ground that it was considered that there the Judge below had never considered the matters at all with reference to the provisions of Section 355, and had never decided upon that Section that the evidence ought to have been received. One of them is so explained by Mr. Justice Hobhouse in special appeal No. 666 of 1869. I do not at all question the authority of these decisions, but I am not prepared to go to the length of saying that in this case the Judge has not considered the matter in accordance with the law. He says he considers that it is proper to ascertain the point of fraud or no fraud with reference to the documents then produced for the first time. If it were necessary to record the reason for the reception of the new evidence in order to render the new evidence legally admissible, the Judge has not done so. But as it is conclusively settled that this is not necessary, then, I think, we have nothing before us which will justify us in saying that the Judge has acted erroneously. This seems to me to be in accordance with the view taken by Bayley and Hobhouse*, *JJ.*, in the special appeal No. 668 of 1869, in which decision I concur.

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* The 8th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse *Bart., Judges.*

Case No. 668 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 15th August 1868, reversing a decision of the Moonsiff of Bohur, dated the 30th November 1867.

Radhanath Dhoopee and another (two of the Defendants), *Appellants,*

versus

Luckhee Kant Paul and another (Plaintiffs), and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Romesh Chunder Mitter, Kalee Mohun Doss,* and *Kalee Kant Sein* for Appellants.

Mr. G. C. Paul and *Baboos Hem Chunder Banerjee* and *Bhyrub Chunder Banerjee* for Respondents.

I fully accede to the necessity of a very careful exercise of the power to receive fresh evidence given by Section 355, and I think it quite likely that the exercise of that power frequently leads to great injustice, as it manifestly must, unless such care be taken.

Hobhouse, J.—In this case, the plaintiffs sued to obtain possession of a certain howla tenure alleged to be situated in the talook of the zemindar-defendants, on the ground that they had been dispossessed of the said tenure by the two defendants, who are now the special appellants before us.

The said two defendants alleged that the lands in question were not howla lands at all, but were the khas lands of the zemindar-defendants which had been sold to them as such in the month of Falgoon 1272.

The issue between the parties was, and that issue has been admitted on all sides to have been correct, "whether the disputed howla called Brojo Mohun "Paul appertained to the talook in question, and whe-"ther the plaintiffs had been in possession thereof "and were dispossessed, as alleged, by the defendants."

On this issue, the first Court found against the plaintiffs, and dismissed their suit.

The Lower Appellate Court reversed that decision, and gave the plaintiffs a decree for possession.

There are three grounds taken in special appeal before us. The *first* is to the effect that the Lower Appellate Court has based its judgment upon evidence which was improperly admitted by it under the supposition that it was entitled to admit it by the provisions of Section 355, Act VIII. of 1859.

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On the *first* objection, we understand the argument of the learned Advocate-General to result to this, *viz.*, that in taking the evidence of two certain persons, Kalee Pershad Sein and Bhyrub Chunder Doss, the Lower Appellate Court has not acted under any sanction given under the provisions of Section 355, but it has in reality of his own motion supplemented certain facts of the original case which the plaintiffs attempted to prove in the first Court, and to show that this was an error in law. The learned Advocate-General relies on a case to be found in page 228, Volume X., Weekly Reporter. In that case, the Judges remark that the Lower Appellate Court has not given any reason for summoning for the first time a certain witness; that if the Court had any reasons at all, they were nothing more in effect than this, *viz.*, that the defendant had failed to give material evidence which it was in his power to give in the Court below, and that, on the representation given by the Judge of the course taken by him, it amounted very nearly to saying that he, finding that he was unable, on the state of the evidence on the record, to give a decision on the evidence, had *therefore* called for the additional evidence of the defendant himself for the purpose of giving him an opportunity of proving certain matters. In such a case, the Judges in that decision thought that the evidence should not have been admitted, and they therefore rejected it. The grounds stated by the Lower Appellate Court in this case for admitting the evidence of the two persons mentioned are these: "The case being called on for hearing on the 29th July, the Court, with reference to the nature and the circumstances of the case, considered it necessary for the proper decision of the case to take the depositions of the owners of the parent talook," *viz.*, the witnesses I have referred to.

At the very first sight, therefore, this case seems to us materially to differ from that on which the learned Advocate-General relies. In that case, no reasons were given at all, or if there were any reasons given, they simply seemed to express a determination on the part of the Court to prove for the party that which he had failed to prove for himself; but here the case seems to us to be very different.

Jackson, J.—I think this case not free from difficulty, but, on the whole, I concur in the judgment proposed.

It is not so clear to me that the Subordinate Judge meant by the first part of his order to admit the review, and, having done that, then by the subsequent words to make an order under Section 355 to permit fresh evidence to be given. My first impression (and one which I have not quite got rid of) was that both the curious inadvertence admitted by the Subordinate Judge, and the necessity of letting in the fresh evidence, had worked upon his mind as reasons for granting the review; but either construction is possible, and, that being so, I think we ought to adopt that one which at once favors a full enquiry, and enables us to support the decision of the Court below.

In the first place, the Lower Appellate Court has given its reasons for admitting the evidence in question, and those reasons seem to us to be almost word for word the reasons on which the law permits such evidence to be received. The terms of Section 355, Act VIII. of 1859, applying to this case are these: "If "the Appellate Court requires any witnesses to be ex-"amined to enable it to *pronounce a satisfactory judg-"ment, or for any other substantial cause*, the Appel-"late Court may allow any such necessary witnesses to "be examined, whether such witnesses shall have been "previously examined in the Court below or not;" provided only that the Court records its reasons for the admission of such evidence. Now, it seems to us that the meaning of the Court was this—that it wishes to make up its mind upon a point before it, and yet could not, in the words of the law, pronounce a satisfactory judgment on the point without taking the evidence of certain necessary witnesses, that is, as we read the law, witnesses necessary to enable it to pronounce a satisfactory judgment; and obviously the two witnesses selected were the very best that could have been selected for the purpose. They had not been examined by either side; it was therefore reasonable to suppose that they would give impartial evidence. They were persons who could give the best evidence either on the one side or on the other. They were the zemindars of the talook, and would therefore know whether this howla had existed in that talook. They were also the vendors of the defendants, special appellants, and would, therefore, know what it was that they had or had not sold to the appellants, and there was a further reason for considering that they were likely to be impartial witnesses in the fact that they had no longer any interest to speak anything but the truth, for they had ceased to be the proprietors of the talook. There were, therefore, we think, obviously the best reasons for considering that they were necessary witnesses, and the terms of the law seem to us to entitle the Principal Sudder Ameen to call for any such witnesses in order to his pronouncing a satisfactory judgment. We are of opinion, therefore, that the first objection taken by the special appellants fails.

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I therefore concur in dismissing the appeal, but I think this is not a case in which the appellant ought to be ordered to pay costs in this Court.

The 26th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Notice of enhancement—Specification of grounds —Sections 13 and 17, Act X., 1859.

Case No. 168 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 6th November 1868, reversing a decision of the Deputy Collector of that District, dated the 26th September 1867.

Grish Chunder Ghose (Plaintiff), *Appellant,*

versus

Issur Chunder Mookerjee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kalee Mohun Doss* for Appellant.

Baboos Ashootosh Dhur and *Bungshee Dhur Sein* for Respondents.

In a notice of enhancement of rent, a landlord is bound in specifying the ground of enhancement to state the particulars of which that ground is composed; *e. g.*, when enhanced rent is claimed on the ground of "excess land" being held by the ryot, the notice should mention the quantity of such excess, and how it has been ascertained.

Mitter, J.—I AM of opinion that this special appeal ought to be rejected.

With reference to the first point, I observe that the Lower Appellate Court has distinctly found that the special appellant has failed to prove that the productive powers of the land held by the defendant, respondent, have increased otherwise than by his agency. This is a finding on a disputed question of fact, and we have no power to interfere with it on special appeal.

With reference to the second point which relates to the "excess lands," I see no reason whatever to interfere with the judgment of the Lower Appellate Court. It is true that the special appellant did state in the notice of enhancement that the defendant was holding "excess lands" in his possession, but the notice is altogether silent as to the amount of such "excess lands." No information is given as to the quantity of land for which the defendant was already paying rent, or as to the quantity which he was found to be in possession of by actual measurement. Such a notice is not, in my opinion, sufficient to meet the requirements of Section 13, Act X. of 1859. That Section distinctly provides that the notice must *specify* the rent to which the ryot will be subject for the ensuing year, *and the ground* on which the enhancement is claimed. Now, in *specifying* the ground of enhancement, the landlord is bound, in my opinion, to state the particulars of which that ground is composed.

The ground of enhancement which relates "to excess lands" is described in Section 17 of the Act as follows: "That the quantity of "land held by the ryot has been proved by "measurement to be greater than the quantity "for which rent has been previously paid by "him." This description, no doubt, is a very general one, but the Legislature could not have possibly adopted a *particular* description when it was laying down a general rule to be applied to an infinite variety of particular cases. It would be highly unreasonable to argue from the generality of the above description that, when a particular landlord wishes to enhance the rents of a particular ryot, it would be a sufficient compliance on his part with the requisitions of Section 13, if the notice served by him under the provisions of that Section is a mere repetition of the general words used in Section 17, without any reference whatever to the facts and circumstances of the particular case. Thus, for instance, the party whose rent is to be enhanced is described in Section 17 by the general expression "the ryot," and it would be simply absurd to contend that that general description would be sufficient to meet the provisions of the law, without specifying in the notice the name of the particular ryot whose rent is sought to be enhanced. When the Legislature laid down so imperatively that *no ryot* who holds land without a written engagement *shall* be liable to pay any higher rent than the rent payable for the previous years, unless a notice has been served upon him on or before the month of Chyet, specifying the rent to which he will be subject for the ensuing year, and the *ground* upon which the enhancement is claimed; it must be, as a matter of course, admitted that it had a particular object in view. This object, as far as I can judge, appears to have been

that the ryot should be furnished in due time with the fullest information regarding the nature, the extent, and the ground of the claim for enhancement, in order that he might be placed in a position to exercise his discretion as to whether it would be advisable for him either to submit to that claim, or to resist it wholly or in part, or to avoid it altogether by giving up his holding on or before the commencement of the year for which he is called upon to pay the enhanced rent. The question, therefore, reduces itself to this: "Does a notice which merely states "that the ryot is in possession of 'excess "lands' fulfil the object indicated above?" I am clearly of opinion that it does not. The ryot is not told what the 'excess' is, nor is he supplied with any information as to how it is made out. How then is he to judge whether the demand of his landlord is reasonable or otherwise? How is he to ascertain, before the month of Chyet expires, whether it would be advisable for him to submit to the demand, or to contest its legality before a Court of Justice, or to avoid it by giving up the lands in his possession on or before the commencement of the year for which he is called upon to pay the enhanced rent?

It may be said that the ryot is at least expected to know for what quantity of land he has been hitherto paying rent. Admitting the correctness of this argument as far as it goes, how is the ryot to know that his landlord is also agreed as to this quantity? Suppose the ryot knows that he has been paying rent for 50 beegahs; but the landlord chooses to think that he has been paying rent for 25 beegahs only, and that he is, therefore, bound to pay enhanced rent for the remaining 25 beegahs in his possession. If the landlord does not choose to specify either of these particulars in the notice, how is the ryot to know whether the demand is reasonable or otherwise, and in the absence of such knowledge how is he to ascertain in proper time what line of action would be the best for him to adopt?

At any rate, it is beyond all dispute that the ryot's knowledge in respect of this particular would afford him no *data* for ascertaining the quantity of "excess land" which his landlord supposes he is in possession of, and for which he is called upon to pay enhanced rent. In the absence of all information on this important point, he is almost as much in the dark as if he were never served with any notice at all; and to hold that a notice which does not supply that information is sufficient in law would be to perpetuate the very mischief which the Legislature has been so anxious to prevent, namely, the mischief of a ryot being suddenly called upon to meet an unknown and an undefined demand, when it is too late for him to avoid it by giving up the holding on account of which it is made.

But, be this as it may, the appellant is not entitled to obtain any enhanced rent for any "excess lands," inasmuch as he has given no evidence whatever to prove what that excess is. It is true that the Ameen who was deputed to hold a local investigation in this case has found that the defendant is in possession of a particular quantity of land; but without expressing any opinion on the proceedings of the Ameen, as I am sitting here in special appeal, and assuming that the result of his measurement is correct, the mere fact that the defendant is in possession of a particular quantity of land taken by itself is mathematically insufficient to prove "the excess." In order to prove such excess, the landlord is bound to show in the first place for what quantity of land the ryot has been hitherto paying rent, and then to establish the quantity of land which he is actually occupying. It is admitted that the special appellant has given no evidence whatever on the first point; and even if the Ameen's report is taken as proof of the second, it is perfectly clear that the existence of the alleged excess would not be made out.

It has been said that the defendant having admitted in his written statement that he was in possession of a certain quantity of land, the difference between that quantity and the quantity found in his possession by the Ameen must be taken as the excess for which the appellant is entitled to obtain enhanced rent. But, in the first place, it is clear that the statement made by the defendant, to the effect that he was in possession of a certain quantity of land, does not necessarily go to show that he was actually paying rent for that quantity, and for no more; and in the next place it is equally clear that the utmost use which the appellant can make of that statement is to treat it as a piece of evidence in the cause. Unfortunately, however, for the appellant, this statement has been rejected as untrue by the Lower Appellate Court, and indeed

erroneous in law, and must be reversed, and the case remanded for re-trial.

The plaintiffs sued for certain lands which they said had diluviated from certain kismuts of their talook and had re-formed and then accreted to their kismuts Kolaparah and Aowal.

The defendant's case was that the lands had accreted to lands that he already held, which last were lands that had re-formed and were held by him as such, and as appertaining to kismut Goburando. The defendant had also obtained a possessory award under Section 318, Act XXV. of 1861, for the lands in suit.

The first Court gave the plaintiffs a decree, limiting it to lands actually belonging to their own talook.

The Lower Appellate Court upheld that decree.

There are two points raised in special appeal, *firstly*, whether, as Mr. Paul contends, this is a case neither of accretion nor of re-formation, but of water receding and lands thereupon accreting to lands already in the defendant's possession, and therefore not governed by Sections 3 and 4, Regulation XI. of 1825; and, *secondly*, whether the judgment of the Lower Appellate Court contains a legal finding of the title of the plaintiffs either by re-formation or accretion.

I do not think it necessary to give any judgment on the *first* point as it is not pressed, and, in fact, does not arise, for the case will have to be decided on another ground.

On the *second* point, I would observe that the whole judgment of the Lower Appellate Court is contained in this simple passage: "There can be no question of "the plaintiffs' title to the kismut Aowal "and Kolaparah, or of their possession of "their original remaining lands now on the "main land, neither is there any question "of the defendant's title to his kismuts "as pertaining to his talook Captain Moore, "*but the argument of re-formation of these* "*in their former position cannot stand* "*against the plaintiffs' title by re-formation* "*in a site adjoining the remains of their* "*old land, nor does the decree which the* "*defendant obtained against Government* "*bar the plaintiffs from asserting their* "*right by accretion to new alluvial land.*"

Now, these words in their ordinary meaning contain no clear finding as to whether the plaintiffs' title has been held by the Judge to have been proved under Regulation XI. of 1825—either because of those lands having been *identified to be re-formed on the original site of diluviated lands of the estate*, or whether the Judge thinks that those lands are *accretions* to the plaintiff's estate of Aowal and Kolaparah *by recession of the river*.

It is contended by the Counsel for the special appellant that, if we take the judgment in connection with the written statement, and read it by the light of that written statement, we shall find that the Lower Appellate Court has found the plaintiff's title by accretion; but the words underlined are words which, in their ordinary construction, may be taken to mean a title either by *re-formation* only, or by *contiguity*, or both; and there are no express terms showing that the Judge has found the plaintiff's title by *accretion*; whereas the law on this point looks to proof of title by *accretion* as one specific title independent of that of re-formation on the original site.

Again, it is not the written statement but the issues framed between the parties under the Procedure Code which ought to be the index of what has been and what has to be adjudicated; and when we look to the issues that were agreed to between the parties in the Court below, we find one running to this effect: "Are the lands in dispute *shikust* "*pyust* of the kismuts alleged by the "plaintiffs and an accretion to kismuts Aowal "and Kolaparah, or are they *shikust pyust* "and contiguous accretion to kismuts Go-"burando, &c., purchased by the defendant "at an auction." There was no objection to this issue, and under the ordinary rules of pleading the burden was on the plaintiffs of proving their allegation that, by right of accretion to kismuts Aowal and Kolaparah, the lands actually belonged to them under the provisions of Regulation XI. of 1825.

I think that, as there is no clear finding as to this, the case should be remanded to that Court to try the following issue, *viz.*: "Are "the lands in suit proved by the plaintiffs "to have been theirs by right of accretion "to their mehals Aowal and Kolaparah "under the provisions of Clause 1, Section "4, Regulation XI. of 1825, that is to say, "by the gradual accession from the recess "of the river to the lands of the estate of "the plaintiffs."

The costs of this remand will follow the result.

Hobhouse, J.—I agree in the order of remand. Whatever may have been the case

set up by the defendant, there can, it seems to me, be no doubt as to what the case was which the plaintiffs had to prove. They had to prove whether the lands in dispute were a gradual accession by the recess of the river to their estate; and when we are treating of the lands in dispute, I understand that both the parties mean only those lands which, by a modified decree of the first Court, have been given to the plaintiffs. The question, therefore, seems to me to be whether the Lower Appellate Court has given a good legal judgment upon the point before it, so as to entitle the plaintiffs to the confirmation of the said Court's decree. By the provisions of Section 185 of the Code, the judgment is to contain the points for determination, the decision thereupon, and the reasons for that decision; and it seems to me that in every one of these particulars there is something wanting in the judgment of the Lower Appellate Court. The first part of the judgment is nothing more than a recital of the dispute between the parties. The second part disposes adversely to the plaintiffs of some questions as to the exact identity of the site of certain lands. Another part of the judgment disposes of the plaintiffs' cross-appeal, and then we come to that part of the judgment which alone refers to the point now before us. The Judge says, first of all, that there is no question as to the plaintiffs being proprietors of kismuts Aowal and Kolaparah, nor, on the other hand, to the defendant's being the proprietor of the kismuts appertaining to his talook Captain Moore; and then follow the sole words which have any reference to the point in dispute. They are these: "But the "argument of re-formation of these (*i. e.*, "defendant's lands) cannot stand against "the plaintiffs' title by re-formation in a site "adjoining the remains of their old land." This is the whole of the judgment of the Lower Appellate Court. Now, it seems to me that, by the very words of this judgment, it is apparent that the Judge did not fully comprehend what was the point which he had to decide. He had to decide whether the lands were a gradual accretion by the recess of the river to the plaintiffs' estate. But if he decides anything, he decides that they are some kind of re-formation; and it is not necessary to point out that "re-formation" of lands is, under the terms of the law in question, Regulation XI. of 1825, an entirely different thing from a gradual accretion of lands. The Judge did not, therefore, it seems to me, fully comprehend what the point was that he had to decide; neither, if he did fully comprehend that point, did he decide it, for, instead of giving a judgment between the parties on that point with good and sufficient reasons assigned—and that I take to be the meaning of a judicial decision—he begs the whole question. He says: "But the argument on one side cannot stand against the title on the other." By these remarks he clearly begs the whole question, for the question on which he had to give judgment was the very title of the plaintiffs which he here in so many words assumes without giving judgment.

I agree, therefore, in remanding the case to be tried on the point that I have mentioned. But as there may still be some difficulty in the Judge's mind as to what the contention was on the part of the defendant, I think I ought to mention that I have no doubt that that contention is expressed in the issue which Mr. Justice Bayley has quoted at length. The main point to be determined will be the title of the plaintiffs. The point to be determined on the defendant's side in rebuttal of the plaintiffs' title is, in the words of the issue, "whether the lands are *shikust pyust* and a contiguous accretion to the defendant's land kismut Gobarundo."

The costs of this remand will follow the result.

The 28th July 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Section 230, Act VIII., 1859—Right of action—Jurisdiction.

Case No. 64 of 1869.

Regular Appeal from a decision passed by the Deputy Commissioner of Gowalparah, dated the 24th November 1868.

Kalee Narain Singh (Plaintiff), *Appellant,*

versus

Protap Chunder Burooah (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Mohinee Mohun Roy* for Appellant.

Mr. R. T. Allan and *Baboo Tarinee Kant Bhuttacharjee* for Respondent.

Where in an application professedly under the provisions of Section 230, Act VIII., plaintiff affirmed that he was in possession, and sued to have his rights confirmed:

HELD that, as plaintiff was not dispossessed, he had no cause of action; and that he was not entitled to be heard, nor had the Court jurisdiction to hear and determine his cause under the extraordinary provisions of that Section.

Hobhouse, J.—THE purport of this suit was as follows: The plaintiffs alleged that the defendant had got a decree for certain lands; that this decree was obtained in their (petitioners') absence; that it affected their rights to certain lands covered by that decree; and that they, therefore, prayed that the Court might be pleased "to confirm their rights," and award them their costs.

The application made by the petitioners was an application under the provisions of Section 230, Act VIII. of 1859. The case was first decided by the first Court on the 6th June 1865, but on regular appeal to this Court the case was remanded in order that the Lower Court might give a judgment which it had omitted to give in the case of the appellant now before us. On that occasion, the Division Bench of this Court which remanded the case gave no opinion whatever on the merits, but simply directed the first Court to give what it had omitted to give before—its decision upon those merits so far as the plaintiffs, special appellants, were concerned. The first Court has now given that decision, and has dismissed the plaintiff's suit.

The plaintiff has appealed, but before going into the grounds of appeal, a preliminary objection is urged by the pleader for the respondent to the effect that, upon the plaintiff's own statement of his case, the first Court had no jurisdiction to give any decision upon that case, but should have at once dismissed it.

It will have been remarked from the statement given of the application made by the plaintiffs—an application professedly under the provisions of Section 230—that they did not state that they had been dispossessed of the property in dispute, but on the contrary they affirmed that they were in possession and sued, not to recover possession, but to have their rights confirmed.

Now, the material provisions of Section 230 are these: "If any person other than "the defendant *shall be dispossessed* of any "land in execution of decree, and such other "person shall dispute the right of the "decree-holder to *dispossess* him of such "property under the decree," on certain grounds which are afterwards stated, then that person "may apply to the Court within "one month from the date of such dispossession, and if, after examining the applicant, it "appears to the Court that there was probable cause for making the application, "the application shall be registered and "numbered as a suit between the applicant "as plaintiff and the decree-holder as defendant, and the Court shall proceed to "investigate the matter in dispute in the "same manner and with the like powers as if "a suit for the property had been instituted "by the applicant against the decree-holder."

It seems to us that, by provisions of this Section, an extraordinary remedy is given to certain persons under particular circumstances, and under those circumstances only. Ordinarily, if a person is dispossessed of immoveable property by any other person, he has his remedy in a regular suit upon a full stamp and instituted within the period of limitation applicable to immoveable property; but when a person who is not a party to a decree, as was the case here, has been dispossessed of immoveable property, and disputes the right of the decree-holder who dispossesses him, and when that party applies within one month from the date of dispossession, and when, after examination made of that party, he shows a probable cause for making the application, then the suit may be tried between him and the decree-holder as if it were a regular suit instituted regularly between the parties. It seems to us, therefore, that the conditions precedent to the success of any application or to the exercise of jurisdiction under the provisions of Section 230 are, *firstly*, as the law declares, that the applicant shall have been dispossessed; *secondly*, that he shall dispute the right to dispossess him; and, *thirdly*, that, on examination held, he can show probable cause for making the application. Now, here every one of these elements is wanting. The plaintiff in this case was not dispossessed; he admitted in his plaint that he was not dispossessed, and his pleader now admits that, at the time he made the application, he was in possession, and had not been dispossessed. He was not examined by the Court below, and he did not show, therefore,

any probable cause of action; and, in truth, he had no cause of action. Clearly, therefore, he was not a person entitled to be heard, and whose cause the Court had jurisdiction to hear and determine, under the extraordinary authority given by the provisions of Section 230.

But the pleader for the appellant relies on a case to be found at page 177, Volume VIII., Weekly Reporter. If that case had been an exactly parallel case to the one now before us, and if in it had been expressed an opinion on such parallel case diverse from our own, we should have thought it right to refer the case for the decision of a Full Bench; but, as pointed out by Mr. Allan for the respondent, we think that that case is not in point. The judgment of the learned Judges is a very short judgment and is very concise, and it is, therefore, difficult to extract from it exactly the principle of law which the learned Judges would lay down. But that principle seems to be this, that, when an applicant, that is, a plaintiff, under Section 230, has come in on the ground of dispossession, and has asked that on that ground his question of title to land may be decided, then he cannot object in special appeal when that question of title has been decided against him. Whether we should ourselves follow that doctrine, it is not necessary that we should here say, but the case before us is a different case. The case here is that of a plaintiff who had never any cause of action at all on his own statement, who has been unsuccessful in the Court below, who wants to disturb the judgment of that Court, and who is opposed by the defendant upholding the judgment, not necessarily upon the grounds stated in it, but upon the ground that the Court had no jurisdiction. The cases, therefore, we think, are different, and the decision relied upon does not, therefore, seem to us to apply. We think that, under the circumstances of this case, the Court below had no jurisdiction to try and determine it, and that, therefore, the judgment of that Court should be reversed and set aside altogether.

We observe, however, that the defendants in this case have never raised, although the case has been *sub judice* since 1865, the objection now made until this present year 1869; and although we think that they are entitled to the costs of this present appeal, we are yet of opinion that each party must bear his own costs in the matter of the whole of the previous litigation.

The 28th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Bond debt—Liability of heirs.

Case No. 239 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 8th April 1869, affirming an order of the Moonsiff of that District, dated the 26th February 1868.

Mooktakeshee Debia (Decree-holder), *Appellant*,

versus

Wooma Churn Bhuttacharjee (Judgment-debtor), *Respondent*.

Baboo Kallee Prosunno Dutt for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Whether a bond becomes due before or after the obligor's debt, his sons are liable only to the extent of the assets which they receive of his estate, and which remain unadministered in their hands

The property of sons is liable for a deceased father's debt unless the sons prove, according to Section 203, Code of Civil Procedure, that they have duly applied such property of the deceased as came into their possession.

Peacock, C. J.—The decree was obtained against the defendants who are described as the sons and heirs of their father; and it appears from the grounds of appeal that the suit was brought against them on a bond which was executed, not by them, but by their father. The bond which was executed in 1260 became due after the father's death in 1270, after the defendants, as stated in the grounds of appeal, had succeeded to the father's estate. But it is not because the bond became due after the father's death that the sons were personally liable any more than if the bond had become due before the father's death. They are liable only to the extent of the assets which they received and which have remained unadministered in their hands. Upon a former appeal to the Judge, the case was remanded for a distinct finding on the point as to whether, under Section 203 of Act VIII. of 1859, the self-acquired property of the defendant was liable for his father's debts. It was then decided that all the assets of the father had been adminis-

tered, and consequently that, under Section 203, the sons were not personally liable to make good the debt.

The third ground of appeal is that though the decree be taken as having been passed against the defendants in their representative character (which it was not), the defendants were still bound to show that they had duly applied the whole property of their father, to which they succeeded, before they can be discharged from liability. The finding of the Lower Court was that they had done so, and there was no appeal on the ground that the Court had come to a wrong conclusion on that point, or that the Judge had not disposed of it. The case, consequently, does not come under Section 246, because, admitting that the property was the property of the sons, that property was liable for the father's debt, unless the sons proved, according to Section 203, that they had duly applied such property of the deceased as had come into their possession.

Under these circumstances, this appeal must be dismissed with costs.

Jackson, J.—I am of the same opinion.

The 28th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Res-adjudicata—Suit by reversioner—Adverse possession.

Case No. 32 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 27th November 1868, affirming a decision of the Subordinate Judge of that District, dated the 7th January 1868.

Deoranel Koowar (Defendant), *Appellant,*

versus

Mussamut Indurjeet Koowar (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Kishen Succa Mookerjee, Chunder Madhub Ghose,* and *Kallee Mohun Dass* for Appellant.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondent.

A widow (a life-tenant of an ancestral estate), having executed an ekrar, transferring a share to *N*, her grand-daughter, afterwards sued to set it aside on the ground that *N* had not conformed to its terms. While the suit was in the appeal-stage, *A* died, and her reversioner applied to be made, and was admitted as, her *kaem-mukam* to carry on the appeal on her behalf. He afterwards sued to recover possession of the share as reversioner, alleging that the succession opened out to him on the death of the widow.

HELD that the causes of action in the two suits were different, and that it was not necessary for the reversioner, when he took up the widow's case in its appeal-stage, to disclose his title and claim as reversioner, as he was not competent then to introduce any pleas arising out of a new state of facts not existing when the suit was instituted.

HELD that, the life-tenancy having been made over to *N* with the widow's consent to enure during the grantor's lifetime, *N's* possession was not adverse to the reversioner.

Kemp, J.—THE plaintiff, special respondent before us, sues to recover possession of a 4-annas share in the estate of one Bukhoree Singh, the common ancestor, which estate was held by the aunt of the plaintiff, Mohesh Koowar, as life-tenant. The said lady died in the year 1265, and the plaintiff, on the allegation that, in that year, the succession opened out to him, sues to obtain possession of the estate mentioned above. The defendants are the heirs of Nund Koowar, the grand-daughter of Mohesh Koowar. They allege that Mohesh Koowar transferred the 4-annas share which she held as a life-tenant by an agreement, dated the 26th March 1849, to her grand-daughter, Nund Koowar, who held possession up to her death under the aforesaid agreement, and died in the year 1274 Fuslee, leaving a daughter Deoranee Koowar, the defendant in the case. Both the Courts below have given the plaintiff a decree.

The points taken in special appeal by the senior pleader for the appellant, Mr. Allan, were, *first*, that the suit of the plaintiff was barred under Section 2 of Act VIII. of 1859; and, *secondly*, that it was barred under the general and special Law of Limitation; and the junior pleader for the special appellant, Baboo Kallee Mohun Dass, objected that, as the property in dispute must be regarded as the *streedhun* of the aforesaid lady, Mohesh Koowar, she had a complete dominion over that estate, and that her grant of the estate to her grand-daughter Nund Koowar was one that she was perfectly competent to make, and that the plaintiff as reversioner cannot claim possession of that estate, which must devolve on the heirs of the grantee.

With reference to the first objection, namely, the *res-adjudicata* point, it appears

that Mohesh Koowar, after executing the ekrar in favor of her grand-daughter in 1849, sued to have that ekrar set aside, not on the ground that she had not executed it, but on the ground that the grantee had failed to conform to the terms of the ekrar. The suit in the first instance was dismissed, but on appeal the ekrar was upheld in its integrity and the possession of the grantee was maintained. This took place in October 1858. It appears that Mohesh Koowar, the plaintiff in that suit, died when the suit was in the appellate stage. The plaintiff before us applied to the Court to be made "*kaemmukam*" of Mohesh Koowar to enable him to carry on the appeal on her behalf. This application was allowed, and he was admitted. as the words of the order express it, "*waste-jurwabdehee-appeal.*" Mr. Allan contends that in that stage of the case, the plaintiff in this case was bound to disclose his whole claim, and the omission on his part to put forward the whole of his title on that occasion has rendered the decision passed in that case binding upon him, and that his present suit is, therefore, barred under Section 2 of Act VIII. of 1859. Mr. Allan has referred us to a decision published in Volume II. of the Bengal Law Reports, Part 8, page 102.* In that case, the Judges held that where a party sues to recover possession of certain lands, first claiming it as part of her talook, and then as "Towfeer," but in both suits asking for possession of the same land, it follows that the cause of action is one and the same in both suits. In that case, the Judges observed that if the plaintiff omitted to put forward her strongest title, or her real title on the first occasion, it was so much the worse for her. Now, in this suit before us, it is very clear that the cause of action is not the same as that in the suit brought by Mohesh Koowar. In the suit by Mohesh Koowar, who was the life-tenant, she admitted the execution of the ekrar which made over the enjoyment of the life-tenancy to her grand-daughter, but she alleged that the terms under which she had made that grant, namely, that the grantee was to pay her debts, had not been fulfilled.

In the present case the plaintiff sues as a reversioner, and his cause of action arose on the death of the life-tenant, to set aside the agreement between the life-tenant and her grantee as one which she was not competent to make so as to bind him after her death. It is obvious that the causes of action are very different in the two cases. But it is said that the plaintiff, when he took up the case of Mohesh Koowar in the appeal-stage, ought to have at once disclosed his title and to have claimed as reversioner. We do not think that it was at all necessary for him to do so The issues in that case involved merely a question of whether the grantee had fulfilled the terms of the ekrar or not, and, therefore, as observed by the Judge, the plaintiff "was unable to "introduce any pleas arising out of a new "state of facts not existing or before the "Court, when the suit was instituted and "decided in the first Court."

We, therefore, overrule the first plea in bar.

On the second plea, on the general Law of Limitation, it is contended that if Mohesh Koowar had brought a suit, it would have been barred, and that the reversioner is also barred. A decision in Volume IX. of the Weekly Reporter, page 506. by a Full Bench of this Court, has been quoted in support of this contention. There is, no doubt, and it is now settled law, that if a widow, a life-tenant, in the absence of fraud, allows a decree to be passed and possession to be taken adversely to her, and that adverse possession lasts for 12 years or more during her lifetime, she being barred by limitation, the reversioner would also be barred; but this is not the case in the present instance. The possession of Nund Koowar, the grantee of Mohesh Koowar, is not an adverse possession. Mohesh Koowar was but a life-tenant, and with her consent the life-tenancy was made over to Anund Koowar to enure during the life of the grantor. On the death of the grantor, the right of succession opened out, and the permissible possession of the grantee, Nund Koowar, ceased and determined. Nund Koowar did not claim to hold as heiress, and therefore her possession was not hostile to Mohesh Koowar. This second objection is therefore overruled.

The third ground on the special Limitation Law was not raised in the argument before the Judge, or in the first Court; we therefore think it unnecessary to enter into it in special appeal.

The last point taken by the junior pleader, namely, the question of *streedhun*, is wholly untenable. This property was not acquired by Mohesh Koowar by gift from her parents or from her husband at the time of her marriage, and can in no way be called *streedhun*. All the grounds taken in special appeal therefore fail, and the special appeal must be dismissed with costs.

* Wooma Tara Dabee, Appellant, 10 W. R. 426.

The 28th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Benamee conveyance—Claim of creditors—Sale certificate—Purchase for minor.

Case No. 271 of 1868.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 1st December 1868.

Hemanginee Dossee (Defendant), *Appellant,*

versus

Jogendro Narain Roy (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, Mohinee Mohun Roy, and *Bhowanee Churn Dutt* for Appellant.

Baboos Mohesh Chunder Chowdhry, Khetturnath Bose, and *Bipeen Beharee Dutt* for Respondent.

There is nothing fraudulent or illegal in a father making provision that property over which he has complete control shall not go into the hands of an insolvent son; but a *benamee* conveyance to female members, the father continuing the absolute and uncontrolled owner during his life, and the son entering into possession after his death, cannot exclude the claim of the son's creditors.

Where a purchaser at a sale in execution was named in the sale certificate as "mother and guardian of her infant son," the title to the property was held to be vested by the certificate in the minor absolutely.

Markby, J.—THE plaintiff in this case was a judgment-creditor of one Sreenath, the son of Ajoodhya Ram, to a large amount. Ajoodhya Ram was possessed of considerable property in his lifetime, and he had two sons, Sreenath and Shib Narain. Shib Narain is also dead, having left a son Poorno Chunder, and his widow Hemanginee.

After the death of Ajoodhya Ram, the plaintiff, as judgment-creditor of Sreenath, attempted to seize in execution the share of Ajoodhya Ram's property to which Sreenath would be entitled by inheritance. He was, thereupon, met by a claim to the part of the property which he attempted to seize under a hibbanamah or deed of gift, which, it is alleged, that Ajoodhya Ram executed in 1849, that is, 15 or 16 years before his death. By it, Ajoodhya Ram professed to give all his property to his wife Tripoora Soonduree, and his sister-in-law Shibo Soonduree upon condition that they should not alienate the same, and that they should bring certain suits to recover outstanding debts and pay the Government revenue and certain other charges. During their lives, it was declared that these two ladies should enjoy the profits, but the property was not to be liable to their debts. On their death, the property was to go to Sreenath's son, if he should have any, and to Shib Narain, the younger brother of Sreenath and his sons absolutely.

As to a bond-debt due from one Nil Kant Roy, which the plaintiff was desirous of seizing in execution, Hemanginee claimed it as her own. And a certain talook Chuck Gunesh, which the plaintiff alleged also to belong to the estate of Ajoodhya Ram, was claimed by Hemanginee as the absolute property of her minor son.

The plaintiff having been unsuccessful in obtaining execution against this property brought the present suit against Hemanginee as guardian of her minor son Poorno, and against Sreenath, substantially to have it declared that the property in question was a portion of Ajoodhya Ram's estate, a share of which came by inheritance to Sreenath.

Hemanginee repeats in this suit the allegations she had made when the plaintiff attempted to seize the property. The plaintiff in his plaint expressly admits the execution of the hibbanamah. Nevertheless, the Judge raised an issue which involved an inquiry into the execution of that document; and he finds against the evidence, as it appears to us, both of the plaintiff and of the defendant, that the execution was not proved. The respondents have not attempted to support this part of the judgment, and we have no hesitation in considering it as perfectly clear that the document was executed.

The Judge then proceeds to consider the *bona fides* of the deed. By this we understand him to mean whether or no it was a fraud on the part of Ajoodhya Ram to convey his property to his wife and his sister-in-law. But we are at a loss to see what fraud there could be in such a proceeding. It is suggested that Ajoodhya Ram was himself in embarrassed circumstances at the time. But the plaintiff's witnesses, who were intimately acquainted with him, do not say so; and the vague statement in a petition which some one appears to have made for execution of a decree against Ajoodhya Ram, and which the Judge received as evidence of his insolvent condition, appears to us wholly worthless. It is also suggested that it was the object of Ajoodhya Ram by his transfer to save his property from his son Sreenath's creditors. But if that were his object, that was in no sense fraudulent. Whether such a transaction would have been in this particular case strictly honorable for a Hindoo is a question we need not inquire into. There is nothing fraudulent or illegal in a father making provision that property over which he has complete control shall not go into the hands of an insolvent son, and so into the hands of his creditors.

It seems to us that the Judge has somewhat mistaken the case of the parties, which is. not that the conveyance by Ajoodhya Ram to Tripoora Soonduree and Shibo Soonduree was void, if real, but that there was in reality no conveyance at all. Their whole evidence was pointed to this: That however carefully the names of these ladies had been used in all paper transactions. Ajoodhya Ram had remained until the day of his death in the actual enjoyment of the property, and that since his death Sreenath had been in possession of his share. In short, that the transaction was what is called *benamee*.

The motive of such a transaction is perfectly clear By this transaction, if successful, while on the one hand Sreenath's creditors would be excluded, on the other hand Sreenath himself would not. The deed could be used to keep off claimants outside the family, whilst within the family matters would go on as before. The very essence of such a transaction is that it should have a double aspect, and there is no doubt the experience and skill which persons in this country have gained by a constant resort to such transactions make it exceedingly difficult for a Court of Justice to detect the truth. But upon the whole, we have come to a clear conclusion upon this evidence that the conveyance by Ajoodhya Ram to his wife and sister-in-law was *benamee;* that Ajoodhya Ram, notwithstanding that nominal conveyance, remained the absolute and uncontrolled owner of the property; and that a share in this property passed at his death by inheritance to Sreenath. The defendant's mookhtear attempted to prove that after the hibbanamah was executed, Ajoodhya Ram never interfered in the management of the property. That is contradicted by all the plaintiff's witnesses. And the evidence produced on the part of the plaintiff is, some of it, very strong indeed; as. for instance, that of the vakeel No. 5 and Pitamber Deb, a co-sharer, No. 6, who prove in our opinion beyond a doubt that no change whatever, except in name, took place after the deed was executed. Had Ajoodhya Ram really intended that the property should be well vested in the two ladies who were apparently made donees, he would certainly have taken care, not only by using their names on paper, but by an ostensible change in the management and enjoyment of the property, to make that intention clear.

Though, therefore, we are unable to agree entirely with the view taken by the Judge of the Court below, we agree that notwithstanding the hibbanamah, a share in the property of Ajoodhya Ram is vested by inheritance in Sreenath.

The Judge below also considered the bond to be part of the property of Ajoodhya Ram, as the money which was lent belonged to him; but it appears that this bond has been paid off, so that it is useless to seize it in execution, and the respondents have abandoned it.

As regards the talook Chuck Gunesh, the question stands thus: It was purchased at a sale in execution of a decree, and the person named as purchaser in the sale-certificate was "Hemanginee Dossee, mother and guardian of her infant son Poorno Chunder." Upon this, it is contended that, under the terms of Sections 259 and 260 of the Code of Civil Procedure, it must be held conclusively that Poorno Chunder is the owner, and that no further inquiry into the title is permitted. The defendants, on the other hand, contend that the money to purchase the talook was supplied by Ajoodhya Ram, and that even if the infant had any rights

by virtue of that Section, they have never been asserted; on the contrary, that the evidence shows that the property was all along treated as belonging to Ajoodhya Ram who was in possession up to his death, from which it may be inferred that the rights of Poorno Chunder have been abandoned.

Had the minority of Poorno Chunder been out of the question, we might perhaps have been able to come to the conclusion that the plaintiffs' contention was right. Possibly, it might be said that here the certified purchaser had abandoned his rights to the real purchaser, who was in possession under a good title derived from the certified purchaser himself. But holding, as we must do, that the title to his property was by the certificate vested in the minor absolutely (see Full Bench Decision, 9 Weekly Reporter, page 20), we do not see how by any act of Hemanginee, the minor can be deprived of this property. It appears to us, therefore, that the infant is still the absolute owner of talook Chuck Gunesh, and that neither Sreenath nor any other member of the family has any share in it whatsoever.

The result is, in our opinion, that there ought to be a decree declaring that all the properties mentioned in the plaint, except No. 9 and No. 12, belong to the estate which was of Ajoodhya Ram, deceased, and that Sreenath as one of his heirs is entitled to a share thereof. The plaintiff to have his costs in this Court and the Court below.

The 28th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Section 248, Act VIII., 1859—Construction—Jurisdiction.

Case No. 234 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Nuddea, dated the 8th May 1869.

Judoonath Roy and others (Judgment-debtors), *Appellants*,

versus

Ram Buksh Chatterjee and others (Decree-holders), *Respondents*.

Baboos Ashootosh Chatterjee and *Jadub Chunder Seal* for Appellants.

Baboos Grish Chunder Mookerjee and *Biprodass Mookerjee* for Respondents.

In Section 248, Act VIII. of 1859, the words, "whom the Court may appoint," apply not only to the words "any other person," but also to the officers of the Court.

In the absence of the Subordinate Judge it is not competent to the Judge, because he is a superior officer, to perform the duties required by Section 248.

Peacock, C. J.—It appears to me that this sale ought to be set aside. I think that the words of Section 248, Act VIII. of 1859, "whom the Court may appoint" apply not only to the words "any other person," but also to the officers of the Court; otherwise any officer of the Court might without any authority of the Court take upon himself to sell property in execution. Then the question arises whether the Subordinate Judge being ill, the Judge can be said to be the Court. It is not because he is a superior officer that he can perform the duties required by Section 248, any more than he can perform the duties of any Moonsiff under him if that Moonsiff is ill. This is not, therefore, merely an irregularity which renders it necessary for the appellant to show that substantial injury has been caused. Doubtless, the Judge performed the duties to the best of his ability, but we cannot say that under the circumstances no injury was caused to the judgment-debtor in having his property sold by the Judge.

The sale is set aside. Each party will bear his own costs of this appeal.

Jackson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Certificate under Act XXVII., 1860—Evidence of intention.

Case No. 242 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorshedabad, dated the 15th March 1869.

Zeemutoonissa Khanum (Objector), *Appellant*,

versus

Khutoo Begum and others (Petitioners), *Respondents*.

Baboo Nubo Kishen Mookerjee for Appellant.

Moonshee Syud Ameer Ali for Respondents.

The circumstance of a deceased party having, on the day of his death, informed his debtor that he had given the whole of the moneys due to him to his mother-in-law, was held to be a sufficient indication (whether the gift was valid or not) that she was the proper person to receive the money due to the deceased and the certificate under Act XXVII. of 1860.

In cases under Act XXVII. of 1860, Judges should always certify whether the certificate has been actually granted.

Peacock, C. J.—It does not appear that the Judge has granted a certificate; and assuming that a certificate has not been granted, we think that the certificate ought to be granted to the appellant.

It appears to me that the evidence is not sufficient to satisfy the Court that the respondent really was the uncle of the deceased. It appears from the evidence that the wife of the deceased died about 10 months ago, and that, at the time of his death, the deceased was living with the mother-in-law, the appellant. I see no sufficient reason to disbelieve the evidence of Modhoosoodun Doss, who stated that he owed the deceased a sum of 1,100 rupees for which he had not given a *hath-chittah*. That evidence was sufficient to render him responsible to pay that amount to some one, whoever that person may be, who is the representative of the deceased. He says that, on the day of his death, the deceased informed him that he had given the whole of the moneys due to him to his mother-in-law. Whether that gift was a valid gift or not, or whether it passed the whole of the property or only one-third of it, it is not necessary now to determine. Assuming the evidence to be true, there can be but little doubt that the deceased intended that Modhoosoodun should pay the debt to the appellant. Under these circumstances, it appears to me that she is the proper person to receive the money due, and that the certificate ought to be granted to her. This decision will not preclude the respondent from proving that he is heir-at-law of the deceased, or from showing, notwithstanding the alleged gift to the appellant, that he is entitled to the whole of the property of the deceased or to some portion of it.

We think that, before the certificate is granted, security should be taken from the appellant under Section 5 for rendering an account of the debts that shall be received by her and for the indemnity of persons who may be entitled to the whole or any part of the moneys received by virtue of such certificate. The amount of security will be determined by the Judge. If the certificate has already been granted, the Judge will certify the fact to this Court, in order that a fresh certificate may be granted by this Court in supersession of the certificate which he has granted, instead of directing the Judge to grant it to the appellant. In these cases, the Judge should always certify whether a certificate has been actually granted, or whether the grant has been suspended pending the appeal.

The appellant will receive her costs of this appeal and the costs in the Lower Court.

Jackson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Judgment-debtor's assets—Liability of heirs.

Case No. 2890 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th June 1868, reversing a decision of the Sudder Ameen of that District, dated the 27th July 1867.

Hajee Ali (Plaintiff), *Appellant,*

versus

Mirza Ali Nukee and others (Defendants), *Respondents.*

Baboos Gopal Lall Mitter and *Debendro Narain Bose* for Appellant.

Messrs. R. T. Allan and *C. Gregory* and *Baboo Grish Chunder Ghose* for Respondents.

A decree declaring the heir of a mortgagor liable to pay the mortgage-debt out of such assets as he had received from the estate of his father (the mortgagor) was held not to include assets which came to him after passing through the hands of another heir (his brother) in right of inheritance from that brother.

Glover, J.—To understand the plaintiff's case, it is necessary to go somewhat into detail. It appears that one Asudh Ali mortgaged in the year 1843 a 9-annas share of a mouzah called Pursool to his brother-in-law, one Mahomed Ali. The plaintiff claims through the daughter of the mortgagee by purchase. Asudh Ali died leaving two sons, one Mahomed Hadee who is also called Mirza Imaumee, and Ahmed Hosseinee, who is otherwise called Bunnee Mirza; and this particular Mouzah Pursool descended in the proportion of 3 annas and 6 annas respectively to the two brothers—Mahomed Hadee inheriting the 3 annas and Ahmed Hossein the 6-annas share. Ahmed Hossein pre-deceased his brother Mahomed Hadee; and his 6-annas share of the property is said to have gone by the law of inheritance prevailing among the *Shiah sect* to his brother Mahomed Hadee. The plaintiff, as the representative of the original mortgagee, sued on the original side of the High Court Mahomed Hadee as the heir of Asudh Ali, the mortgagor, and got a decree by confession of judgment on the 23rd January 1866. In that decree it is said that the defendant Mahomed Hadee having admitted receipt of assets of Asudh Ali, his father, he was adjudicated liable to pay the mortgage-money then due out of the said assets, and in execution of this decree the mortgaged property was attached and Asudh Ali's right and interest therein sold.

Whilst the execution was proceeding, the defendant in this suit, who is the widow of the younger son of Asudh Ali, Ahmed Hossein, intervened, on the ground that the decree obtained in the High Court was a fraudulent and a collusive one, and that the property which had descended to Ahmed Hossein, her husband, was hers in lieu of the dower which was due to her. Her objections were rejected on the 22nd April 1866, but before that she had executed the decree obtained by her for her dower against Mahomed Hadee as the representative of his brother, her husband Ahmed Hossein, and attached the 6-annas share of the mouzah which belonged to her deceased husband. On this attachment, the plaintiff (who had, we may remark, purchased in the execution-sale the property originally mortgaged) came in in her turn, and objected to the attachment by Ahmed Hossein's widow. Her objections were, however, overruled, and the decision of the Lower Court was confirmed by the High Court in September 1866, and it was to reverse his miscellaneous order, and to declare that the 6-annas share of Mouzah Pursool was still burdened by her mortgage and by the decree passed upon it that the present suit was brought.

The defence was mainly the same as that set up in the execution-proceedings. The widow of Ahmed Hossein states that the plaintiff's decree was obtained collusively; that she has a lien on the 6-annas share of Ahmed Hossein for the dower due to her; and that, under any circumstances, the decree of the High Court on the original side was only against such assets as Mahomed Hadee had received by inheritance from his father, namely, a 3-annas share, and that the sale included only that amount of property.

The Court of first instance decreed in the plaintiff's favor to the amount of a 16-annas share, holding, apparently, that the other 3 annas had been taken out of the question by some private arrangement between Mahomed Hadee and the plaintiff, by which she had relieved him from liability.

The Judge, on appeal, considered that the decree of the High Court referred only to the 3-annas share which Mahomed Hadee had received as assets of his father's estate; and the only point which we have to consider in this special appeal is whether the Judge was right or wrong in so construing the decree of the High Court, for, with regard to the merits of the case so far, it is not contended, and it cannot be contended, that the property originally mortgaged by Asudh Ali did not necessarily continue to be burdened by that mortgage into whosoever's hands it may have gone by inheritance. Now, it has been held on many occasions by Division Benches of this Court that, when a party prefers a special appeal on the ground of misconstruction of a document, it must be distinctly shown that the construction put upon it by the Lower Appellate Court is such a one as the words of the document will not reasonably bear. The words of the decree in this case are clear enough. They are to the effect that the decree is to be satisfied by Mahomed Hadee, who had admitted the receipt of assets from the estate of his father, Asudh Ali, out of these assets; and *primâ facie*, it would seem that these words limited the power of the decree-holder to bring to sale anything but the 3 annas which Mahomed Hadee had received from his father. But it is contended by the special appellant's pleader that the words of the plaint show exactly the position of Mahomed Hadee and in what way he was sued, and that, as the decree declares him liable to pay the mortgage-debt out of the assets of Asudh Ali according to the plaint, that therefore these words included, not only the 3-annas share of the mouzah in dispute which he had received direct from his father, but also the 6-annas which formed originally part of Asudh Ali's estate, and which came to Mahomed Hadee through his brother after his brother's death. It does not appear to me that this is a fair and reasonable construction to be placed upon the words of the decree, and it is cenainly not in accordance with their lexicographical meaning. The decree says that Mahomed Hadee is to pay the mortgage-debt out of such assets as he had received from the estate of his father Asudh Ali, and by such assets I understand assets which came to him direct from his father, and not to include assets which came to him after his brother's death in a roundabout way after passing through the hands of another heir. It cannot, therefore, it seems to me, be said that, in construing the words of the High Court decree and of the bill of sale, as the Judge has construed them, that there is any palpable mistake in his interpretation of these documents, and we should not be justified in special appeal in interfering with his decision.

In a case of this kind, we are bound to go strictly upon the words of the decree, and unless it be shown very clearly that the Judge has misunderstood these words, there can be no ground of special appeal. I may also remark that the meaning which the Judge has attached to the words "assets of Asudh Ali" is precisely the same which had been previously attached to them by a Division Bench of this Court in their decision in miscellaneous appeal No. 512 of 1866, passed on the 20th of September of that year. The learned Judges there gave the same interpretation to the decree and to the terms of the bill of sale as has been given by the Judge below, and state their opinion that the property derived from the father was the only thing sold, and that the share of Ahmed Hossein still remained subject to the claim of his wife for her dower; that is to say, it was not included in the High Court decree. It appears to me, therefore, that, as the present suit was brought, that is, to have it declared that this 6-annas share of Mouzah Pursool forms part of the assets Asudh Ali received by Mahomed Hadee, and is, as such, liable for the mortgage-debt, the case must fail, and the special appeal be dismissed with costs.

There is nothing in this decision to prevent the plaintiff, if so advised, from following the property mortgaged into the hands of the present owners, or from seeking in another suit a declaration that that property is still burdened by the mortgage granted by Asudh Ali in 1843.

Kemp, J.—I am of the same opinion that the special appeal must be dismissed; but I would go somewhat further than my learned colleague has done. I hold that the Judge has put a proper construction upon the decree passed on the original side of this Court, as well as upon the question of what passed to the special appellant under the certificate of sale.

In the suit on the original side of the Court, the plaintiff did not in her plaint allege that Mahomed Hadee was in possession of the whole of the estate of the original judgment-debtor, Asudh Ali, whether acquired from his father or from his brother. She sued him in two capacities, namely, as the heir and representative of Asudh Ali, and as the heir and representative of Ahmed Hossein. She did not claim to have the mortgaged premises sold in satisfaction of the debt, and the decree obtained does not say against what property it is to be executed; but as Mahomed Hadee had confessed judgment to the effect that the assets of Asudh Ali were in his hands, which might well be, seeing that he admittedly inherited a 3-annas share of the property from his father Asudh Ali, the Court's decree was to the effect that the debt was to be satisfied from the assets in the hands of Mahomed Hadee. The sale-certificate passed to the plaintiff what Mahomed Hadee, the judgment-debtor, acquired from his father Asudh Ali, and not what he acquired after his brother's death in right of inheritance, not from the father, but from the brother.

The Judge having, in my opinion, put a proper construction upon the decree of the original side of the Court and upon the certificate of sale, I dismiss the special appeal with costs.

The 28th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Default—Onus probandi.

Case No. 980 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 3rd February 1869, reversing a decision of the Moonsiff of Bistoopore, dated the 26th November 1868.

Damoodur Bhooshun (Plaintiff), *Appellant,*

versus

Rughoonath Panja and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Where a plaintiff has not given any evidence whatever in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence.

Loch, J.—There is a case reported in Marshall's Reports, page 568, which is on all fours with the present case. It was held in that case that, as the plaintiff had not given any evidence in support of his claim, the Judge, in appeal, was not wrong in dismissing the suit, notwithstanding that the defendant who had been duly summoned to give evidence had not attended, and although the first Court had given judgment under Section 170, Act VIII. of 1859.

The pleader for the special appellant in this case has pointed out a case reported in 1 Weekly Reporter, pages 114 and 115. But that case is very different from the one now before us. For in that case the plaintiff was called upon by the defendant to give evidence; and having failed to do so, the Court would not give him a decree upon the evidence that he had filed to support his claim. That case will not assist the present appellant. We think the decision reported in Marshall is correct, and we shall follow it in the present case. We concur with the view taken by the Judges in that case in Marshall, that, where a plaintiff has not given any evidence whatever in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence.

We dismiss this appeal with costs.

Macpherson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Separation of shares—Section 11, Act XI., 1859.

Case No. 994 of 1869.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 4th February 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 28th November 1868.

Poorno Chunder Banerjee (Plaintiff), *Appellant,*

versus

Ram Kanaye Ghose and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Nil Madhub Sein for Respondent.

The proprietors of a certain lot having obtained a separation of their shares under Section 11, Act XI. of 1859, there remained one share (comprising one village and one-third of three other villages), which was sold for arrears of revenue and purchased by *W*. Of this share, *W* sold one village to P, who agreed to pay a certain sum as his share of the Government jumma, and then applied to the Collector to open a separate account at the rate which had been agreed upon. The shareholders having objected, the Collector referred the parties to the Civil Court under Section 12. *P* then brought a civil suit for a separate account.

HELD that there was no legal objection to plaintiff's having his separate share opened at the rate he mentioned, even if the jumma on the share which remained in *W*'s possession was excessive; for, if the whole estate were put up to sale for arrears on account of that remnant share, the other shareholders could always protect themselves by paying the sum due.

Loch, J.—IT appears that of the lot Jamura there were several proprietors, who from time to time applied to the Collector, and obtained an order from him for separation of shares, under the provisions of Section 11, Act XI. of 1859, and there remained a share with a jumma of 319 rupees 2 annas and 9 pie. This last share was sold for arrears of Government revenue, and purchased by one Wooma Churn. This share comprised the whole of Mouzah Dadookhan and one-third of three other villages. Wooma Churn subsequently sold the Mouzah Dadookhan to the plaintiff, Poorno Chunder Banerjee. and by the terms of the deed it was agreed that Poorno Chunder should pay a sum of Rupees 114-11 annas and 3 pie as his share of the Government jumma assessed according to certain quinquennial papers. which had formed the basis of the other separate accounts. Poorno Chunder then applied to the Collector to open a separate account at the rate of Rupees 144-11 annas 3 pie; and certain objections having been raised by the shareholders, the Collector, under the provisions of Section 12, Act XI. of 1859, referred the parties to the Civil Court; and the plaintiff has brought the present suit to have opened a separate account of his share at Rupees 144-11 annas and 3 pie.

We think that the objections raised by the defendants to a separate account being opened in plaintiff's favor are of no weight. There is no legal objection to the plaintiff's having his separate share opened at the rate he mentioned, and the reason given by the Judge for refusing to allow a separate share being opened is insufficient. It is true, as the Judge observes, that all the shareholders have an interest in the matter, and have a right to protect themselves, and it may also be true that the jumma which remains on the one-third of the three mouzahs in Wooma Churn's possession may be excessive. Even if this should be the case, and the share be put up for sale, and the sum bid be insufficient to cover the balance, and so render the whole estate liable to be put up for sale, yet the other shareholders can always protect themselves by paying the sum due.

We think, therefore, that the decree of the Lower Appellate Court must be set aside, and that of the first Court restored. The special appellant is entitled to his costs in this Court and in the Lower Appellate Court.

Macpherson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble J. P. Norman and Dwarkanath Mitter, *Judges.*

Uniform rent—Section 4, Act X. of 1859—Applicability to other cases—Presumptions and inferences.

Case No. 719 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 19th December 1868, modifying a decision of the Sudder Ameen of that District, dated the 24th June 1868.

Dukhina Mohun Roy (Plaintiff), *Appellant,*

versus

Kureemoollah Mooktear (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Kishen Dyal Roy* for Appellant.

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Respondent.

The presumption arising under Section 4, Act X., 1859, is not necessarily restricted to proceedings under that Act; but even if it did not apply to suits other than those under Act X., a Court would not do wrong to

follow the rule laid down in Section 4 in determining what length of time payment of a fixed rent should be made in order to warrant the presumption of its having been made since the Permanent Settlement.

In a suit for enhancement of rent, if a defendant fails to prove anything except that he has held for more than 20 years at a fixed rent, and has been recognized in the receipts granted to him as a holder of a fixed tenure; and no evidence is given in favor of plaintiff's claim, the mere fact of there being some infirmity in the defendant's title cannot entitle the plaintiff to a decree.

Norman, J.—THIS appeal must be dismissed. As regards the lands claimed under the two pottahs of 1197 and 1198, it appears that the defendant and his predecessors have held those lands from before the Permanent Settlement. Even if the pottahs are not genuine—and the Judge by no means says that they are not, but excepts to them because they were granted by a Hindoo widow, and do not contain any words of inheritance—even if the pottahs are not genuine, and do not confer a good title, the defendant, if a ryot, is protected from eviction by Section 3 of Act X. of 1859; if a talookdar, by Section 15 of Act X. or by Regulation VIII. of 1793. In either case, his title to retain possession on payment of rent is clear. Now, as to the proof that he has held from the time of the Permanent Settlement, we think that, on proof of payment of a uniform rent for 20 years in the absence of any proof to the contrary, we ought to assume that the land has been held since the time of the Permanent Settlement at a fixed rent.

It is argued that Section 4 of Act X. does not apply to any suits *not instituted under that Act*, because it says, "whenever in any suit under this Act," &c. Probably the words "*in any suit under this Act*" were not intended to limit the presumption to cases under that Act. It was probably supposed that cases between ryots and zemindars, and talookdars and zemindars, on questions of enhancement of rent and of right to possession, would be determined under Act X. It does not follow, therefore, that it was the intention of the Legislature that Section 4 was to be wholly restricted to proceedings under that Act. But even if the presumption under the 4th Section does not, in fact, in terms apply to suits other than those under Act X., it would then become a question from what length of time during which the payment of a fixed rent should have been made, we should assume that payment at such rate dated back to, or had its origin before, the Permanent Settlement. And in a suit under Act VIII., if it should be proved that the land was held at a fixed rent for the period mentioned in Section 4, I think we should be wrong not to follow the rule laid down in Act X., Section 4. I, for my part, should feel bound to adopt that as a rule.

There only remains a question as to a parcel of land about which there is some uncertainty (owing to the want of proper materials and information at the command of the vakeels), which is alleged to be held under a pottah of 1217. The Judge does not decide whether the pottah is genuine or not, but he says, "in any case the defendant has a right of occupancy." In truth, no issue was raised in the first Court whether the defendant has a right of occupancy under Act X. or not. It is by no means clear that the defendant is a ryot or person capable of acquiring a right of occupancy. We cannot treat the question as satisfactorily decided by the Lower Appellate Court. But assuming that the defendant has failed to prove anything except that he has held the land in question for a long time, certainly for more than 20 years, at a fixed rent, and that he has been recognized in the receipts granted to him as a holder of a fixed tenure, there being no evidence on the part of the plaintiff—none, in fact, having been given by him—there is nothing in the record or in the evidence on which we could base a decree in favor of the plaintiff. Therefore, as regards the land comprised in the pottah of 1217, there may be some infirmity in the defendants' title, but that cannot entitle the plaintiff to a decree.

We dismiss the appeal with costs.

The 29th July 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Evidence—Objections.

Case No. 745 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 23rd December 1868, modifying a decision of the Deputy Collector of that District, dated the 31st August 1868.

Sheetul Pershad Mitter (Defendant), *Appellant,*

versus

Junmejoy Mullick and another (Plaintiffs), *Respondents.*

d

Baboos Bama Churn Banerjee and *Hem Chunder Banerjee* for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

Even if the evidence upon the record is in itself insufficient, a Judge may properly decide the case upon that evidence if the defendant consents to its being taken as sufficient. It is the duty of the party, who wishes to object to evidence, to object in the first instance, and not to delay doing so until the case is before the High Court in special appeal.

Macpherson, J.—In this case it is somewhat difficult to ascertain exactly how matters stood before the Judge; but it rather appears that the objection which is now taken as to there being no evidence to bring the case within Clause 1, Section 17, Act X. of 1859, was not taken before the Judge. There is no doubt that, even if the evidence on the record were in itself insufficient, the Judge might properly have decided the case upon the evidence such as it was, if the defendant had waived his objection to its insufficiency and consented to its being taken as sufficient. There is also no doubt that it is the duty of the party, who wishes to object to evidence, to object to it in the first instance, and not to lie by in both the Lower Courts, and then come in special appeal here, and raise objections for the first time.

The difficulty which I have in this case is that it is not perfectly certain that the objection was not taken before the Lower Appellate Court; and from one expression in the judgment of the Judge, there is some reason to suppose that the question may have been raised before him, although not pressed. There is, in truth, no evidence which amounts to strict proof of the plaintiff's right to enhance under Clause 1, Section 17 of Act X. of 1859; and it is under that Clause that the plaintiff has a right to enhance, if he has a right at all.

The first Court has fixed the issues very loosely; and the case must be remanded in order that the proper issues under Clause 1 may be tried. The issues are whether (*a*) the rate of rent paid by the defendant is below the prevailing rate payable by the same class of ryots; (*b*) for land of a similar description; (*c*) and with similar advantages; (*d*) in the places adjacent.

The Court must try the issues as to the land being of a similar description, and as to its having similar advantages with those in the places adjacent, just as much as the issue as to the prevailing rates payable by the same class of ryots; and it must find distinctly upon each one of these questions.

As I have already said, the objection now taken has not been properly raised in either of the Lower Courts; and therefore we direct the parties respectively to bear their own costs of the litigation up to this time, whatever the result of the remand may be.

The case will go back, and the Court must take it up out of its turn, and decide it with the least possible delay.

Glover, J.—I am of the same opinion.

The 29th July 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Fresh evidence taken by Appellate Court—Witnesses—Value of testimony.

Case No. 231 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 18th November 1868, reversing a decision of the Officiating Sudder Moonsiff of that District, dated the 16th July 1868.

Shib Chunder Mahtoon (one of the Defendants), *Appellant,*

versus

Kasheenath Kurmokar (Plaintiff), *Respondent.*

Baboo Gopeenath Banerjee for Appellant.

Baboos Ashootosh Chatterjee and *Jadub Chunder Seal* for Respondent.

A decree-holder, having sold in execution the property of his judgment-debtor (*D*), became himself the purchaser, and sold it again to plaintiff. Plaintiff, on going to take possession, found defendant there, who claimed under a mokurruree pottah granted by *D*, and denied plaintiff's title to anything but the rent. Plaintiff sued for khas possession. The Lower Appellate Court gave plaintiff a decree after calling in *D* as a witness.

Held that the Lower Appellate Court should have stated most fully and clearly its reasons for calling for fresh evidence; but that, in point of law, it was sufficient if that Court considered the matter, and stated that such reasons existed without mentioning what they were.

Held that the Lower Appellate Court committed as grave and material error in considering *D's* evidence as conclusive on the point of the genuineness of the mokurruree pottah set up by defendant, and that it was just as necessary to weigh the value of his testimony as that of any other witness.

Markby, J.—I THINK that this case must be remanded to the Lower Appellate Court. The plaintiff, one Shumboonath Shah, had obtained a decree against a person of the name of Dinonath Koondoo, and in execution of that decree had caused the property, which is the subject of this suit, to be sold in satisfaction, and he became himself the purchaser, and afterwards sold it in Magh 1274 to the present plaintiff. When the present plaintiff went to take possession, he found the defendant there, who claimed to hold under a mokurruree pottah granted by Dinonath, and he, on the strength of that pottah, denied the title of the plaintiff to receive anything but the rent of the land. The plaintiff, accordingly, brought this suit for khas possession.

Now, it is admitted by both sides that the title of Dinonath is in no way in dispute in the present suit. The only question is whether that title has passed wholly to the plaintiff to the exclusion of the defendant, or whether the defendant has a right to rely upon his grant from Dinonath.

The first Court dismissed the suit, holding that the plaintiff was not entitled to khas possession, but only to receive rent, because, in the opinion of the first Court, the defendant had obtained, as he alleged, a mokurruree pottah from Dinonath. The plaintiff then appealed to the Subordinate Judge, and the Subordinate Judge thought fit to call Dinonath as a witness, and he, eventually coming to the conclusion that the defendant had failed to prove the mokurruree pottah, gave the plaintiff a decree.

The defendant has appealed specially to this Court. He objects that the Lower Appellate Court had no power to examine Dinonath as a witness without having stated any reasons for so doing. Now, what appears upon the record is simply a proceeding showing that the Court thought it necessary to examine Dinonath. No reasons were given why it was necessary, and no explanation as to why the Court should resort to so unusual and so undesirable a mode of proceeding. It has been repeatedly said by the Privy Council and by Division Benches of this Court that this is a course which Appellate Courts ought not to take except under special circumstances, and that, when doing so, it is most essential to the interests of justice that they should state most fully and clearly the reasons which induced them to depart from the usual course of procedure and to call for fresh evidence in the Appellate Court. At the same time, it has been held, both by the Privy Council and by this Court, that it is not a condition precedent to the exercise of the power vested in Appellate Courts to call fresh evidence that reasons should be recorded; that it is, in point of law, sufficient if it appear that the Appellate Court considered the matter, and states that these reasons did exist, without stating what they are. In strictness of law, therefore, this ground of special appeal fails. But when we come to see how the Lower Appellate Court deals with the evidence of Dinonath, it is clear that there has been a failure. The whole question between these parties, and the whole contest from first to last, was on the one hand that no mokurruree had been granted by Dinonath at all, and on the other hand, by the defendant, that that mokurruree pottah was a genuine and valid instrument. The Judge in the Lower Appellate Court says that the defendant Dinonath and the defendant Shibnath were "admittedly" in possession and held "*bhag shootre.*" What the Lower Appellate Court means by saying that it is admitted that they were in possession as *bhog-jotedars*, I am quite at a loss to conceive, and the only interpretation I can put upon it is that the Lower Appellate Court considered that, there being a conflict of evidence between the evidence of the witnesses called by the plaintiff and the evidence adduced by the defendant, that the Court had a right to call in Dinonath, who was a defendant in the suit, as a witness, and to treat the statement of Dinonath as conclusive on the point. That is the only construction I can place upon the Subordinate Judge's decision, and if that was his view, he never made a greater mistake. Dinonath was at the most only a disinterested witness; it was very important to ascertain whether he was that; but whether he was so or not, it was just as necessary to weigh the value of his testimony as of any other witness in the case. That appears to me to be an error so grave and so material that we are justified in saying that there has been an irregularity affecting the merits of the case, which is a good ground of special appeal.

I, therefore, am of opinion that the case must go back to the Lower Appellate Court. The Subordinate Judge will consider the evidence of Dinonath, not as of a party interested, but as that of a simple witness. He will contrast that evidence with all the other evidence adduced, and after giving

due weight to the decision of the Court below, he will come to a fresh finding as to whether the pottah said to have been granted by Dinonath has been established by the evidence to be a valid and genuine document.

Kemp, J.—I am of the same opinion.

The 29th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Persons interested—Parties to a suit.

Case No. 721 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 19th December 1868, reversing a decision of the Officiating Sudder Ameen of that District, dated the 24th June 1868.

Dukheena Mohun Roy (Plaintiff), *Appellant,*

versus

Ameerooddeen Mahomed and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Kishen Dyal Roy* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

In a suit by a superior holder (representing the zemindar by whom certain pottahs were alleged to have been granted) for a declaration that the pottahs were forgeries, against a party holding a portion of land by a title derived from lessees under those pottahs, it was HELD that all the parties interested in and holding under the pottahs should be made parties to the suit on the principle that all persons who are interested in the question must be made parties to a suit in a Court of Equity.

Norman, J.—It appears to us that there are no grounds for interfering with the decision of the Judge.

The plaintiff sues praying for a declaration that the two pottahs dated in 1197 and 1198 are forgeries, and for confirmation of his possession, which he alleges he acquired after the expiration of a lease to one Muddun Mohun, who had given him a kubooleut. The two alleged mokurruree pottahs of 1197 and 1198 relate, not only to the property of which the defendant is in possession, but to a much larger extent of property in the possession of Kureemoollah and others; and so far as the suit seeks to obtain a declaratory decree that the pottahs are forgeries, it appears to us that all those parties who are interested and claim under them, namely, Kureemoollah and others, should have been made parties to the suit on the principle laid down by Lord Hardwicke in the case of Poore *versus* Clarke (II. Att: 515), where he says: "The general rule is that "you must have all persons parties before "this Court who will be necessary to make "the determination complete and to quiet the "question."

So also Lord Lyndhurst in his judgment in the case of Small *versus* Attwood (Yonge, 458), "the general rule is that all persons "who are interested in the question must be "parties to a suit instituted in a Court of "Equity." A similar principle is expressed in Comyn's Digest, namely, "that all con-"cerned in the demand ought to be made "parties in equity." "Not all concerned in "the subject-matter respecting which a thing "is demanded, but all concerned in the very "*thing which is demanded*, in the *matter* "*petitioned for*, in the *prayer of the bill*, or, "in other words, in the *object of the suit.*"

It would be the matter of the greatest possible hardship to the proprietor of the extensive property which was comprised in these pottahs, if the owner of some adjoining estate, or superior holder representing the zemindar by whom the pottahs were granted, could bring a suit against a party holding a small portion of land as grantee by a title derived from lessees under mokurruree pottahs, and in a suit against *him alone*, without joining other parties, obtain a declaration that the pottahs were forgeries. Such a decree might seriously impair and affect the value of the property of the principal holder. Therefore, this suit, so far as it seeks to have the pottahs declared forgeries, is improperly framed, and we think that no decree ought to be made upon it.

Striking out that part of the plaint, the case is no more than this. Plaintiff is in possession, and he seeks to have a particular declaration made about that possession which we think ought not to be made.

We, therefore, think that the suit having been improperly framed must be dismissed.

The appeal is dismissed with costs.

The 28th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Judgment-debtor's assets—Liability of heirs.

Case No. 2890 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th June 1868, reversing a decision of the Sudder Ameen of that District, dated the 27th July 1867.

Hajee Ali (Plaintiff), *Appellant,*

versus

Mirza Ali Nukee and others (Defendants), *Respondents.*

Baboos Gopal Lall Mitter and *Debendro Narain Bose* for Appellant.

Messrs. R. T. Allan and *C. Gregory* and *Baboo Grish Chunder Ghose* for Respondents.

A decree declaring the heir of a mortgagor liable to pay the mortgage-debt out of such assets as he had received from the estate of his father (the mortgagor) was held not to include assets which came to him after passing through the hands of another heir (his brother) in right of inheritance from that brother.

Glover, J.—To understand the plaintiff's case, it is necessary to go somewhat into detail. It appears that one Asudh Ali mortgaged in the year 1843 a 9-annas share of a mouzah called Pursool to his brother-in-law, one Mahomed Ali. The plaintiff claims through the daughter of the mortgagee by purchase. Asudh Ali died leaving two sons, one Mahomed Hadee who is also called Mirza Imaumee, and Ahmed Hosseinee, who is otherwise called Bunnee Mirza; and this particular Mouzah Pursool descended in the proportion of 3 annas and 6 annas respectively to the two brothers—Mahomed Hadee inheriting the 3 annas and Ahmed Hossein the 6-annas share. Ahmed Hossein pre-deceased his brother Mahomed Hadee; and his 6-annas share of the property is said to have gone by the law of inheritance prevailing among the *Shiah sect* to his brother Mahomed Hadee. The plaintiff, as the representative of the original mortgagee, sued on the original side of the High Court Mahomed Hadee as the heir of Asudh Ali, the mortgagor, and got a decree by confession of judgment on the 23rd January 1866. In that decree it is said that the defendant Mahomed Hadee having admitted receipt of assets of Asudh Ali, his father, he was adjudicated liable to pay the mortgage-money then due out of the said assets, and in execution of this decree the mortgaged property was attached and Asudh Ali's right and interest therein sold.

Whilst the execution was proceeding, the defendant in this suit, who is the widow of the younger son of Asudh Ali, Ahmed Hossein, intervened, on the ground that the decree obtained in the High Court was a fraudulent and a collusive one, and that the property which had descended to Ahmed Hossein, her husband, was hers in lieu of the dower which was due to her. Her objections were rejected on the 22nd April 1866, but before that she had executed the decree obtained by her for her dower against Mahomed Hadee as the representative of his brother, her husband Ahmed Hossein, and attached the 6-annas share of the mouzah which belonged to her deceased husband. On this attachment, the plaintiff (who had, we may remark, purchased in the execution-sale the property originally mortgaged) came in in her turn, and objected to the attachment by Ahmed Hossein's widow. Her objections were, however, overruled, and the decision of the Lower Court was confirmed by the High Court in September 1866, and it was to reverse his miscellaneous order, and to declare that the 6-annas share of Mouzah Pursool was still burdened by her mortgage and by the decree passed upon it that the present suit was brought.

The defence was mainly the same as that set up in the execution-proceedings. The widow of Ahmed Hossein states that the plaintiff's decree was obtained collusively; that she has a lien on the 6-annas share of Ahmed Hossein for the dower due to her; and that, under any circumstances, the decree of the High Court on the original side was only against such assets as Mahomed Hadee had received by inheritance from his father, namely, a 3-annas share, and that the sale included only that amount of property.

The Court of first instance decreed in the plaintiff's favor to the amount of a 16-annas share, holding, apparently, that the other 3 annas had been taken out of the question by some private arrangement between Mahomed Hadee and the plaintiff, by which she had relieved him from liability.

The Judge, on appeal, considered that the decree of the High Court referred only to the 3-annas share which Mahomed Hadee had received as assets of his father's estate: and the only point which we have to consider in this special appeal is whether the Judge was right or wrong in so construing the decree of the High Court, for, with regard to the merits of the case so far, it is not contended, and it cannot be contended, that the property originally mortgaged by Asudh Ali did not necessarily continue to be burdened by that mortgage into whosoever's hands it may have gone by inheritance. Now, it has been held on many occasions by Division Benches of this Court that, when a party prefers a special appeal on the ground of misconstruction of a document, it must be distinctly shown that the construction put upon it by the Lower Appellate Court is such a one as the words of the document will not reasonably bear. The words of the decree in this case are clear enough. They are to the effect that the decree is to be satisfied by Mahomed Hadee, who had admitted the receipt of assets from the estate of his father, Asudh Ali, out of these assets; and *primâ facie*, it would seem that these words limited the power of the decree-holder to bring to sale anything but the 3 annas which Mahomed Hadee had received from his father. But it is contended by the special appellant's pleader that the words of the plaint show exactly the position of Mahomed Hadee and in what way he was sued. and that, as the decree declares him liable to pay the mortgage-debt out of the assets of Asudh Ali according to the plaint, that therefore these words included, not only the 3-annas share of the mouzah in dispute which he had received direct from his father, but also the 6-annas which formed originally part of Asudh Ali's estate, and which came to Mahomed Hadee through his brother after his brother's death. It does not appear to me that this is a fair and reasonable construction to be placed upon the words of the decree, and it is certainly not in accordance with their lexicographical meaning. The decree says that Mahomed Hadee is to pay the mortgage-debt out of such assets as he had received from the estate of his father Asudh Ali, and by such assets I understand assets which came to him direct from his father, and not to include assets which came to him after his brother's death in a roundabout way after passing through the hands of another heir. It cannot, therefore, it seems to me, be said that, in construing the words of the High Court decree and of the bill of sale, as the Judge has construed them, that there is any palpable mistake in his interpretation of these documents, and we should not be justified in special appeal in interfering with his decision.

In a case of this kind, we are bound to go strictly upon the words of the decree, and unless it be shown very clearly that the Judge has misunderstood these words, there can be no ground of special appeal. I may also remark that the meaning which the Judge has attached to the words "assets of Asudh Ali" is precisely the same which had been previously attached to them by a Division Bench of this Court in their decision in miscellaneous appeal No. 512 of 1866, passed on the 20th of September of that year. The learned Judges there gave the same interpretation to the decree and to the terms of the bill of sale as has been given by the Judge below, and state their opinion that the property derived from the father was the only thing sold, and that the share of Ahmed Hossein still remained subject to the claim of his wife for her dower; that is to say, it was not included in the High Court decree. It appears to me, therefore, that, as the present suit was brought, that is, to have it declared that this 6-annas share of Mouzah Pursool forms part of the assets Asudh Ali received by Mahomed Hadee, and is, as such, liable for the mortgage-debt, the case must fail, and the special appeal be dismissed with costs.

There is nothing in this decision to prevent the plaintiff, if so advised, from following the property mortgaged into the hands of the present owners, or from seeking in another suit a declaration that that property is still burdened by the mortgage granted by Asudh Ali in 1843.

Kemp, J.—I am of the same opinion that the special appeal must be dismissed; but I would go somewhat further than my learned colleague has done. I hold that the Judge has put a proper construction upon the decree passed on the original side of this Court, as well as upon the question of what passed to the special appellant under the certificate of sale.

In the suit on the original side of the Court, the plaintiff did not in her plaint allege that Mahomed Hadee was in possession of the whole of the estate of the original judgment-debtor, Asudh Ali, whether acquired from his father or from his brother. She sued him in two capacities, namely, as the heir and representative of Asudh Ali, and as the heir and representative of Ahmed Hossein. She did not claim to have the mortgaged premises sold in satisfaction of the debt, and the decree obtained does not say against what property it is to be executed; but as Mahomed Hadee had confessed judgment to the effect that the assets of Asudh Ali were in his hands, which might well be, seeing that he admittedly inherited a 3-annas share of the property from his father Asudh Ali, the Court's decree was to the effect that the debt was to be satisfied from the assets in the hands of Mahomed Hadee. The sale-certificate passed to the plaintiff what Mahomed Hadee, the judgment-debtor, acquired from his father Asudh Ali, and not what he acquired after his brother's death in right of inheritance, not from the father, but from the brother.

The Judge having, in my opinion, put a proper construction upon the decree of the original side of the Court and upon the certificate of sale, I dismiss the special appeal with costs.

The 28th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Default—Onus probandi.

Case No. 980 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 3rd February 1869, reversing a decision of the Moonsiff of Bistoopore, dated the 26th November 1868.

Damoodur Bhooshun (Plaintiff), *Appellant,*

versus

Rughoonath Panja and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Where a plaintiff has not given any evidence whatever in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence.

Loch, J.—There is a case reported in Marshall's Reports, page 568, which is on all fours with the present case. It was held in that case that, as the plaintiff had not given any evidence in support of his claim, the Judge, in appeal, was not wrong in dismissing the suit, notwithstanding that the defendant who had been duly summoned to give evidence had not attended, and although the first Court had given judgment under Section 170, Act VIII. of 1859.

The pleader for the special appellant in this case has pointed out a case reported in 1 Weekly Reporter, pages 114 and 115. But that case is very different from the one now before us. For in that case the plaintiff was called upon by the defendant to give evidence; and having failed to do so, the Court would not give him a decree upon the evidence that he had filed to support his claim. That case will not assist the present appellant. We think the decision reported in Marshall is correct, and we shall follow it in the present case. We concur with the view taken by the Judges in that case in Marshall, that, where a plaintiff has not given any evidence whatever in support of his case, he is not entitled to a decree merely on the default of the defendant to give evidence.

We dismiss this appeal with costs.

Macpherson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Separation of shares—Section 11, Act XI., 1859.

Case No. 994 of 1869.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 4th February 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 28th November 1868.

Poorno Chunder Banerjee (Plaintiff), *Appellant*,

versus

am Kanaye Ghose and others (Defendants), *Respondents*.

Baboo Bungshee Dhur Sein for Appellant.

Baboo Nil Madhub Sein for Respondent.

The proprietors of a certain lot having obtained a paration of their shares under Section 11, Act XI. of 59, there remained one share (comprising one village d one-third of three other villages), which was sold arrears of revenue and purchased by *W*. Of this are, *W* sold one village to P, who agreed to pay a tain sum as his share of the Government jumma, d then applied to the Collector to open a separate count at the rate which had been agreed upon. The hareholders having objected, the Collector referred the parties to the Civil Court under Section 12. *P* then brought a civil suit for a separate account.

HELD that there was no legal objection to plaintiff's having his separate share opened at the rate he mentioned, even if the jumma on the share which remained in W's possession was excessive; for, if the whole estate were put up to sale for arrears on account of that remnant share, the other shareholders could always protect themselves by paying the sum due.

Loch, J.—IT appears that of the lot Jamarra there were several proprietors, who from time to time applied to the Collector, and obtained an order from him for separation of shares, under the provisions of Section 11, Act XI. of 1859, and there remained a share with a jumma of 319 rupees 2 annas and 9 pie. This last share was sold for arrears of Government revenue, and purchased by one Wooma Churn. This share comprised the whole of Mouzah Dadookhan and one-third of three other villages. Wooma Churn subsequently sold the Mouzah Dadookhan to the plaintiff, Poorno Chunder Banerjee, and by the terms of the deed it was agreed that Poorno Chunder should pay a sum of Rupees 114-11 annas and 3 pie as his share of the Government jumma assessed according to certain quinquennial papers, which had formed the basis of the other separate accounts. Poorno Chunder then applied to the Collector to open a separate account at the rate of Rupees 144-11 annas 3 pie; and certain objections having been raised by the shareholders, the Collector, under the provisions of Section 12, Act XI. of 1859, referred the parties to the Civil Court; and the plaintiff has brought the present suit to have opened a separate account of his share at Rupees 144-11 annas and 3 pie.

We think that the objections raised by the defendants to a separate account being opened in plaintiff's favor are of no weight. There is no legal objection to the plaintiff's having his separate share opened at the rate he mentioned, and the reason given by the Judge for refusing to allow a separate share being opened is insufficient. It is true, as the Judge observes, that all the shareholders have an interest in the matter, and have a right to protect themselves, and it may also be true that the jumma which remains on the one-third of the three mouzahs in Wooma Churn's possession may be excessive. Even if this should be the case, and the share be put up for sale, and the sum bid be insufficient to cover the balance, and so render the whole estate liable to be put up for sale, yet the other shareholders can always protect themselves by paying the sum due.

We think, therefore, that the decree of the Lower Appellate Court must be set aside, and that of the first Court restored. The special appellant is entitled to his costs in this Court and in the Lower Appellate Court.

Macpherson, J.—I concur.

The 28th July 1869.

Present:

The Hon'ble J. P. Norman and Dwarkanath Mitter, *Judges*.

Uniform rent—Section 4, Act X. of 1859—Applicability to other cases—Presumptions and inferences.

Case No. 719 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 19th December 1868, modifying a decision of the Sudder Ameen of that District, dated the 24th June 1868.

Dukhina Mohun Roy (Plaintiff), *Appellant*, *versus*

Kureemoollah Mooktear (Defendant), *Respondent*.

Baboos Romesh Chunder Mitter and *Kishen Dyal Roy* for Appellant.

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Respondent.

The presumption arising under Section 4, Act X., 1859, is not necessarily restricted to proceedings under that Act; but even if it did not apply to suits other than those under Act X., a Court would not do wrong to

follow the rule laid down in Section 4 in determining what length of time payment of a fixed rent should be made in order to warrant the presumption of its having been made since the Permanent Settlement.

In a suit for enhancement of rent, if a defendant fails to prove anything except that he has held for more than 20 years at a fixed rent, and has been recognized in the receipts granted to him as a holder of a fixed tenure; and no evidence is given in favor of plaintiff's claim, the mere fact of there being some infirmity in the defendant's title cannot entitle the plaintiff to a decree.

Norman, J.—This appeal must be dismissed. As regards the lands claimed under the two pottahs of 1197 and 1198, it appears that the defendant and his predecessors have held those lands from before the Permanent Settlement. Even if the pottahs are not genuine—and the Judge by no means says that they are not, but excepts to them because they were granted by a Hindoo widow, and do not contain any words of inheritance—even if the pottahs are not genuine, and do not confer a good title, the defendant, if a ryot, is protected from eviction by Section 3 of Act X. of 1859; if a talookdar, by Section 15 of Act X. or by Regulation VIII. of 1793. In either case, his title to retain possession on payment of rent is clear. Now, as to the proof that he has held from the time of the Permanent Settlement, we think that, on proof of payment of a uniform rent for 20 years in the absence of any proof to the contrary, we ought to assume that the land has been held since the time of the Permanent Settlement at a fixed rent.

It is argued that Section 4 of Act X. does not apply to any suits *not instituted under that Act*, because it says, "whenever in any suit under this Act," &c. Probably the words "*in any suit under this Act*" were not intended to limit the presumption to cases under that Act. It was probably supposed that cases between ryots and zemindars, and talookdars and zemindars, on questions of enhancement of rent and of right to possession, would be determined under Act X. It does not follow, therefore, that it was the intention of the Legislature that Section 4 was to be wholly restricted to proceedings under that Act. But even if the presumption under the 4th Section does not, in fact, in terms apply to suits other than those under Act X., it would then become a question from what length of time during which the payment of a fixed rent should have been made, we should assume that payment at such rate dated back to, or had its origin before, the Permanent Settlement. And in a suit under Act VIII., if it should be proved that the land was held at a fixed rent for the period mentioned in Section 4, I think we should be wrong not to follow the rule laid down in Act X., Section 4. I, for my part, should feel bound to adopt that as a rule.

There only remains a question as to a parcel of land about which there is some uncertainty (owing to the want of proper materials and information at the command of the vakeels), which is alleged to be held under a pottah of 1217. The Judge does not decide whether the pottah is genuine or not, but he says, "in any case the defendant has a right of occupancy." In truth, no issue was raised in the first Court whether the defendant has a right of occupancy under Act X. or not. It is by no means clear that the defendant is a ryot or person capable of acquiring a right of occupancy. We cannot treat the question as satisfactorily decided by the Lower Appellate Court. But assuming that the defendant has failed to prove anything except that he has held the land in question for a long time, certainly for more than 20 years, at a fixed rent, and that he has been recognized in the receipts granted to him as a holder of a fixed tenure, there being no evidence on the part of the plaintiff—none, in fact, having been given by him—there is nothing in the record or in the evidence on which we could base a decree in favor of the plaintiff. Therefore, as regards the land comprised in the pottah of 1217, there may be some infirmity in the defendants' title, but that cannot entitle the plaintiff to a decree.

We dismiss the appeal with costs.

The 29th July 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Evidence—Objections.

Case No. 745 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 23rd December 1868, modifying a decision of the Deputy Collector of that District, dated the 31st August 1868.

Sheetul Pershad Mitter (Defendant), *Appellant,*

versus

Junmejoy Mullick and another (Plaintiffs), *Respondents.*

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Baboos Bama Churn Banerjee and *Hem Chunder Banerjee* for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

Even if the evidence upon the record is in itself insufficient, a Judge may properly decide the case upon that evidence if the defendant consents to its being taken as sufficient. It is the duty of the party, who wishes to object to evidence, to object in the first instance, and not to delay doing so until the case is before the High Court in special appeal.

Macpherson, J.—In this case it is somewhat difficult to ascertain exactly how matters stood before the Judge: but it rather appears that the objection which is now taken as to there being no evidence to bring the case within Clause 1, Section 17, Act X. of 1859, was not taken before the Judge. There is no doubt that, even if the evidence on the record were in itself insufficient, the Judge might properly have decided the case upon the evidence such as it was, if the defendant had waived his objection to its insufficiency and consented to its being taken as sufficient. There is also no doubt that it is the duty of the party, who wishes to object to evidence, to object to it in the first instance, and not to lie by in both the Lower Courts, and then come in special appeal here, and raise objections for the first time.

The difficulty which I have in this case is that it is not perfectly certain that the objection was not taken before the Lower Appellate Court; and from one expression in the judgment of the Judge, there is some reason to suppose that the question may have been raised before him, although not pressed. There is, in truth, no evidence which amounts to strict proof of the plaintiff's right to enhance under Clause 1, Section 17 of Act X. of 1859; and it is under that Clause that the plaintiff has a right to enhance, if he has a right at all.

The first Court has fixed the issues very loosely; and the case must be remanded in order that the proper issues under Clause 1 may be tried. The issues are whether (*a*) the rate of rent paid by the defendant is below the prevailing rate payable by the same class of ryots; (*b*) for land of a similar description; (*c*) and with similar advantages; (*d*) in the places adjacent.

The Court must try the issues as to the land being of a similar description, and as to its having similar advantages with those in the places adjacent, just as much as the issue as to the prevailing rates payable by the same class of ryots; and it must find distinctly upon each one of these questions.

As I have already said, the objection now taken has not been properly raised in either of the Lower Courts; and therefore we direct the parties respectively to bear their own costs of the litigation up to this time, whatever the result of the remand may be.

The case will go back, and the Court must take it up out of its turn, and decide it with the least possible delay.

Glover, J.—I am of the same opinion.

The 29th July 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Fresh evidence taken by Appellate Court—Witnesses—Value of testimony.

Case No. 231 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 18th November 1868, reversing a decision of the Officiating Sudder Moonsiff of that District, dated the 16th July 1868.

Shib Chunder Mahtoon (one of the Defendants), *Appellant,*

versus

Kasheenath Kurmokar (Plaintiff), *Respondent.*

Baboo Gopeenath Banerjee for Appellant.

Baboos Ashootosh Chatterjee and *Jadub Chunder Seal* for Respondent.

A decree-holder, having sold in execution the property of his judgment-debtor (*D*), became himself the purchaser, and sold it again to plaintiff. Plaintiff, on going to take possession, found defendant there, who claimed under a mokurruree pottah granted by *D*, and denied plaintiff's title to anything but the rent. Plaintiff sued for khas possession. The Lower Appellate Court gave plaintiff a decree after calling in *D* as a witness.

HELD that the Lower Appellate Court should have stated most fully and clearly its reasons for calling for fresh evidence; but that, in point of law, it was sufficient if that Court considered the matter, and stated that such reasons existed without mentioning what they were.

HELD that the Lower Appellate Court committed as grave and material error in considering *D's* evidence as conclusive on the point of the genuineness of the mokurruree pottah set up by defendant, and that it was just as necessary to weigh the value of his testimony as that of any other witness.

In the special appeal No. 769, the appellants are Obhoy Churn Nundee and others. They were not originally made defendants in the suit by the plaintiff. They are the proprietors of Rughoonathpore, and are said to be in possession of the whole of the rest of the chur of which the lands now sued for form a part. They applied to be allowed to intervene, and have been added as defendants. Why they should have been so added, seeing that the plaintiff sought for no relief as against them I do not know. But as they are on the record now as defendants, they will be bound by such decree as regards the plaintiff as the Court may make. If the Court shall be of opinion that the plaintiff proves his title, the Court will be careful not to decide any question between the two sets of defendants, that is to say, the defendant Rashmonee Dassee, who is the proprietor of Hazipore (who is in actual possession of the disputed land), and the proprietors of Rughoonathpore. The suit is not a suit for trying any questions between the proprietors of Hazipore and Rughoonathpore. It is merely a suit in which the right of the plaintiff to get possession of this chur is to be decided.

As regards the Rughoonathpore defendants also, the only question for the Lower Court to decide is whether the plaintiff proves his title. Whether the Rughoonathpore people prove their title is quite immaterial unless the plaintiff first proves *his*.

The case is remanded in order that the Court may decide whether or not this chur is an accretion to a portion of the old chur, which portion never was swept away, although the rest of the old chur disappeared. If the plaintiff proves the affirmative, that is to say, proves that a portion of the old chur remained in existence, and that the land now in dispute accreted to that portion, then the plaintiff will be entitled to a decree; but if the plaintiff fails to prove that, then the plaintiff's suit ought to be dismissed.

The costs of the special appeal No. 659 will abide the result of the remand. As regards the special appeal No. 769, Rashmonee Dassee has been unnecessarily made a respondent, and the appellants in No. 769 must, therefore, pay her costs. We make no order as to the costs of the other respondent in No. 769.

Glover, J.—I concur in remanding this case to the Lower Appellate Court. I have nothing to add to the remarks made by Mr. Justice Macpherson.

The 30th July 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Decree without reason—Trial de novo.

Case No. 831 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 21st December 1868, affirming a decision of the Deputy Collector of that District, dated the 18th September 1868.

Nobo Chunder Banerjee and others (Defendants), *Appellants,*

versus

Ishur Chunder Mitter (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Peary Mohun Mookerjee for Respondent.

A Deputy Collector having died before giving his reasons for a decree said to have been made by him, the whole of the subsequent proceedings were held to be bad, and the case was remanded to the Collector to be tried *de novo* upon the evidence upon the record.

Macpherson, J.—THE Deputy Collector having died before he pronounced judgment, and he never having given his judgment—that is to say, his reasons for the conclusion at which he arrived—we think that the whole of the subsequent proceedings are bad, although a decree is said to have been made by him. We consider it necessary that the case should go back to the Collector in order to be tried *de novo*. The Collector will take up the case at once out of its turn, and dispose of it forthwith, before the Doorgapoojah holidays. The case having been gone into already, the Collector will dispose of it upon the evidence which is now upon the record. If the defendant chooses to appear he may do so and must be heard; but further evidence will not be admitted.

The 31st July 1869.

Present:

The Hon'ble F. A. Glover and Sir Charles Hobhouse, *Bart., Judges.*

Limitation—Condonation.

Case No. 874 of 1869.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 19th January 1869, reversing a decision of the Moonsiff of Burjorah, dated the 8th August 1868.

Bhooputty Lall Tewaree (one of the Defendants), *Appellant,*

versus

Soochee Sekhur Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Tarucknath Sein for Respondents.

The decision of the Full Bench (10 W. R., p. 8, Full Bench Rulings), that a decree once barred is always barred for the reason that no proceedings in execution can be valid if instituted after three years from the date of the last proceeding, was held to apply in a case where the admissions of a judgment-debtor were pleaded in condonation of the decree-holder's laches in executing his decree.

Hobhouse, J.—The plaintiffs in this case held a decree for arrears of rent of date the 24th March 1839 against the judgment-debtor, respondent. The defendant, special appellant before us, in execution of another decree against the same respondent, purchased the property in dispute. The plaintiffs now sue to sell that property in the hands of the defendant, special appellant, in satisfaction of their decree of the 24th March 1839 against the judgment-debtor, respondent; and they rest their suit upon this ground. They say, that the decree which was given to them was followed by a kistbundee of date the 25th March 1839, and that by this kistbundee the property in question was pledged to them until the amount of the decree, which again was based on the kistbundee, was paid off.

In this state of facts we may admit for the purpose of the argument before us that so long as any money was due or could be realized by the plaintiffs under their decree of the 24th March 1839, so long was the property in question pledged by the judgment-debtor, respondent, as security for the amount of that decree. But if, on the other hand, the amount of that decree has either been paid off or has ceased for any reason to be due, then clearly the lien on the property no longer subsists. And the question as to whether the money is or is not due turns upon the construction of the Statute of Limitations. If the plaintiffs' decree of the 24th March 1839 is still alive, then the money is due; and if the money is due, the lien subsists; but if the plaintiffs' decree is no longer alive, then the money is no longer due, and the lien is at an end.

Now, the first Court has found as a fact, and the finding is admitted to be a good finding of fact, that the plaintiffs' decree of the 24th March 1839 has been twice barred by the Statute of Limitations, that is, that no proceedings were taken within three years previous to June 1862, and that, again, no proceedings in execution of that decree were taken within three years subsequent to June 1862. But the pleader for the special respondents contends that these laches on their part in executing their decree, have been condoned by admissions made by certain of the judgment-debtors to the effect that the money is still due: and he relies on certain judgments of Division Benches of this Court to be found at page 27, Volume III., and page 13, Volume V., Weekly Reporter, Miscellaneous Rulings.

No doubt, if these decisions were still binding decisions, we should either have to follow them, or should else have to refer the difference for a judgment of the Full Bench. But these decisions seem to us to have been clearly set aside by a decision of the Full Bench to be found in 10 Weekly Reporter, page 8, Full Bench Rulings. By that decision it was substantially held that a decree once barred is always barred; and for the reason that no proceedings in execution of that decree can be valid, if such proceedings are instituted at any time after three years from the date of the last proceeding. This decision seems to apply and to bind us in the case

before us ; and we think, therefore, that the Lower Appellate Court was in error in giving the plaintiffs a decree. We think that the defendant's debt to them no longer subsisted, and that, therefore, their lien also no longer subsisted.

We reverse the decision of the Lower Appellate Court, and restore that of the first Court, dismissing the plaintiffs' suit, with costs of this Court and of the Lower Appellate Court.

The 31st July 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Acquiescence—Mistake.

Case No. 2 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 3rd November 1868.

Pahaladh Singh and others (some of the Defendants), *Appellants,*

versus

Mussamut Luchmunbutty (Plaintiff) and others (Defendants), *Respondents.*

The Advocate-General and *Mr. R. T. Allan* and *Baboo Unnoda Pershad Banerjee* for Appellants.

Mr. C. Gregory and *Baboo Sreenath Doss* for Respondents.

G S had four sons, *H, R, B,* and *A*. The grandson and representative of *H* died in possession of a pergunnah belonging to the joint family. On his death it was, before 1825, taken possession of by the widow of another grandson. The heirs of *A* sued the widow to recover possession, and the heirs of *R* and *B* intervened, claiming jointly. The case was decreed in 1839 in favor of the three sets of heirs, but the decree did not define their shares. Prior to the suit (about 1825), the heirs of *A* had agreed with one *P* to give him a four annas share of all that they might recover, on condition of being furnished with funds to carry on the litigation, and, subsequently, the heirs of *R* and *B* entered into a similar, but separate, agreement with *P*. Under their decree the heirs of *A* got possession of two-thirds of the whole property; and in 1842, they made over one-fourth of their two-thirds share, and the heirs of *R* and *B* made over one-fourth of *R* and *B's* share in possession, that is to say, one-third to *M*, the representative of *P*. *M* then got his name put on the Collector's register in respect of the one-fourth of the share of 10 annas 8 pie held by the heirs of *A*. The heirs of *R* and *B* in 1852 sued the heirs of *A* for a declaration of right and got a decree in 1859 declaring them entitled to two-thirds, and *A* to one-third only of the property held under the original decree. *M* was a party to that suit. The right and interest of one of the heirs of *A* in the property having been sold in execution, a suit was brought for possession in which was raised the question what was, in 1866, the share of *A's* heirs?

HELD that the last decree having declared the heirs of *A* to be entitled to only one-third of the whole property, and they having so long ago as 1842 of their own accord given up to *M* one-fourth of two-thirds the share which remained to them (after the last decree) was only one-third of the whole estate, less one-fourth of two-thirds: and if the heirs of *A* had in fact, in 1842, given up a larger share to *M* than they need have given, of *B*, they could not call upon the heirs of *R* and the heirs who were strangers to the transaction, to recoup them, though they might have benefited by it.

HELD also, that if any re-arrangement of shares as between the representatives of *G S* was necessary by reason of what had occurred as to *M's* share, the matter should have been raised and settled in the suit brought by the heirs of *R* and *B* in 1852.

HELD, further, that a suit, which is in the nature of a partition-suit, cannot be properly dealt with unless all who are admittedly shareholders in the joint property are before the Court.

Macpherson, J.—THIS is a suit to obtain possession of a 3 pie 16 krant share (I shall throughout my judgment omit all notice of more minute fractions) of Pergunnah Poakhallee in the District of Purneah.

On the 30th May 1867, the right, title, and interest of Golab Singh and Monoruth Singh, the heirs of Bullub Singh, in the Pergunnah, were sold in execution of a decree of a Civil Court, and Abdool Kurreem purchased them. On the 2nd of August 1876, Abdool Kurreem assigned his interest to the plaintiff. One main question in the suit thus is—what passed by the sale of the 30th May 1867? and that depends upon the further question, what was the share of Bullub Singh in this Pergunnah?

Bullub was one of the six sons of Achul Singh. The plaintiff's case is that Bullub's share was 1 anna 1 pie (out of the whole 16 annas). The case of the defendants, who are appellants before us, is that Bullub's share was only 10 pie 13 krants. Whichever of these contentions be right, it is admitted by all parties that prior to the execution-sale Bullub Singh sold to the defendant Barnes a 9-pie share (of the 16 annas) on the 20th May 1863, and that what the plaintiff is entitled to is no more than what remained to Bullub after the assignment made by him to Barnes. The appellants contend that 1 pie 3 krants remained; the plaintiff contends that 3 pie 16 krants remained.

The question is in itself a small one: but it involves the consideration of the details and of the effect of much of a litigation

which has been going on for more than forty years.

The general features of the case, and the position of the family of which Bullub was a member, are stated in the judgment of Mr. Justice Seton-Karr and myself in the case of Gunesh Lall Singh and others *versus* Amedoollah and others, delivered on the 15th of May 1866. This judgment, in which some of the questions raised in the present case have been already decided, is to be found printed at page 261 of Volume V. of the Weekly Reporter; but the report is very inaccurate as regards the dates of the documents referred to.

I shall proceed to state, as briefly as possible, such facts only as are absolutely necessary in order to make the conclusions at which I arrive intelligible.

There were five brothers, sons of Gureeb Singh, namely, Huree, Jai, Run, Bhao and Achul. Jai died childless, and for the purposes of this suit it may be taken that there were but the other four sons of Gureeb.

Rung Lall, the grandson and representative of Huree Singh, died in or before 1825 in possession of Pergunnah Poakhallee; and on his death, it passed into the possession of Pudmabutty, the widow of a deceased brother of Rung Lall. Shortly thereafter, the representatives of Achul Singh instituted a suit against Pudmabutty to recover possession of the Pergunnah from her. The representatives of the two other brothers, Run and Bhao, intervened in that suit, claiming a share jointly with the representatives of Achul. The case was, in 1839, decided against Pudmabutty by the Sudder Court, which gave a decree in favor of the representatives of the three brothers Achul, Run, and Bhao. The decree did not, however, define or declare the shares which the several representatives were to take, but the decree-holders were put into possession jointly. The decision of the Sudder Court was confirmed by the Privy Council in 1847.

In order to provide the means for carrying on the litigation with Pudmabutty, the representatives of Achul (who at that time claimed the whole property, ignoring the existence of the representatives of Run and Bhao), on the 18th November 1825, or the 4th of Aghran 1233, entered into an agreement with one Punaoollah, by which they agreed to give him a 4-annas share of all that they might recover, on condition of his furnishing them with funds, &c.

It is said by the plaintiff (but is denied by the appellants) that when the representatives of Run and Bhao intervened, they, on the 19th Kartick 1234, entered into a similar agreement with one Mahomed Rumzan—who was merely *benamee* for the same Punaoollah—agreeing to give him a 4-annas share of whatever they recovered.

When they got their decree, the representatives of Achul considered themselves to be entitled among them to two-thirds (that is 10 annas 8 pie) of the estate, leaving only one-third (that is 5 annas 4 pie) to the representatives of Run and Bhao. And in 1841 or 1842, there is no doubt that all the decree-holders made over to Musheatoollah, the son and representative of Punaoollah, certain mouzahs (the subject of the suit in which, I have already said, judgment was given on the 17th of May 1866), which mouzahs were deemed by all parties to represent a 2 annas 8 pie share out of the 10 annas 8 pie share of the representatives of Achul, as well as a 1 anna 4 pie share out of the 5 annas 4 pie share of the representatives of Run and Bhao.

In an ekrarnamah of the 2nd January 1850 (19th Pous 1257), given by the representatives of Achul to Musheatoollah, it is recited that they, as entitled to 10 annas 8 pie of the estate, had previously given possession to Musheatoollah of 2 annas 8 pie of the Pergunnah, while the representatives of Run and Bhao had put him in possession of 1 anna 4 pie—being 4 annas in all. And on the 23rd of August 1850, Musheatoollah got his name put by the Collector on the register in respect of 2 annas 8 pie out of 10 annas 8 pie of the Pergunnah, *the share of the representatives of Achul.* He never got himself registered as against the representatives of Run and Bhao.

In 1853, there was a proceeding under Act IV. of 1840, when the Magistrate held that Musheatoollah was, and had long been, in possession of a 4-annas share of the Pergunnah; and he was accordingly maintained in possession.

Shortly before this proceeding under Act IV. of 1840, the representatives of Run and Bhao brought a suit, in 1852, against the representatives of Achul for a declaration of their respective rights and shares in Pergunnah Poakhallee. Musheatoollah was made a defendant (although only what was unmeaningly called *pro formâ*) in that suit. On the 31st December 1858, a decree was passed by the Judge of Purneah, declaring the

representatives of Run and Bhao entitled to two-thirds, *i. e.*, 10 annas 8 pie, and the representatives of Achul to one-third, *i. e.*, 5 annas 4 pie—thus exactly reversing the position of the contending parties.

On the 22nd of January 1859, the representatives of Run and Bhao sold 2 annas and 8 pie out of their 10 annas 8 pie share to the representatives of Achul. This left an 8-annas share to each party—putting out of consideration the 4 annas given to Musheatoollah.

From the Judge's decision of December 31st, 1858, Musheatoollah alone appealed to the Sudder Court; but that Court dismissed his appeal, on the ground that no injury would accrue to him from the decree which had been passed. The Court said that if he was really already in possession of a 4-annas share, his possession could not be disturbed in executing the decree; while if he was *not* actually in possession, he must bring a suit in order to establish his right.

As a matter of fact, however, Musheatoollah was dispossessed in the course of executing that decree.

Thereupon Ahmedoollah, his son (who is also stated to have *purchased* his father's interest in the property), sued to be restored to possession; and it was finally decided by Mr. Justice Seton-Karr and myself on the 17th May 1866 (in the judgment already more than once referred to), that he was entitled to possession with mesne-profits. The appeal in that case was exclusively by the representatives of Run and Bhao, who absolutely denied that they had ever put Musheatoollah in possession of any part of the Pergunnah, and denied that any contract with Punaoollah had ever been entered into by them or by those whom they represented. The effect of our judgment of the 17th May 1866 is that we decided that the representatives of Achul, and the representatives of Run and Bhao, did enter into agreements with Punaoollah, as alleged—and that Musheatoollah did get possession of 4 annas, as alleged, long before the Act IV. of 1840 case in 1853: and we declared Ahmedoollah entitled to possession (with wassilat) of the property from which he had been dispossessed in executing the decree which the Sudder Court had expressly said could not and should not affect him. Substantially, we did no more than declare his right and restore him to his previous possession and give him wassilat.

After all those proceedings, the remains of Bullub's share were sold in execution, and the plaintiff appeared on the scene, and instituted the present suit.

The real point at issue is this. The representatives of Achul, rightly or wrongly, deeming themselves the owners of a 10 annas 8 pie share, or two-thirds of the 16 annas, put Musheatoollah in possession of 2 annas 8 pie, a proportionate share, *i. e.*, two-thirds of 4 annas. That they did so as long ago as 1248 or 1841 is admitted by them in their ekrarnamah of January 2nd, 1850, and in the proceedings before the Collector in that year, to say nothing of those before the Magistrate in 1853. But subsequent to those admissions, &c., the representatives of Run and Bhao having got a decree declaring that *they* were entitled to the 10 annas 8 pie share, and the *representatives of Achul* to the 5 annas 4 pie share only, the plaintiff comes forward and contends that the 2 annas 8 pie share given to Musheatoollah and now held by Ahmedoollah, should be deducted, not from the share of the representatives of Achul, but from the 10 annas 8 pie share which the representatives of Run and Bhao are now proved to be entitled to. If this deduction is made, then Bullub was entitled to the larger share contended for by the plaintiff. If the deduction is not made, then Bullub took only the smaller share which the appellants say he took.

The Lower Court has given the plaintiff a decree, holding that it was by a mistake that the 2 annas 8 pie were given up by the representatives of Achul.

The Advocate-General for the representatives of Run and Bhao contends in appeal that there was no mistake whatever, and that there is no evidence to support the finding that there was; that there is no legal evidence whatever of the representatives of Run and Bhao having entered into any agreement to give Punaoollah a 4-annas share, or any other share of what they recovered, or of their having put Musheatoollah in possession of a 1 anna 4 pie share: and that this suit is bad in the absence of the other joint shareholders, the representatives of Achul, who have not been made parties to it.

In my opinion, the decision of the Lower Court is wrong and ought to be set aside.

As regards the mere question of whether the representatives of Run and Bhao entered into any such agreement as alleged with

Punaoollah, I have no doubt myself that they did: and I look upon the point as settled by the decision of the Division Court on the 16th May 1866. In like manner, I consider it established that about 1841, the representatives of Run and Bhao put Musheatoollah in possession of what was deemed equivalent to a 1 anna 4 pie share.

I do not see that there ever was any "mistake" on the part of the representatives of Achul. They asserted their right to two-thirds when they were entitled to only one-third: and assuming that their rights were such as they asserted them to be, they gave up a 2 annas 8 pie share of the Pergunnah (out of their own share) to Musheatoollah. Because the Court many years afterwards held that they were entitled to no more than one-third, it cannot be said that, as regards the appellants, what was done was done under a "mistake" in any legal sense which that word may bear. They believed themselves to be under a certain obligation to Musheatoollah, and they fulfilled it according to what they believed their liability to be. If they gave too much, that is no mistake entitling them to have recourse to third parties, and to call on them to recoup their loss.

But if there was ever any mistake on the part of the representatives of Achul, it is quite too late for them now to avoid its effect. By their own admission, they in 1248 (1841 or 1842) put Musheatoollah in possession of a 2 annas 8 pie share out of that which they held and deemed to be their own share. He remained in possession, and was, as is also admitted by them in their ekrar of 2nd January 1850, entitled as against them to have his name registered in the Collector's books as proprietor of 2 annas 8 pie *out of their share.* He was proved to be in possession, and was retained in possession of these 2 annas 8 pie by the Magistrate in December 1853: and he remained in possession until dispossessed in the course of the proceedings which were taken in executing the decree of the Judge of Purneah, which the representatives of Run and Bhao obtained in 1858. Finally, he has, by our decree of the 16th May 1866, and by the decree which we affirmed, been ordered to be restored to the possession which he was deprived of, and to get *wassilat* for the time he was kept out of it. It appears to me that it is out of the question to speak of mistake at this period, after the arrangement which was come to has been acted on and acquiesced in so many years.

In the suit brought in 1852 by the representatives of Run and Bhao against the representatives of Achul, in order to have their respective shares ascertained and declared, Musheatoollah was a defendant. If any re-arrangement of shares as amongst the representatives of Gureeb Singh was necessary by reason of what had occurred as to Musheatoollah's share, the matter should have been raised and settled in that suit. But nothing was said about it, and no allowance was asked for or made, the shares of the parties being declared as if no such person as Musheatoollah existed. In that suit, apparently, the object of all parties was to ignore Musheatoollah and his 4-annas share, and to get a decree under which he might afterwards be ejected. I think that what subsequently happened justifies my saying this. However this may be, the representatives of Achul (by whose acts the plaintiff is bound) having chosen to adopt the line which they did in that suit, they cannot now bring a fresh suit in order to raise a question which, if it could be raised at all, ought to have been raised then.

But the present suit is not a suit in which the representatives of Achul allege they have been inequitably or unfairly dealt with, or that they have acted under any mistake. As a body they apparently acquiesce in the existing state of things, while the purchaser of the small remains of a small share raises the question, and takes care not to make the other representatives of Achul parties. I am aware that it has been pleaded, although the Lower Court has found it is not proved (and no argument on this part of the case has taken place before us in appeal) that the person really interested in this suit is one of the direct representatives of Achul. If he is, the case is none the less strong against the plaintiff on this ground.

So far as I can ascertain, there has as yet been no partition; there has been nothing more than a declaration that, amongst them, the representatives of Run and Bhao are entitled to two-thirds, and the representatives of Achul to one-third. If the shares are still undefined and joint, this suit cannot lie in the absence of the representatives of Achul Singh (other than the plaintiff). I think that the Advocate-General's objection as to this defect is unanswerable, and that, if it were for this defect alone, the plaintiff's suit ought to have been dismissed. The suit is in the nature of a suit for partition, and cannot be properly dealt with unless all who

are admittedly shareholders in the joint property are before the Court.

I think that the decree of the Lower Court should be reversed, and that the plaintiff's suit should be dismissed with costs in both Courts.

Jackson, J.—I concur with Mr. Justice Macpherson that the decree which the plaintiff has obtained from the Subordinate Judge of Purneah should be set aside and the suit of the plaintiff dismissed with all costs.

I am of opinion that the suit of the plaintiff is barred under the Law of Limitation. The plaintiff has purchased the rights and interests of one Bullub Singh. He is entitled to recover only such interests as Bullub Singh actually possessed at the time of the plaintiff's purchase, or such as Bullub Singh might have brought a suit to recover had Bullub Singh still remained in possession. The plaintiff gains no higher right than Bullub Singh would have held. If Bullub Singh had preferred the present suit, I think that his claim would have been barred by limitation. Similarly I think the plaintiff's claim is barred. The plaintiff's allegation is that he is entitled to a certain share in the Pergunnah of Poakhallee calculated on the fact that the heirs of Achul Singh, one of the former owners of that estate, were originally entitled to hold 5 annas 4 pie of it, with a deduction of 1 anna 8 pie which they had agreed to make over to one Musheatoollah in lieu of services rendered by him to them in recovering the estate. In fact, however, the heirs of Achul Singh so far back as the year 1842 made over to Musheatoollah 2 annas 8 pie out of their share of the estate. This is proved by their own documents executed in favor of Musheatoollah, and by their own admissions in the proceedings which Musheatoollah took to have his name registered in the Collectorate. It may be, and I think it is, the case that the result of subsequent litigation has been to show that the heirs of Achul were not bound to make over to Musheatoollah a larger share than 1 anna 8 pie; and if they had taken legal steps to recover the excess which they had, under a mistaken view of their legal rights, given over to Musheatoollah, I think they might have recovered it. But they took no such steps at any time after 1852. They had one special opportunity for raising this question, *viz.*, when the heirs of Achul Singh's brothers, Bhao Singh and Run Singh, sued them to establish their right to the 10 annas 8 pie share of the estate: they did not avail themselves of that opportunity. Bullub Singh as one of the heirs of Achul Singh could not, therefore, in my opinion, now open this question. If he had brought this suit, I should hold that his claim was barred by limitation. I think the plaintiff's suit is, consequently, also barred from being heard on the merits. On this ground, therefore, I concur in the dismissal of the plaintiff's suit with all costs.

The 31st July 1869.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Attachment—Execution-case—Striking off the file.

Case No. 2262 of 1868.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 22nd May 1868, affirming a decision of the Subordinate Judge of that District, dated the 6th September 1866.

Mr. J. DaCosta (Plaintiff), *Appellant,*

versus

Kalee Pershad Singh and others (Defendants), *Respondents.*

Baboo Toolsee Doss Seal for Appellant.

Mr. C. Gregory and *Baboo Chunder Madhub Ghose* for Respondents.

Certain property having been attached and advertised for sale in execution of a money-decree, the decree-holder asked the Court to stay further proceedings for six weeks as the debtor had made part-payment, praying that the attachment might be considered to be still in force. The execution-case was accordingly removed from the file:—

HELD that the order striking the case off the file for the convenience of the Court did not put an end to the attachment.

HELD (*Jackson, J., dissenting*), that the attachment continued in force notwithstanding a year's delay on the part of the judgment-debtor in applying again for execution.

Loch, J.—THE facts with which we have to deal are as follows:—

One Asumtoonissa obtained a bond from Modhoobun Singh, on 22nd April 1861, in which the property which is the subject of this suit was pledged as security for the loan. On 9th September 1862, she got a simple money-decree, having merely sued

to recover the amount of her debt without seeking to enforce her lien on the property pledged; and on 9th December 1862, she applied for execution, and the property of the debtor was attached on 12th January 1863, and advertised for sale. On the 24th April 1863, the decree-holder prayed the Court to stay further proceedings in execution for six weeks, as the debtor had paid Rupees 2,000, at the same time praying that the attachment might continue in force. The execution-case was accordingly removed from the file on 30th April 1863.

The decree-holder, Asumtoonissa, took no further steps to enforce her decree till the 20th June 1864, when she filed a petition praying for execution, and the debtor's property was ordered to be attached. The Nazir made his return on 5th July, and the property was sold on the 5th September 1864, and purchased by the defendants.

The plaintiff took a bond from Raj Coomar Singh and Rughoonath Narain Singh, on 4th June 1864, by which the above property was pledged to the plaintiff. He got a decree on 26th July 1864, which made the mortgaged property liable to sale for the liquidation of the debt, and he applied for execution on 30th July 1864. The debtor's property was attached on 12th August 1864. Objection to the proposed sale of the property was made by the defendant, whose objection was overruled on 9th August 1865. The sale commenced on the 4th of September 1865, and was continued till the 6th idem, when the defendant Kalee Pershad applied for a review of the order by which his objection to the sale had been rejected. On 23rd January 1866, the application for review was admitted, and the sale in execution of plaintiff's decree was never completed.

The present suit is brought to enforce the plaintiff's decree by sale of the property pledged in his bond. The Subordinate Judge held that the property had been pledged to the plaintiff after it had been attached in execution of Asumtoonissa's decree and while that attachment was in force, and he dismissed the suit.

On appeal, the Additional Judge differed from the view taken by the Subordinate Judge, and held that, as the execution-case had been struck off the file, the attachment was no longer subsisting. But though the Additional Judge overruled the first Court on this point, he confirmed the decree dismissing the suit, on the ground that, as both the parties who were claiming the property held upon bonds from the same debtor, and as the property had been pledged to each creditor in their respective bonds, the plaintiff, who was the holder of a bond of subsequent date, could not enforce his decree against that property, as it had been sold on the decree of the other creditor whose bond was of a prior date, and who had already obtained a decree, though that decree was a simple money-decree which did not direct the sale of the pledged property in liquidation of the debt. The Additional Judge rested his decision on a judgment of this Court, printed in VII. Weekly Reporter, page 232.

An appeal has been preferred from this order, *first*, on the ground that, when the property was pledged to the plaintiff, appellant, no attachment was in force; and, *secondly*, that defendant's decree, being a simple money-decree, gave him no lien upon the property pledged to the plaintiff after the attachment had been withdrawn, and who held a decree by which the property was specially held liable to sale; *thirdly*, admitting for the sake of argument that the judgment-creditor on the money-decree had a lien on the property, that right did not, and could not, pass to the auction-purchaser, the present defendant.

The first question to be disposed of is whether the attachment made by Asumtoonissa in execution of her money-decree was in force when the property was pledged to the plaintiff, appellant, on 4th June 1864. Asumtoonissa took out attachment on 12th January 1863, and on 24th April following she stayed further execution-proceedings for six weeks on payment by the debtor of Rupees 2,000, praying that the attachment might be considered to be still in force, and stating that, on the expiry of the period, she would, if the decree were still unsatisfied, again apply for the sale of the property. The execution-case was struck off the file on 30th April 1863, with an order to the effect that the case was decided to the extent covered by the payment. It is clear, therefore, that the case was not struck off for any default of the plaintiff, but merely removed from the file, as nothing further in execution of the decree could be done till the expiry of six weeks; and it was struck off in compliance with the judgment-creditor's application who gave as a condition of her delaying the sale of the debtor's property that the attachment was to be considered still

in force. Both parties before the Court must be considered to have agreed to this, and as the Court did not refuse this part of the creditor's prayer, it must be considered to have complied with it. When, therefore, did the attachment cease to be in force? If the order of the 30th April 1863, striking the case off the file for the convenience of the Court, did not put an end to the attachment, then it must, I think, be held to have lasted at least six weeks from the date of that order, which would bring down the time to the middle of June 1863. At what date between the middle of June 1863 and the 20th June 1864 did the attachment cease? Did it cease on the expiry of the six weeks? Certainly not, and the appellant does not say it did. He looks to the order striking off the case. Had the decree-holder a day or two after the expiry of the six weeks applied to the Court to realize the balance of his debt, could it then have been said: You must take out fresh process of attachment? Could he not have pointed to the condition in his petition, and have urged successfully that he was not bound to apply to the Court for execution immediately on the expiry of the six weeks? It is impossible to fix a date. If the order of the 30th April 1863 had not the effect of removing the attachment, nothing else had.

It may be asked whether an attachment is to last for ever. It may be urged that an attachment hanging over a property for a long period is detrimental to the debtor's interest, as it must have the effect of deteriorating the value of the property. That, however, is the business of the debtor. If he have property, a sale by him might possibly be considered valid, if it were made in good faith for an adequate price and for the purpose of paying off the decree, and if the proceeds were actually applied for the purpose. But if a debtor having property will take no steps to satisfy his creditor's just claims, for which a decree has been issued, the debtor has no good cause of complaint if the value of his property is supposed to be deteriorated by the continuance of the attachment made by the judgment-creditor. An execution-case struck off for the convenience of the Court is quite a different thing to a case struck off for default of the judgment-creditor. In the former case, matters remain as they were at the date of the order. If an attachment is in force, it remains so; and the only thing to be done on the fresh application for execution being made is to issue a fresh proclamation for sale, fixing the time and place of sale for the information of intending purchasers. In the latter case, the previous proceedings are held to be void through the default of the decree-holder who has failed to comply with the orders of the Court.

But it is said that from the order passed on the defendant-respondent's petition of the 20th June 1864, it is apparent that both the Court and the parties considered the former attachment to be at an end. This cannot be said of the respondent, for he distinctly asks the Court to proceed to the sale of the property without taking out process of attachment; and little weight is to be attached to the order on the petition directing attachment to be made as usual, for this is only the customary order written on all applications of the kind; nor can any inference be drawn to the detriment of the respondent, defendant, from the fact that, instead of remonstrating, he complied with the order of the Court, and made attachment a second time, though it was under the circumstances unnecessary. It appears to me, therefore, that the finding of the Lower Appellate Court on this point is incorrect, and I would reverse this part of his judgment, and restore the order of the first Court. Under this view of the case, it is unnecessary to go into the other points raised in appeal.

Jackson, J.—I regret that I differ from my learned colleague. I would dismiss the appeal on the point on which my colleague would decree it. I think that the plaintiff's attachment was not in force when the defendant obtained his mortgage from the plaintiff's judgment-debtor. The plaintiff attached on the 12th January 1863, and the attached property was to be put up to sale on the 24th May 1863. But on the 24th April 1863, the plaintiff petitioned the Court, stating that he had received a portion of his debt, and that the debtor had agreed to pay the remainder in six weeks' time, and asking that the sale might be deferred, the attachment continuing in force. The plaintiff took no further steps to enforce his decree until June 1864, *i. e.*, for a whole year. The defendant obtained his mortgage in June 1864, and the plaintiff then came into Court, and asked the Judge to sell his debtor's property on the previous attachment of May 1863. The Court, I think, very properly refused, and directed the plaintiff to take out fresh attachment. No further proceedings having been taken on the attachment for more than a year, I am not prepared to hold that that

attachment still subsisted. In the meanwhile the case had been struck off, and though it should not have been struck off at the time those orders were passed, it certainly should have been struck off if the plaintiff did not carry on the case within some reasonable time after the six weeks had elapsed. I read the plaintiff's petition of April 1863 to mean that he asked for an adjournment of the case for six weeks, at the end of which time he would be prepared to take further measures in it. At the end of that time, however, he did nothing, and for more than a year he did nothing. His case had been struck off, and he took no steps to revive or carry on his execution-proceedings. Under these circumstances, I think that the defendant, if he had had notice of the attachment and was aware of all the facts connected with it and with the petition of April 1863, and the subsequent silence of the plaintiff, would have been justified in coming to the conclusion either that the plaintiff had received his money, or at least was not desirous to proceed with the sale of his debtor's property, and had allowed the attachment to drop. The plaintiff has not been vigilant in carrying on his case; and if his want of care and negligence has led the defendant into a mistake, I think the defendant should not suffer for it. I would decide against the plaintiff in consequence of his own conduct, and not because the Court struck off the case. The Court was wrong to strike off the case when it did, as the admission of the plaintiff's petition was a virtual adjournment of the execution for six weeks. The Court should have on that petition adjourned the case to some day not less than six weeks after; and if the plaintiff did not then carry on his execution-proceedings, I think the Court would have been right to remove the execution-case from the file of pending cases. In execution, as previous to decree, a plaintiff is bound to carry on his case, and if he fails to do so, the Court may strike the case off. This is certainly the practice of our Courts, and I am not prepared to hold that it is contrary to law. If, however, it is, orders should be issued upon the subject so that the Courts' mistakes should not injure third parties, who, under the present practice, may be deceived by them.

The 31st July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Zemindar and ryot—Heirs of lessee.

Case No. 707 of 1869.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 31st December 1868, affirming a decision of the Moonsiff of that District, dated the 26th October 1868.

Wopendro Mohun Tagore and others (Plaintiffs), *Appellants,*

versus

Thanda Dossia and another (Defendants), *Respondents.*

Baboos Sreenath Doss and *Kalee Prosunno Dutt* for Appellants.

Baboo Bungshee Dhur Sein for Respondents.

As between the zemindar and persons to whom he grants leases, he cannot be compelled to recognize the title of any one beyond the persons with whom he deals and to whom he looks for rent; *e. g.*, the rights of members of the family of the lessees.

Norman, J.—This is a suit which was brought by the late Prosunno Coomar Tagore for possession of certain lands held by one Huro Pershad under a lease from the 30th Bhadro 1266, expiring in Bysack 1271.

The defendant is the widow of an uncle of Huro Pershad, and she claims to retain possession of the jote.

The Judge finding that it is an ancestral jote has dismissed the suit.

The facts, as appearing in the written statement of the defendant herself, are that originally there were five brothers, Roop Narain, Gour Mohun, Saful Ram, Soobul Ram and Luckhun; that the property now in dispute was originally taken under a pottah granted to Roop Narain, and after his

decease it was settled with Luckhun. After the death of Luckhun, namely, in 1266, Huro Pershad, who was the son of the second brother Gour Mohun, took a lease in terms which appears from the kubooleut of Huro Pershad which has been put in: "I "take for five years a temporary lease of a "limited jote. To the end of the term I "will pay rent according to kists named; "and after the term on certain conditions, "until a fresh settlement is made." Huro Pershad having died, the plaintiff entered on the jote. The defendant brought a suit under Clause 6, Section 23 of Act X. of 1859, and obtained a decree restoring her to possession. Upon which the plaintiff brought this suit to establish his title to possession of the land upon the ground that the rights of Huro Pershad had ceased. We think that the plaintiff is entitled to recover.

The defendant alleges herself to be the heiress of Huro Pershad; but that she certainly is not the widow of an uncle not being capable under any circumstances of inheriting to her own nephew.

As between the zemindar and persons to whom he grants leases (whatever may be the rights of the members of the family of the lessees of the lands so granted as between themselves), we think it plain that the zemindar cannot be compelled to recognize the title of any one beyond the persons with whom he deals, and to whom he looks for rent. And the zemindar having given leases to Roop Narain, Luckhun, and Huro Pershad, could not be compelled to recognize the defendant, the widow of Soobul Ram, as having any title to or share or interest in the property. At best the defendant as heiress of her husband could only be entitled to a fractional interest in the jote. But a landlord is not compelled to recognize or give effect to the division of the tenure.

By Section 27 of Act X. of 1859, it is provided that "no zemindar or superior "tenant shall be required to admit to re-"gistry, or give effect to any division or "distribution of the rent payable on account "of any intermediate tenure, nor shall any "such division or distribution of rent be "valid and binding without the consent "in writing of the zemindar or superior "tenant."

The decree of the Lower Appellate Court must be reversed, and the plaintiff's suit decreed with costs in all the Courts.

The 31st July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Written instrument—Parol evidence—Benamee conveyance—Plea of fraud.

Case No. 747 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Kamroop, dated the 31st December 1868, reversing a decision of the Moonsiff of Gowhally, dated the 12th November 1868.

Sookna Medhee (Plaintiff). *Appellant,*

versus

Gundhoo Ram Mundul and others (Defendants), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

No one for Respondents.

Where an instrument is on the face of it a conveyance or deed of sale, it is not open to the party who executed it to show by parol evidence that the intention of the parties was that it should not operate as a sale or conveyance.

In a suit to enforce such an instrument, where plaintiff does not admit that he was a party or privy to any fraud, it is not competent to the defendant to set up that the deed was concocted for fraudulent purposes.

Norman, J.—THE plaintiff claims certain lands under a deed of sale executed to him by the defendant Gundhoo Ram Mundul.

The defendant admits the execution of the kobalah or deed of sale, which contains an admission that he, defendant, had received the consideration-money mentioned therein. But he says that he did not sell the land or receive the price of it, and that he executed the kobalah to the plaintiff only for the purpose of making the land *benamee* under pressure of some necessity.

The defendant's witnesses attempted to prove that the defendant had executed the deed of sale of the land in favor of the plaintiff for the purpose of defrauding the defendant's own nephew of his share of the property.

The Subordinate Judge of Kamroop finds that the consideration-money was not paid or received, and therefore treats the sale as invalid.

It has been urged by the vakeel of the appellant, that the decision of the Lower Appellate Court ought to be reversed on

the ground that it is not competent to the defendant to set up that the supposed deed was a mere fraudulent contrivance to defeat his nephew's rights.

We may observe in the first place that the instrument is on the face of it a conveyance or deed of sale; and it is not open to the defendant to show by parol evidence that the intention of the parties was that it should not operate as a sale or conveyance.

The appellant's pleader cited and relied upon the case of Obhoy Churn Ghuttuck *versus* Trilochun Chatterjee, to be found at page 1639, Sudder Dewanny Adawlut Reports for 1859.

The case cited is an authority that it is not competent to the defendant to set up, as against the now plaintiff, who does not admit that he was a party or privy to any fraud, that the deed was concocted for fraudulent purposes. The defendant, having chosen to execute a deed conveying his property to the plaintiff for defeating the just rights of his own nephew, has placed himself at the mercy of the plaintiff, and cannot be allowed to say that his conveyance is simply fictitious and inoperative.

The decision of the Lower Appellate Court must be reversed, and the plaintiff must have a decree for the land claimed, with costs of the suit in all the Courts.

The 31st July 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Notice of enhancement—Actual and registered tenants.

Case No. 1040 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 8th February 1869, reversing a decision of the Deputy Collector of that District, dated the 28th October 1868.

Huro Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Goluck Chunder Sircar and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

A suit for arrears of rent at enhanced rates cannot be maintained where the notice of enhancement has been served on parties other than the one *known* to the zemindar as the *actual* tenant from whom he had received rents, and to whom he had given receipts, even though the parties served with the notice are the representatives of the registered tenant.

Loch, J.—PLAINTIFF sued for arrears of rent at enhanced rates after service of notice. Goluck Chunder, the party in actual possession of the tenure, intervened and was made a party to the suit. It is admitted that the tenure was created subsequent to the Permanent Settlement, but it is alleged that, the productive powers having increased by the exertions of the tenant, the plaintiff is not entitled to claim enhanced rent.

The first Court gave plaintiff a decree for rent at Rupees 2 per beegah, on the ground that, though Goluck Chunder had filled up the khal, the time had arrived when the landlord should receive a portion of the ryot's income.

On appeal, the Judge reversed the decree of the first Court on two grounds: *first*, because from the terms of the lease it appeared that Ram Ruttun Sircar, in whose name it is drawn up, obtained it on the condition "that, if he made the land, he should hold it at the rental fixed," and the present landlord was not justified in rescinding this agreement on the ground stated by the Deputy Collector; and, *secondly*, because the notice of enhancement was issued in the name of Issur Chunder Sircar and another, the original defendants, the sons of Ram Ruttun, who were not the real occupants—a fact known to the zemindar, for he had received rent from Goluck Chunder, and acknowledged him in the dakhilahs he had given him to be the occupant ryot.

In special appeal two objections are urged before us: *first*, that the Judge is clearly wrong in his construction of the kubooleut executed by Ram Ruttun; and, *secondly*, that, as the name of Ram Ruttun was registered in his serishtah, he was not bound to look beyond the registered tenant.

On the first point, we think the Judge's construction of the document to be wrong. There is nothing in it to show that any khal was in existence, or that the tenant, on condition of improving the land, was to hold at a fixed rate. It appears, further, that the estate in which this property is situated was formerly a Government estate, and while in the hands of Government was measured and assessed by orders of the Collector, and reference is made to the

jummabundee then prepared, which shows that the land settled with Ram Ruttun was paddy land assessed uniformly at a rate of 1 rupee 6 annas per beegah. There is nothing to show that the land was either jungle or waste, khal or jheel, or requiring improvement in any way, so that the plea raised by the defendant that he has improved the land is not correct if urged in regard to any period subsequent to the date of the kubooleut.

With regard to the second ground taken by the special appellant, it is evident from the dakhilahs filed that plaintiff had received rent from Goluck Chunder, and in the receipts he gave admitted him to be the occupant tenant. The dakhilahs, however, are all given in the name of Ram Ruttun Sircar, and many of them run in these terms :—

Tenant Ram Ruttun Sircar.

Goozrut Goluck Chunder Sircar Marfut ditto:

or sometimes the name of some pyke or other persons by whom the rent was paid. It is not easy to understand why, after having recognized Goluck Chunder as the occupant of the land, the plaintiff should have omitted to make him a party to the suit and brought his action only against the sons of Ram Ruttun. The notice of enhancement is addressed to Issur Chunder Sircar, Ram Lall Sircar, Sookhmoyee, Seetanath, and Chintamonee. Now, it cannot be doubted that, after having received rent from Goluck Chunder, and giving him receipts as the tenant in occupation, the plaintiff knew who was the party really liable to him for rent, and he cannot shelter himself under the plea that he had only to deal with the registered tenant, for the registered tenant was Ram Ruttun, but the notice was served on his sons or representatives, and not on the party whom the plaintiff knew to be the actual occupant from whom he had received rent. Under these circumstances, the decision of the Lower Appellate Court appears to be quite correct, and the special appeal is rejected with costs.

Macpherson, J.—I concur.

The 31st July 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

A third application for a new trial—Section 21, Act XI., 1865.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Patna, dated the 26th June 1869.

Dhunnoo Chowdhry, *Plaintiff,*

versus

Bukshun and another, *Defendants.*

A third application for a new trial in a Court of Small Causes is not admissible under Section 21, Act XI. of 1865.

Case.—The plaintiff is a money-lender. He sued the defendants on his mercantile books to recover Rupees 441-12, being the amount of a loan, with interest, made to them on the 24th March 1868. He produced his account-books to prove the item, the subject of the suit, as also to show that he had dealings with them for a long time, and brought witnesses to attest his books and prove the debt. The defendants denied the demand.

My predecessor, Baboo Muthoora Nath Goopt, dismissed the suit holding that the parol evidence of two witnesses, who were plaintiff's servants and dependants, in the absence of a written acknowledgment of the loan in the plaintiff's account-books, was not sufficient to establish a claim for so large a sum, particularly as the parties were in feud with each other, and ill-feeling existed among them to a certain extent.

The plaintiff applied for a new trial within seven days from the date of the decision, under Section 21, Act XI. of 1865, on the grounds that, in a case where transactions have been carried on for some time between the parties, the written acknowledgment of the party receiving the loans in the account-books of the lender is not necessary for proving the different items of transactions, and according to the custom and usage of this country such acknowledgments are not taken in the

account-books of the native bankers and other money-lenders.

This application was refused by Baboo Muthoora Nath Goopt. The plaintiff again moved for a new trial on the same grounds within seven days from the date of the last order. It was also refused by Baboo Muthoora Nath Goopt.

A third application for a new trial was presented to me within seven days from the date of the last preceding order, on the same grounds with a little modification. It remains undisposed of.

The question, therefore, for the consideration of the Honorable Court is whether an application of the nature described above can be granted if there be sufficient grounds for admitting the new trial.

In para. 9 of the rules of practice for Courts of Small Causes passed by the late Sudder Court on the 1st June 1861, it has been provided that, in disposing of applications for new trials, the procedure prescribed in Section 378 of Act VIII. of 1859 shall be followed. As it has been finally decided that a second application for a review under Section 378 of the Civil Procedure Code is admissible, whether the application for review is dismissed for default of the applicant, or admitted, and the judgment is altered on re-hearing, or admitted, and the judgment is not altered on the re-hearing, or rejected,* I think there is nothing in Section 21 of the Mofussil Small Cause Court Act, XI. of 1865, to prevent a second or a third application for a new trial being heard, if there are good and sufficient reasons for granting it.

* Indian Jurist (N. S.), page 147; (S. C.) V. Suth. W. R., page 93; I. Suth. W. R., page 287; II. Suth. W. R., page 62.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the application is not admissible under Section 21, Act XI. of 1865. The case of a review is very different from that of an application for a new trial under the Section above referred to.

The 2nd August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Dakhilahs not duly attested—Evidence.

Case No. 1163 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 16th September 1867, reversing a decision of the Deputy Collector of that District, dated the 30th September 1865.

Reazoonissa (Plaintiff), *Appellant,*

versus

Bookoo Chowdhrain and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Khetturnath Bose and *Nil Madhub Sein* for Respondents.

Dakhilahs unattested, or attested only by the evidence of a manager and mookhtear, were held to be no legal evidence of uniform payment of rent.

Hobhouse, J.—THIS was a suit for arrears of rent at enhanced rate after notice, the arrears claimed being for the year 1272.

Amongst other pleas, the defendants, special respondents now before us, relied upon the presumption arising from unchanged rent for a period of 20 years before suit as barring the plaintiff's claim. The case came before a Division Bench of this Court in special appeal 2531 of 1866, and was remanded, in the words of the Division Bench of this Court, "to be re-tried with reference to the applicability of Section 4 of Act X. of 1859," and to carry out certain further investigations ordered by this Court.

Upon the question of uniform rents, the Lower Appellate Court has found in favor

of the defendants and has dismissed the plaintiff's suit.

In special appeal, it is urged that there is no legal evidence on the record of uniform payment of rent for a period of 20 years before the commencement of the suit. The evidence on which the pleader for the special respondents relies is that of dakhillahs from 1253 to 1265 and for certain years anterior to 1253, and the evidence on oath of their manager and *am-mookhtear*, one Raj Lall Panday. It is to be remarked, therefore, in the first place that the dakhillahs of 1266 to 1271, or for the last five years of the prescribed period of 20 years, are wanting. Neither is there any evidence on the record to show what the payments were for those last five years; and again it is to be remarked that, although the dakhillahs of 1253, 1258, 1264, and 1265, are in some sense attested, yet the remaining dakhillahs of 1252, 1254 to 1257, and 1259 to 1263, inclusive, have not been attested. It is also to be remarked that the dakhillahs that are attested are not attested by the persons who paid the rents, and who received the dakhillahs in proof of that payment, nor are they attested by the persons who executed those dakhillahs, but they are simply attested to this extent, that the manager and *am-mookhtear* of the defendants says that he received the dakhillahs from the plaintiff's husband, and no more. The best evidence, therefore, to these dakhillahs is not produced, nor is its absence accounted for; and *primâ facie*, therefore, it is quite clear that there is no legal evidence in support of the uniform payment of rent for 20 years before suit.

But the pleader for the special respondents urges that, under the wording of the order of remand of the High Court, he is only bound to prove payments from 1252 to 1260, and that not only that, but that none of the dakhillahs on which he relies have ever been objected to by the special appellant.

In the matter of the *first* objection, there is, no doubt, a remark of one of the Judges of the Division Bench which apparently might be taken to show that the defendants were only called to prove the receipts from 1252 to 1260, but this remark is obviously inconsistent with the remand-order, which finally opens out in so many words the whole question of uniform payment *within the terms of Section 4, Act X. of 1859;* and not only that, but such receipts, that is, the receipts from 1252 to 1260, have not been proved. As we have remarked before, there is no attestation of any receipt of the years 1252, 1254 to 1257, nor of 1259 to 1263, and therefore, taking the order of remand of the High Court to be of that restricted nature which the pleader for the special respondents would contend for, that order has not been complied with.

Then, as to the *second* objection, if that were a good one, it applied equally to the case as it stood before remand, and as it stands now, and it is absurd to suppose that this Court would direct a remand when it considered that, upon the circumstances of the case then existing, there was no necessity for such remand, *i. e.*, as Mr. Justice Bayley suggests, for questioning the applicability of Section 4, Act X. of 1859. The real truth is, that, in ordering the remand, the Division Bench of this Court was doing nothing more than following out an opinion which has since been affirmed by a Full Bench of this Court, to be found at page 526 Volume VI., Weekly Reporter, which lays down that every document must first be started by some proof or other before the person who disputes that document can be considered in any way bound by it; and not only this but it is quite clear from the defendants' own conduct that they knew full well that they were called upon by the order of remand to attest the documents to whatever extent they might do so; for, although they did not attest the *first* batch, yet, when they filed others, they brought a person in order that that person might prove the *second* batch of documents filed. We think there is not legal evidence on the record in support of the defendants' contention of uniform payment, and we are therefore once more obliged to remand the case to be tried on the merits, that is to say, to fix the fair and equitable rents at which the defendants shall pay.

We observe that the Lower Appellate Court has found the area to be 407 beegahs, and all that now remains to do is to find the fair and equitable rates upon that area.

We reverse the decision of the Lower Appellate Court, and remand the case to be tried on the merits.

We think that the special respondents must pay the costs of this appeal. The other costs of the suit will follow the result of this order of remand.

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The 2nd August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Breach of contract—Damages.

Case No. 1148 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 1st March 1869, affirming a decision of the Sudder Moonsiff of that District, dated the 21st December 1868.

Khulleel Mahomed (Defendant), *Appellant,*

versus

Furzam Ally (Plaintiff), *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Defendant borrowed a sum of money below 500 rupees from plaintiff with a view to redeem a mortgage, on condition that, after redemption, he would sell the property to plaintiff. He did not, however, redeem the property.

HELD that plaintiff's suit to recover his dues was one for damages as upon a breach of contract in which, under Section 27, Act XXIII., 1861, no special appeal would lie.

Bayley, J.—WE think that no special appeal lies in this case.

It appears that the defendant mortgaged a talook belonging to him to one Abdool Ghuffoor, and that, for the purpose ostensibly of redeeming that mortgage, he borrowed a certain sum of money (below Rupees 500) from the plaintiff on condition that, after he had released his talook from the mortgage by means of this money, he would sell it to the plaintiff. The defendant, however, did not redeem the property, and the mortgage, therefore, was foreclosed, and the property passed to the mortgagee. Thereupon the plaintiff institutes this present suit for what we think, and the pleader for the appellant admits, to be damages as upon a breach of contract. Consequently, under Section 27, Act XXIII. of 1861, no special appeal would lie to this Court, and in this view we dismiss this appeal with costs.

The 3rd August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Jurisdiction—Advances for construction of bund, &c.

Case No. 434 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 17th November 1868, modifying a decision of the Deputy Collector of that District, dated the 30th June 1868.

Ram Dyal Banerjee and others (some of the Defendants), *Appellants,*

versus

The Court of Wards (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Baboo Juggadanund Mookerjee for Respondent.

Money advanced to a naib for the construction of a bund, or for the payment of the salaries of tehsildars and peadahs, comes within the terms of Section 23, Act X., 1859, with regard to the management of land; and a suit by a manager of an estate to recover such advance is cognizable by a Revenue Court.

Bayley, J.—THIS was a suit brought by a manager under the Court of Wards against the sureties of a deceased naib or agent.

The plaintiff's claim was for Rupees 50 on account of money advanced by him to the deceased naib, Heera Ram, for the construction of a bund, Rupees 135-12 annas for payment of the salaries of the tehsildars and peadahs, and Rupees 143 on account of the collections made by the deceased naib from the mofussil.

The answer of the sureties was that, as regards the first two items, the suit was not cognizable by the Revenue Court under Act X. of 1859—and as the circumstances of this special appeal do not require us to enter into the matter of their defence on the *other* points, it is unnecessary to make any further remark on those points.

The first Court held that the suit was not cognizable by the Revenue Court as regards the sum of Rupees 50 for the bund and Rupees 135-12 for the salaries of the tehsildars and the peadahs, and that Rupees 81, less some 78 rupees odd cash in hand,

and not Rupees 143, was the amount of collections made by the deceased naib. The first Court, accordingly, gave the plaintiff a decree for the said sum of 81 rupees 6 annas 6¼ gundahs less the Rupees 78 odd above alluded to.

On appeal, the Lower Appellate Court held that the suit *was* cognizable by the Revenue Court in respect of the 50 Rupees for the bund and Rupees 135-12 for the salaries of the tehsildars and peadahs, and that, in regard to the rest of the case, there was no question before it, the only objection being with regard to the above point of jurisdiction.

In special appeal by the defendants, the only objection taken is that the plaintiff's claim for the sums of Rupees 50 for the bund and Rupees 135-12 for the salaries of the tehsildars and peons is not cognizable by the Revenue Court under the provisions of Section 24, Act X. of 1859, not being money received for the *management of land or collection of rents.*

Now, the jurisdiction of the Court is to be determined by the terms of the law. Those terms are: "Suits by zemindars and others "in receipt of the rent of land against any "agents employed by them in the *manage-* "*ment of land or collection of rents*, or the "sureties of such agents for money received "by such agents in the course of such em- "ployment, shall be cognizable by the Col- "lectors."

As to the first item of Rupees 50 advanced for the construction of the bund, we think that it was almost, if not as much, a sum advanced directly for the management of land as sums advanced for other matters relating to such management, *viz.*, cultivation, irrigation, and so forth, and therefore legitimately coming within the duty of the naib in the management of land and collection of rents. The naibs certainly could not collect the rents which is one of the direct matters indicated in Section 24 without the lands being duly cultivated, and therefore the construction of the bund (as other matters of cultivation and irrigation) was an act of the naib, clearly, distinctly, and directly coming within the terms of the law with regard to the management of land. The very term 'naib,' as recognized in zemindary-matters, indicates a person whose duty is to manage lands, and the transmission to and receipt by the naib of such money for the purpose specified clearly shows that it was sent to and received for the management of land.

As to the item of Rupees 135-12 for the pay of the tehsildars and the peadahs, there can be no contention that such tehsildars and peadahs are necessary and essential for the management of land. They manage the collection and thus the land, and therefore their employment and payment are directly in connection with the management of the lands.

We think, therefore, that the judgment of the Lower Appellate Court is correct in holding that the plaintiff's suit to recover from the defendants the sum of Rupees 50 for the bund and Rupees 135-12 for the salaries of the tehsildars and peadahs *was* cognizable by the Revenue Court.

The judgment of the Lower Appellate Court is accordingly affirmed, and it is declared that the plaintiff is entitled to recover from the defendants the sum of Rupees 50 on account of the money advanced for the bund, Rupees 135-12 for the pay of the mofussil servants, and 3 rupees 2 annas 6 gundahs, the balance due for the collections made from the mehal.

The defendants must pay to the plaintiff the costs of this appeal.

The 3rd August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Land for public purposes—Compensation—Claims of proprietors and others.

Case No. 438 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 24th November 1868, affirming a decision of the Sudder Ameen of that District, dated the 27th June 1868.

Issur Chunder Banerjee (one of the Defendants), *Appellant,*

versus

Suttyo Dyal Banerjee and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

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When land is taken for public purposes, the party *primâ facie* entitled to compensation is the proprietor. Any party claiming the same as against the proprietor in virtue of a right created by the latter, *e. g.*, as a mokurrureedar upon the land, is bound to prove the title he pleads.

Hobhouse, J.—In this case, certain lands were taken up by Government for a public purpose, and the sum of 710 rupees 12 annas was deposited in the Collectorate as representing the aggregate interests of all the parties who might be entitled to receive any portion of this sum. The plaintiffs, who are the proprietors of the estate in which the lands are situated, sued to recover this sum, but the defendant, who is the special appellant now before us, and certain other defendants who are not before us, oppose the plaintiff's claim on the ground, so far as the special appellant is concerned, that he was a mokurrureedar, and was entitled, therefore, to receive compensation in such capacity.

The Lower Appellate Court has found as a fact that the defendant is not a mokurrureedar, but simply a tenant having a right of occupancy, and has given the plaintiffs, therefore, a decree for the money claimed.

There are three points taken in special appeal. The first is that the Lower Appellate Court has committed an error in law in not obliging the plaintiffs to comply with that part of an order passed by the Court of first instance which directed them to produce certain jumma-wassil-bakee papers. In the first place, this is not an objection taken in the written grounds of appeal before us. Neither, in the second place, is it an objection which was taken before the Lower Appellate Court. But the objection that is taken in the written grounds here, and which was taken before the Lower Appellate Court, was simply to the effect, not that the jumma-wassil-bakee papers had not been produced, but that the plaintiffs themselves had not attended in Court, when directed so to do, to give evidence. We must suppose, therefore, that in neither of the Courts below did the special appellant before us depend upon the production of the jumma-wassil-bakee papers, but only on such evidence as the plaintiffs might have given, and certainly there is no error in law committed by the Lower Appellate Court in the matter of the production of these papers, for the Court was not called upon to adjudicate, and did not, therefore, adjudicate, upon the question of such production.

The second objection is to the effect that the Lower Appellate Court is in error in throwing the *onus* upon the defendant, and not upon the plaintiffs. The argument is put in this way, *viz.*, that it was the plaintiffs who claimed the compensation, and that it was for them, therefore, to prove that they were entitled to the whole of it. But, in the first place, that was evidently not the aspect in which the case was regarded by the defendant in the Courts below, neither is it the right aspect of the case. The plaintiffs were admittedly proprietors of the lands that were taken by the Government. *Primâ facie*, therefore, they were entitled to the compensation that had been awarded for those lands, but the defendant stepped in on the plea that he was a mokurrureedar having claims intermediate and conflicting with the proprietor of the land. The rule of law seems to us to be that, the proprietorship of the lands being admitted, such proprietor is entitled to the proceeds of these lands, unless he is prevented from taking them, or any portion of them, by some one having a right created by him, or by some one through whom he claims and interrupting, modifying, or annulling his *primâ-facie* superior claim as proprietor.

In this case, therefore, we think that, when the defendant set up that he was entitled to the compensation because he was a mokurrureedar upon the lands, the *onus* was upon him to prove the title that he pleaded. This disposes of the second objection.

The third objection is to the effect that, even if it be taken that the defendant is a person having simply a right of occupancy, yet that that right entitles him to some part of the compensation, and that such part, therefore, ought to have been awarded to him. We are referred to a well-known case, to be found at page 327 of the Sudder Dewanny Adawlut Reports of 1860, and to two other cases to be found at pages 12 and 391 of Volume X., Weekly Reporter; but we think, in the first place, that those cases are not in point, that is to say, do not contemplate the particular position of the defendant in this case: and, secondly, that, even if they were, and even if they had laid down the doctrine that a person in the position of the defendant was in some cases entitled to the compensation or some part of the compensation awarded by Government, still we think that, in this particular case before us, this was a question which depended upon

facts to be established, and we find that these facts have not been established in the present case. Neither do we think that the defendant is entitled to a remand to establish those facts. It was found by the first Court that, being a person having but a right of occupancy, the defendant could not obtain any part of the compensation. He did not appeal against this decision to the Judge. He never called on the Judge in the Appellate Court to decide the point now before us; and neither of the Courts have. by reason of the defendant's own negligence, found the facts which might enable us to decide those points. This being so, we think that the special appellant is not entitled to be heard on this point now and in this, the Court of last resort, and this third objection, therefore, also falls to the ground.

We dismiss this special appeal with costs.

The 4th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Reasons for a decision—Section 359, Act VIII., 1859.

Case No. 323 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 13th November 1868, reversing a decision of the Moonsiff of Okrah, dated the 16th March 1868.

Ramessur Bhuttacharjee (Plaintiff), *Appellant,*

versus

Shaikh Bhanoo and another (Defendants), *Respondents.*

Baboo Kedarnath Chatterjee for Appellant.

Moonshee Mahomed Yusuff for Respondents.

HELD *by Markby, J.*, that in saying that the "reasons" for the decision of an Appellate Court must be stated, Section 359, Act VIII., 1859, means, not the reasons for coming to any conclusion of fact, but the reasons showing upon what points of fact or law the decision runs. The bare fact that a Judge has not given the reasons for his judgment is not in itself a ground of special appeal.

Markby, J.—IN this case I think that both the grounds taken in special appeal fail. They are, in fact, only one, and they complain that the Judge of the Lower Court has reversed the decision which the first Court had given in favor of plaintiff, without sufficiently stating the grounds upon which that Court has differed in its opinion of the evidence from the opinion of the first Court. No error in law is suggested by the ground of appeal, unless it be an error in law for a Lower Appellate Court to omit to state its reasons for coming to a different conclusion on a point of fact, from the conclusion arrived at by the first Court on that point. Now, it appears to me that it is not necessary in this particular case for us to express any opinion upon whether or no such an omission on the part of the Lower Appellate Court is an error in law upon which alone a special appeal can be based, because, although the judgment of the Lower Appellate Court is somewhat short, and I think, looking to the great responsibility which rests upon an Appellate Court in reversing the decision of the first Court on a question of fact, somewhat too short, yet I think it is in sufficient compliance with the requirements of Section 359. Therefore, even if we should think that the omission to comply with that Section was an error in law, I think the judgment clearly shows that the Lower Appellate Court considered that the question before it turned upon the evidence, and I think the judgment clearly shows that the Court did consider the evidence, and, having considered the evidence, gave its opinion as to its credibility in favor of the evidence produced by the defendant rather than in favor of the evidence produced by the plaintiff. If we were to comply with the request of the special appellant, and send this case back to the Lower Court in order that that Court should give in full its reasons for differing from the first Court and for believing or disbelieving the evidence adduced by the parties, the only result would be that the reasons would be given for coming to that conclusion of fact; but these reasons would be just as binding upon us and just as conclusive upon the parties as that conclusion itself.

What I apprehend Section 359 means when it says that the "reasons" for the decision of an Appellate Court must be stated is not the reasons for coming to any conclusion of fact, but reasons showing upon what points of fact or law the decision turns, and therefore I think, as I read the judgment of the Lower Appel-

late Court, that there has been a sufficient compliance with the provisions of Section 359. I think, in so saying, I am acting in accordance with the decisions of Justices Kemp and Glover in the cases referred to by the pleader for the special appellant.

The first of these cases, reported at page 312 of the 11th Volume of the Weekly Reporter, is very different from the present one. The Court in that case came to the conclusion that the Judge, although he affirmed the decision of the first Court, had entirely omitted to consider an objection which had been taken and argued in appeal before him. They distinctly say that, where it is evident from the Lower Appellate Court's judgment that the Judge has gone into the whole of the evidence before him, and has considered the Lower Court's reasons for believing or disbelieving that evidence to be good and sufficient reason, that there would be no absolute necessity for his giving separate reasons of his own: although even in that case there can be no doubt that it would be more satisfactory to the litigant parties to have the Judge's own reasons given in his own words; "But in "this case," they say, "we have no ground "whatever to suppose that the Judge "really did take into consideration the "objection urged before him by the appel-"lant, nor can we discover from his judg-"ment that he thought the Lower Court's "reasons for rejecting the evidence to be "good reasons for so doing." I understand that passage to mean this, that there was a ground of appeal before the Judge which had not been gone into and considered by him, and that decision, therefore, would not apply to the present case.

Then with regard to the other case which is somewhat more similar to this, and which is reported at page 559, Volume XI., Weekly Reporter. I take it that in that case there were objections on points of law which the special appellant was desirous to have argued, and which the Judge in the Lower Appellate Court had not noticed in his decision; and the Court, doing what evidently was most desirable in that case, and what this Court had undoubtedly full power to do, having before it a judgment which in three lines reversed the decision of the first Court, sent the case back in order that the Judge should record a full decision in accordance with the directions of Section 359 of Act VIII. of 1859. That is also, therefore, a very different case to the present one, for here it is not even suggested that there was any point of law which the Lower Appellate Court did not consider or decided wrongly, but the appellant in his grounds of appeal merely states that the Lower Appellate Court did not state the grounds which induced it to come to a different conclusion of fact to that arrived at by the first Court.

With regard to the question as to whether or not the omission to state reasons for coming to a decision is, taken by itself, a ground of special appeal, I wish to state—with reference to the practice which, after careful and deliberate consideration, had been adopted on this point by Mr. Justice L. S. Jackson and myself, and which, I think, has been somewhat misunderstood—that we considered that the omission on the part of a Judge to state his reasons could not be a ground, at any rate, for reversing his decision in special appeal; but we have, I think, never said, and I may safely say never intended to say, that if a ground of special appeal in law was taken which would be a good ground, if it arose, and if it was uncertain from the Judge's judgment whether or not he had decided that point, or how he had decided it, it being clear that that point of law did arise before the Judge, that it would not be a very proper course to remand the case in order to obtain a clear statement of the Judge's reasons for his decision, and for myself I went still further, and intimated an opinion that, if a vakeel came to this Court, and said that, in consequence of the summary way in which the Lower Appellate Court had disposed of the appeal, it was impossible to say whether the decision of the first Court had been reversed on grounds of fact or on grounds of law, and that it was impossible to see whether or not a special appeal would lie to this Court; in that case I said, and I still say, that this would be a very good ground to send the case back at once to the Judge for a full decision. But I am still of opinion that, under Act VIII. of 1859, the bare fact that the Judge has not given the reasons for his judgment is not in itself a ground of special appeal.

For the reasons given, I think that this special appeal ought to be dismissed with costs.

Kemp, J.—I concur in dismissing the special appeal, as it appears to me that the judgment of the Lower Appellate Court does contain the points for determination, the decision thereupon, and the reasons for that decision, although those reasons might certainly have been given in greater detail.

The 4th August 1869.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

User—Prescription.

Case No. 324 of 1869.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 5th November 1868, reversing a decision of the Moonsiff of Kandera, dated the 12th June 1868.

Roop Chunder Ghose (Plaintiff), *Appellant,*

versus

Roop Moonjuree Dossee (Defendant), *Respondent.*

Baboo Banee Madhub Roy for Appellant.

Baboo Umbika Churn Banerjee for Respondent.

Where there is evidence showing a long and continuous user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it, without particular reference to any specific number of years.

Kemp, J.—THIS was a suit to have a drain dug for the purposes of irrigation closed, and to recover damages, namely, 10 rupees for 10 haths of land in length and 7 haths in breadth, and 9 rupees the price of the water.

The first Court decreed the plaintiff's claim. The Judge, on appeal, has reversed the decision of the first Court, and has found that the existence of the user had been proved from a time from which a right would be gained, and that the plaintiff's witnesses have not rebutted this fact, but, on the contrary, have admitted that the defendant has irrigated from the tank for upwards of two years.

In special appeal, it is contended that the Judge is wrong in deciding that the defendant acquired a right of user when the depositions of the witnesses do not prove such a continuous and uninterrupted user as would be sufficient in law to establish a right by prescription, and that the testimony of the defendant's witnesses is too vague to establish the right claimed by her.

I am of opinion that this special appeal must be dismissed. It is clear that the right has been admittedly enjoyed by the defendant for upwards of two years.

It is also in evidence that there was a dispute in the Criminal Court about this right and that an order was passed in favor of the defendant, and the Court may, therefore assume that she was in the enjoyment of that right when that order was passed. There is evidence on the part of the defendant, which the Judge has believed. of one witness who deposes that the defendant has all along, and therefore continuously, irrigated from this tank. Another witness deposes that, about 10 or 15 years ago, the defendant irrigated from this tank, and a third witness, who is now 60 years old, deposes that, for as long as he can remember or from his boyhood, he has seen the defendant in the enjoyment of this right.

There is no decision of this Court which has definitely decided what period would confer a right of prescription in cases of this description. Opinions have been given on various occasions by different Benches and by different Judges, but there has been, as far as I am aware, no definite decision on the subject. The learned Chief Justice in a case published in Volume IX. of the Weekly Reporter, page 91, says that he is inclined to think that, by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for 12 years would confer a right to it, but he carefully abstained from pronouncing any decision on the point, observing that it had not been argued before him, and that any decision would at most amount to a *dictum ;* but in the case referred to, in ordering the case to be remanded, the learned Chief Justice directed that the Judge of the Lower Appellate Court should find whether the user was or was not so ancient as to confer a right by prescription.

In this case, I think that the Judge, on the evidence before him, was justified in finding that there had been such an ancient user, uninterrupted and continued, as to confer a right by prescription. The special appeal is, therefore, dismissed with costs.

Markby, J.—I am of the same opinion. The Judge finds that there has been a user from a time from which a right would be gained. The special appellant in his grounds of appeal objects that some of the witnesses do not prove such a continuous

and uninterrupted user as is sufficient in law to establish a right by prescription, and that the testimony of the witnesses is too vague to establish the right claimed by the defendant. With regard to his second objection, I think the evidence does establish in this case that the user has been continuous, and that it has lasted for a very considerable period, extending much beyond 12 years. As far as I can understand the ground which has been argued before us on the first objection, it is not precisely that which has been taken, but rather this, that the Judge's finding is defective, because he does not find as a fact that the user has lasted for more than 12 years. Now, I entirely agree with Mr. Justice Kemp that there is no decision of this Court from the first to the last, which says, either on the one hand, that a finding that the user has lasted for at least 12 years is necessary, or that such a finding of a user for 12 years would be conclusive. None of the decisions of this Court appear to have fixed any distinct or definite period within which a right of this kind by continuous user can be gained. In saying this, however, I do not wish in any way to throw any doubt upon the wisdom of the observations of those Judges who have thought proper to advise Judges in the Lower Courts, who are Judges of fact, not to infer a right from a user of less than 12 years, and I was very much taken by surprise to find that it was supposed I had said in a case decided by Mr. Justice Louis S. Jackson and myself, published at page 237 of the 11th Vol. of the Weekly Reporter, that a user of five or six years without anything else was, in my opinion, sufficient to confer a right. My judgment in that case was based precisely on the same ground upon which the judgments of Mr. Justice Kemp and mine are based in the present case, namely, that where there is evidence showing a long and continuous user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it without particular reference to any specific number of years. The observation as to evidence of a user for four, five, or six years only being possibly sufficient in certain cases was made in that case, not by me, but by my learned colleague, Mr. Justice Jackson. Not having consulted him, I have no authority to place any interpretation upon the words of his judgment; but, from what passed between us on that occasion, I should be extremely surprised if his words could bear the meaning which has been sought to be placed upon them, namely, that a user of five or six years alone, without anything more, and without any special circumstances in the case, would be sufficient to confer a right by prescription. As I have said before, I have no authority to place any interpretation upon the words used, but I certainly do think that Mr. Justice Jackson did not mean that, and that he never had any intention, as far as I know his opinion, to say anything of the kind.

The 4th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Opening and closing of roads—Trespass.

Case No. 284 of 1869.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Maunbhoom, dated the 9th November 1868, reversing a decision of the Officiating Moonsiff of Rughoonathpore, dated the 11th June 1868.

Heera Chand Banerjee (one of the Defendants), *Appellant,*

versus

Shama Churn Chatterjee (Plaintiff), *Respondent.*

Baboos Grija Sunkur Mojoomdar and *Nubo Kishen Mookerjee* for Appellant.

No one for Respondent.

In a suit for the re-opening of an old road which defendants had closed, and for the closing of a new road which they had opened on land alleged to belong to plaintiff, the Lower Appellate Court made a decree declaring the new road to be within plaintiff's premises, and directing that it should be closed, and the old road restored.

HELD that the decree was only in the nature of a declaration that the act of the defendants in making a new road was a trespass, and that, upon this question, it was conclusive in point of fact and good in law.

Markby, J.—IN this case the plaintiff alleged in his plaint that the defendants had closed an old road which had been used for men and cattle, and had opened a new road through lands belonging to the plaintiff, and he prays that the old road may be re-opened, and the new road closed. The defendants, in answer to this, say that the land in which the new road has been opened belonged to them, and that no one is injured by the diversion of the road.

The first Court dismissed the suit, but the second Court made a decree declaring the new road to be within the appellant's premises, that is, the plaintiff's premises, and directing that it should be closed, and that the old road should be restored to its former condition. What exactly is meant by this part of the decree I do not understand. Who was to open the old road, and who was to close the new one, is not said. But it is quite clear that the only question which could be raised in a Civil Court between these parties upon this plaint would be whether or not the defendants had done an injury to the plaintiff by trespassing upon his land, and making a road thereupon. Any question as to the opening or closing of a public road seems to me to belong to the Criminal Court, and not to the Civil Court; and as we said in a case* decided by Mr. Justice Louis S. Jackson and myself, that question can only be enquired into in a Civil Court as ancillary to the question whether or not any damage has been done to the plaintiff. No such damage is alleged here, but upon the question whether or no the defendant has trespassed upon the land of the plaintiff by making a road upon it, I think the finding of the Lower Court is conclusive in point of fact and good in law.

The only objection made to it in the first ground of appeal is that the *onus* of proving that the land was the land of the plaintiff lay upon him, inasmuch as he complained of an injury done to him. That was undoubtedly the case, and I see nothing which gainsays it in the judgment of the Court below. That Court says the defendant should be able to produce evidence in support of his claim to land which lies outside his apparent boundaries. There was other and conflicting evidence that, in the Judge's opinion, is sufficient to turn the scale, and raise the presumption in favor of the plaintiff that the land belongs to him. I do not see that there has been any violation of the law in the finding of the Lower Court.

The second ground of special appeal is that the Judge should not have decreed the re-opening of the old road at the instance of the plaintiff alone, when the first Court found that the new road opened by the petitioner was much more convenient to the public than the old road in its former state was, the more so as the plaintiff has neither alleged nor proved any special damage to himself.

* *Supra*, page 199.

Now, as I have already stated, I am not at all certain that the Judge has decreed the re-opening of the old road by way of a public declaration of right. The decision is certainly not very intelligible. He says that the old road is to be restored to its former condition, but he does not say who by, or what is to be the effect of his order; and therefore I am not sure by any means that the Lower Appellate Court, in the decree which it has passed, has gone beyond its jurisdiction; but even if it has, it would not be necessary for us to consider that point as it was not taken below, and I think no harm has been done to any body by that paragraph in the Lower Court's decree. As I understand that decree, it is only in the nature of a declaration that the act of the defendant was a trespass, inasmuch as the land on which the new road was constructed was the plaintiff's private property. All questions as to whether the new or the old road was most convenient are altogether immaterial.

Kemp, J.—I am of the same opinion, and concur in dismissing the special appeal, but I do not wish to commit myself at present to any opinion with reference to the question of the Civil Court's jurisdiction in cases of public roads, as the point is not taken in special appeal before us, nor raised in the Court below.

The 4th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Sale under Act XI., 1859—Refund of purchase-money.

Case No. 341 of 1869.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 25th November 1868, affirming a decision of the Sudder Ameen of that District, dated the 31st December 1867.

Sreemunt Lall Ghose (one of the Defendants), *Appellant.*

versus

Shama Soonduree Dassee and others (Plaintiffs), *Respondents.*

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Mr. M. L. Sandel for Appellants.

Baboos Huro Chunder Banerjee and *Huree Mohun Chuckerbutty* for Respondents.

The sale of an estate for arrears of revenue, where no such arrears exist, is null and void, even though it is regularly conducted and the purchase is made *bonâ fide*.

Where the original owner in such a case sues to recover possession and obtains a decree, the decree is sufficient for the purposes of Section 34, Act XI. of 1859, without a special declaration, that the sale is annulled; and the order for refund of the purchase-money must be made in execution of the decree.

Markby, J.—I THINK that this special appeal must be dismissed with costs.

In the first Court, the suit was brought to recover possession of land which had formerly belonged to the plaintiff, which the Government had caused to be put up for sale for arrears of revenue, and which the defendant had purchased. On the 13th of December 1866 he had obtained possession, and the suit was brought by the plaintiff against the defendant and also against the Collector, and, as I understand, against the Government also, alleging that the instalment of revenue in respect of which the sale had taken place had been actually paid by him within the proper time.

In the first Court, the Government and the Collector admitted that there had been, in fact, a mistake, and that the rent had been paid. Upon that, the first Court gave the plaintiff a decree for possession.

The defendant thereupon appealed upon several grounds to the Lower Appellate Court, and I think it is perfectly clear that in none of these grounds did he raise any objections to the finding of the first Court on the above admission that the instalment had, in fact, been paid.

The special appellant relies principally on the last ground of his appeal in the Lower Court as showing that he raised that objection. That ground runs thus: "I, having "purchased at a public sale, obtained certi-"ficate, and received possession of land; my "right by purchase cannot be forfeited. "Should the plaintiff have suffered any loss "through the wrongful act of any one, he "has his remedy in a suit for damages "against such a one, but cannot reverse the "sale under Act XI. of 1859."

I think it is quite clear that that ground of appeal was drawn in ignorance by the person who drew it of the Full Bench decision* of this Court which decides that a sale which is made when no arrears of revenue exist is absolutely null and void independently of the Act XI. altogether. What most probably that ground of appeal is intended to raise is that, provided that the purchase has been made *bonâ fide* at a sale regularly conducted, such a sale is good, and cannot be set aside; and this view of the case is strongly confirmed by the words the Judge uses when he says that it was *admitted* before him that there were no arrears of revenue due on the plaintiff's mehal. I think, therefore, that we must take it as an established fact that there were no arrears of Government revenue when the sale took place; and that being so, and it being admitted by the vakeels on both sides that, if there were no arrears of revenue, the sale is null and void under the decision of the Full Bench, it follows that this appeal must be dismissed with costs.

An application has been made to us to make an order under the provisions of Section 34 of Act XI. that the purchase-money should be refunded to the defendant by the Collector; but I think that order must be made, not by us, but in execution of the decree.

We are also asked to make a special declaration that the sale is annulled, but that appears to us to be unnecessary. For the purposes of Section 34 of Act XI. of 1859, we consider that the sale is already annulled by the decree for possession.

Kemp, J.—I am of the same opinion.

* 10 W. R., F. B. Rulings, 66.

The 5th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Rights of occupancy—Nij-jote and other lands —Section 6, Act X., 1859.

Case No. 870 of 1869.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 1st February 1869, reversing a decision of the Assistant Collector of Juggutsingpore, dated the 24th July 1868.

Gour Huree Sing (Defendant), *Appellant,*

versus

Beharee Raoot (Plaintiff), *Respondent.*

Baboo Mohendronath Mitter for Appellant.

Baboo Nil Madhub Sein for Respondent.

The fact of land being *nij-jote* does not *per se* prevent a cultivator from acquiring rights of occupancy in it. Section 6, Act X. of 1859, excludes khamar *nij-jote* and *seer* lands from the operation of such rights, only when such lands have been let by the proprietor on a lease for a term of years, or year by year.

Glover, J.—THERE is no ground for interference with the Lower Appellate Court's decision in this case. The plaintiff sued under Clause 6, Section 24, Act X. of 1859, to recover possession of 2 beegahs 6 cottahs and 10 chittacks of land from which he alleged himself to have been illegally dispossessed by the trustee of a religious endowment. He claimed to have held this land from the time of the Permanent Settlement at a fixed rate; and his cause of action was the letting of the land by the trustee to a third party.

The defence was that the land was the *nij-jote* of the temple; that it had never been let to the plaintiff as alleged by him from the date of the Permanent Settlement, although it had occasionally been let for short periods to the plaintiff's father; that no agreement had ever been come to as to a lease; that the plaintiff at last left the land uncultivated, and then the defendant leased it to a third party.

The first Court dismissed the plaintiff's claim, considering it not proved that he had been holding this land from the time of the Permanent Settlement at fixed rates. The Court of appeal took up the question as to whether plaintiff had or had not a right of occupancy, and finding on the evidence that he had, gave him a decree to recover possession of the land.

One point which has been taken before us in special appeal is that, as the Court of first instance did not decide the question of the plaintiff's right of occupancy, the Judge ought not to have done so; if he thought that the point arose, he should have remanded the case for trial to the first Court.

It is sufficient to state with reference to this plea that it does not form one of the grounds taken before us in the petition of special appeal. The ground that is taken there is that, as the disputed land is the *nij-jote* land of the temple, no cultivator of that land can obtain a right of occupancy with reference to the terms of Section 6, Act X. of 1859.

This appears to be a mistake. Although that Section does exclude *khamar nij-jote* and *seer* lands belonging to the proprietor of an estate, it only does so when such lands have been let by him on a lease for a term of years, or year by year. In this case, there is no evidence to show that the land was let to the defendant for a special term, or that he was only a yearly tenant of the same. There is nothing *per se* in the fact of the land being *nij-jote* which prevents a cultivator from acquiring rights of occupancy in it; and in this case it has been found by the Judge on the evidence as a fact, that the plaintiff has been for more than 12 years in possession of the land paying rent to the trustee of the endowment, and that he has, therefore, acquired a right of occupancy.

We see no necessity to go further than this, or to consider the last objection in special appeal made by the defendant with regard to the rent-receipts, because it was not on these receipts alone that the Judge went in determining that the plaintiff had a right of occupancy, but on the whole of the evidence and on all the circumstances of the case. The Judge gives several reasons for believing that the plaintiff had been in possession for a period exceeding 12 years; and even supposing for the sake of argument that the Judge had let in these receipts as proof without any sufficient ground for doing so, still that would in no way affect the finding that he has come to in this case. There appears, therefore, no reason for interfering with his decision. The special appeal must be dismissed with costs.

Mitter, J.—I concur.

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The 5th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Declaratory decree—Cause of action—Pleader and client—Unauthorized admissions.

Case No. 1085 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 2nd March 1869, modifying a decision of the Moonsiff of Sonamgunge, dated the 14th December 1868.

Gour Pershad Doss (one of the Defendants), *Appellant,*

versus

Sookdeb Ram Deb and others (Plaintiffs), *Respondents.*

Baboos Gopaul Lall Mitter, Grish Chunder Ghose, and *Rajendurnath Bose* for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

In a suit for declaration of right and confirmation of possession, by setting aside certain improper chittahs prepared by a Civil Court Ameen while deputed to deliver possession in execution of a decree:

HELD that, when in execution the Ameen measured a portion of plaintiff's land as covered by defendant's decree, and delivered over possession to defendant, taking receipts and issuing proclamation as required by Section 324, Act VIII., a cause of action arose to plaintiff under the circumstances against defendant.

HELD that it is not within the ordinary scope of a pleader's duties to relinquish any portion of his client's case without express authority from the client, who is not bound by such relinquishment unless it was authorized by himself.

Bayley, J.—THERE are two grounds taken in special appeal in this case. The first is that the plaintiff has no cause of action, and the second is that the Lower Appellate Court is wrong in giving the plaintiff a decree for a portion of the lands *excluded* by the Moonsiff from the decree on an admission of the plaintiff's vakeel.

The suit was for declaration of the plaintiff's right and confirmation of his possession by setting aside certain improper chittahs prepared by an Ameen while deputed to deliver possession in execution of a decree.

The plaintiff alleged that, in execution of a decree obtained by the defendants, the Ameen deputed to deliver possession, acting in collusion with the defendants, included within daghs 20 and 21 of his chittahs the lands in suit belonging to him (plaintiff) as covered by the defendant's decree, and took from the defendants receipts as required by the law for the delivery of such possession, and that thus a cause of action has accrued to him (plaintiff).

The defendant's case simply was that the lands were covered by his decree, and that possession was accordingly delivered over to him by the Ameen deputed for such purpose.

The first Court gave the plaintiff a decree except with regard to 1 H. 1 K. 3 P. 4 gundahs of land lying within the disputed boundaries, in respect of which the pleader for the plaintiff had waived his claim.

In appeal before the Lower Appellate Court questions were raised as to whether the plaintiff had any cause of action, and whether plaintiff's vakeel had authority to relinquish a portion of plaintiff's claim without his express authority for the purpose.

On the first point, the Lower Appellate Court has found that the plaintiff had a cause of action, and on the second point it has held that it was beyond the scope of the pleader's power and authority to relinquish any portion of the plaintiff's claim without the plaintiff's permission, which was not given.

I am of opinion that the Lower Appellate Court is right on both these points.

As regards the first point, it is clear that, when in execution of the defendant's decree the Ameen had a portion of the plaintiff's land measured as included in daghs Nos. 20 and 21 and covered by the decree, and when the Ameen delivered over possession of such lands to the defendants as in execution of their decree, and in so doing took receipts and issued proclamation (as required by the law, Section 224) on the tenants, to the effect that the property passed to the defendants under their decree, it is clear that, under such circumstances, the plaintiff had a cause of action against the defendants.

It is, however, argued that there was no injury done to the plaintiff, and therefore he had no cause of action, and in support of this argument we are referred to pages 325 and 587, Volume IX., Weekly Reporter, and 330, Volume X., Weekly Reporter.

None of these cases, however, appears to me to be in point. The one in page 325 refers to a case of survey-demarcation where the plaintiff had full notice of the survey-proceedings, and yet preferred no objections at the time, and where it was said that the defendant only did what the law required him to do, *viz.*, be present and point out the lands to the survey-officers. In the case at page 587, Volume IX., Weekly Reporter, which was a suit to obtain a declaration that two pottahs and a chittah put forward in a *butwarrah* were forgeries, it was held that the plaintiff had no cause of action, inasmuch as the operative effect of the documents was confined to the butwarrah, and plaintiff's rights were not prejudiced, and therefore the Court could make no binding declaration of right. The *third* is simply a case where a suit to have a registered kobalah declared fictitious and void as against plaintiff was held to disclose no good cause of action, as a competent Court had already declared that the defendant was entitled to obtain registration of the deed. I think, therefore, that none of the cases cited by the pleader for the special appellant applies, and that the contention of the special appellant on this point is untenable.

On the second point, we are referred to a case reported at page 322, Volume X., Weekly Reporter. But in that case the admission of a defendant's vakeel in Court was held to be legal evidence of the *receipt of money*, and was held to do away with the necessity for other proof. It was a case with regard to the examination of the vakeel technically termed the vakeel's *istfessar*. This examination is prescribed by the law, for, when from the plaint and the written statement the facts of the case are not properly before the Court, the Court may, at its discretion, examine the pleader or the party to elicit the facts of the case and fix the question then, and after that the Court can proceed properly to fix the issues necessary to be fixed before it comes to an adjudication; but here in this case the pleader *waived* his client's rights, and it does not appear that he had any *express* authority to do so. As to an implied authority, which is also one of the points urged by the pleader for the special respondent, I have to remark that it has been held by several decisions of this Court that it is not within the ordinary scope of the pleader's duties to give up any portion of his client's case without his express authority, and I fully concur in those decisions.

In this view of the case, both the points taken in special appeal failing, I would dismiss this appeal with costs.

Hobhouse, J.—I concur in dismissing this appeal with costs.

On the second point taken, *viz.*, as to whether or not the admission of a vakeel is binding upon his client, I adhere to the opinion which I expressed in a case to be found at Volume III., No. 12, Bengal Law Reports, page 15 of the Appendix—the opinion, *viz.*, that a party is not bound by an admission of his vakeel relinquishing a portion of the claim unless such vakeel has authority to make such relinquishment.

On the first objection taken, we are placed somewhat in difficulty by the conduct of the defendant, special appellant before us. He never put in issue in the Court of first instance the question as to whether or not the plaintiff had a cause of action, and consequently the plaintiff has not had the opportunity of showing more explicitly than perhaps the plaint does show, whether or not he had a cause of action. It was, therefore, dealing with the plaintiff somewhat hardly to allow this objection to be taken in the Lower Appellate Court without giving him an opportunity of being heard upon the point; but even upon the defendants' own statement of the facts, I think that sufficient cause of action has been shown. Those facts are, that the defendants got a decree for possession of certain lands against a third party; that in execution of that decree they obtained the services of an officer of the Court to give them the possession that had been decreed to them; that they went with this officer into the mofussil, and pointed out certain lands, alleging that those lands were their property, and were covered by their decree; that thereupon the lands were entered by the officer of the Court into certain documents on the records to the effect that the lands were the defendants' lands, and were covered by their decree, and that accordingly possession thereof was given to the defendants; and more than that, the said officer of the Court warned the tenants on the lands that the defendants were the persons who, under the decree of the Court, were entitled to the receipt of the rents due upon those lands. All these proceedings must, as we know, have been recorded in the Court itself; and judging from my experience of the proceedings in the mofussil, I can have no sort of doubt that, when the ryots were informed that the defendants were the

ersons to whom, by a decree of Court, they ad to pay the rents, the plaintiff, and, in ct, anybody who might have had any le to the lands, must have had a very rious obstacle to, if, indeed, he were not together prevented from, collecting the nts. Of course, this proceeds somewhat pon an assumption; but, as observed before, we proceed upon assumption, it is because e special appellant has by his conduct prented us from proceeding upon anything etter; and, after all, the utmost that the ecisions cited so far as they are decisions on cts at all analogous to those before us, the most length to which those decisions go is lay down that a suit for declaration of ght would not lie unless there be some overt t of hostility on the part of the defendant the suit against the plaintiff; and as reards the proceedings in the mofussil, I an understand no more overt act of hostility han that of a person indicating to an officer f Court another's land as belonging to himelf, having the lands entered in his name in document to be recorded in Court, taking ymbolical possession of the lands as covered y his decree, and warning the tenants n the lands through an officer of Court hat under such decree he was the owner of he lands. If this is not as between parties n the mofussil an overt act of hostility giving the plaintiff a cause of action, I am t a loss to conceive what would be such an act.

The 5th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure—Keeping decree alive.

Case No. 524 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 5th December 1868, reversing an order of the Subordinate Judge of that District, dated the 20th March 1868.

Mahomed Baker Khan (Decree-holder), *Appellant,*

versus

Sham Dey Koer (Judgment-debtor), *Respondent.*

Moonshee Mahomed Yusuff for Appellant.

No one for Respondent.

Where a decree-holder applies for execution and pays in the money for the service of notice, and the only reason why notice is not served is that the officer of Court is not able to find the judgment-debtors, the application is a *bonâ-fide* proceeding keeping the decree alive.

Glover, J.—It seems to us that the Judge's decision that the execution of this decree is barred by limitation is wrong. There is no doubt that the decree-holder applied to have notice served on his debtors on the 25th November 1865, and did all in his power to carry on proceedings. The Full Bench decision of this Court has laid down that any *bonâ-fide* application in execution is sufficient to keep a decree alive; and we think that a very good test of *bonâ-fides* is the expenditure of money for the purpose of getting the notice served. If the decree-holders had simply contented themselves with putting in a petition to have notice served, and had done nothing else, of course it would have been a different thing; but here it is clear that the money was put in, and that the ittalanamah was handed over to the Court officer, and the only reason why it could not be served was that the officer could not find the judgment-debtors. It appears to us, therefore, that the proceeding of the 25th of November 1865 was a *bonâ-fide* proceeding sufficient to keep the decree alive, and that, therefore, the second application of September 1866 was made within three years, and therefore was not barred by limitation. The order of the Lower Court is reversed, and the decree-holder will be allowed to take out process of execution in the usual way. The appellant will get his costs.

The 5th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Sales in execution—Irregularities—Section 256, Code of Civil Procedure.

Case No. 243 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 1st May 1869.

Pokhraj Singh and others (Judgment-debtors), *Appellants,*

versus

Gossain Munraj Pooree (Decree-holder), and others (Auction-purchasers), *Respondents.*

Baboos Nil Madhub Sein and *Bhowanee Churn Dutt* for Appellants.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Kalee Mohun Doss* for Respondents.

Where property is advertised to be sold in execution, a change in the specified order of sale or other sudden alteration of programme, without notice to intending bidders or the express consent of the judgment-debtor, is an irregularity under Section 256, Code of Civil Procedure, vitiating the sale.

Glover, J.—THIS was an application by a judgment-debtor to set aside the sales in execution of decree of his shares in Mouzahs Domraon, Eranlee, and Dhanooa, on the ground of irregularity in conducting and publishing the sale, from which substantial injury had accrued to him.

The amount, including interest, for which execution was taken out, was Rupees 10,426, and the estates were advertised to be sold in the following order, *viz.*, first, Domraon, then Eranlee, and last Dhanooa.

It is admitted that the judgment-debtor's interest in each of two of these mouzahs at least was worth more than the whole amount of his debt.

The debtor objected to the sale on the ground of want of proper noticeand insufficient value, and asked that the properties might be put up and re-sold.

The Judge, whilst admitting that the estates had been sold below their value, held that notice had been duly served in the mofussil, and that the sale had taken place at the appointed hour; and that, if substantial injury had accrued to the judgment-debtor in consequence of the low prices obtained from the properties, it was one that had not been caused by any irregularity in conducting or notifying the sale, and was therefore remediless.

It appears to us that the Judge was not quite correct in his statement of the judgment-debtor's objections to the sale; they were not confined to the non-service of notice in the mofussil, but extended to the circumstances under which the sale itself was conducted at the Sudder Station. There is no reason, therefore, why we should not, even at this stage of the case, take up and dispose of these objections.

Now, the sale was fixed for the 10th of December 1868 at noon, and the three estates were advertised to be sold in the following order; first Domraon, second Eranlee, and third Dhanooa. Sometime before noon, the decree-holder petitioned the Judge to have Domraon struck out of the sale-notification, and the other two mouzahs only sold. The reason of this, we are told, was that the decree-holder had another attachment hanging over this estate already, but there is some evidence on the record to the effect that the change was agreed to by the debtor, because his family-house was in that village, and that, therefore, he did not wish it sold.

The Judge, however, does not appear to have made any enquiry into the circumstances or to have asked the debtor's consent, but at once granted the request of the petition, and the remaining two mouzahs were sold, first in order Dhanooa, and second Eranlee.

These fetched together only Rupees 4,300, and on this being known, the decree-holder again petitioned the Judge to reverse his former order and have Domraon also sold to make up the deficit. The Judge granted this petition also, and Domraon was put up and sold for Rupees 11,500. The consequence of these petitions of the decree-holder was that the estates were sold in precisely the reverse order of what had been notified.

It appears to us that this was a most clear irregularity in conducting the sales.

The notification was that, on a certain fixed day at noon, three estates, or to speak more correctly, the judgment-debtor's interest in three estates, would be put up to auction and sold in a certain specified order, namely, first Domraon, second Eranlee, and last Dhanooa. The order in which they *were* actually sold was, first Dhanooa, then Eranlee, and last Domraon. There is no reliable evidence, we think, that the judgment-debtor knew of or consented to the arrangement; on the contrary, it is clear that, immediately after the sale of Dhanooa and Eranlee, he objected and asked that the mouzahs should be put up again on the ground that intending purchasers had not had time to arrive.

It appears to us that the sudden change in the sale-programme at the eleventh hour, without the express consent of the judgment-debtor, was an irregularity in conducting the sale under Section 256. If such changes could be made, under such circumstances, at the will of the presiding officer, we fail to see of what use it would be to publish any sale-notification at all. The object of notice is to give all interested the opportunity of making objections to the

sale if they have any to make, and to inform intending purchasers of what is going to be sold, in order that the debtor may get a proper price for his property, and anything which prevents the attainment of these objects would be an irregularity in conducting the sale.

Of what use, for instance, would it be to publish to the world that estate A would be sold at noon of such and such a day, if some other estate was substituted for it; and would not intending purchasers of both estates have good cause of complaint against changes which had not been published, and of which they had been kept in ignorance? It is essential to the proper conduct of sales by auction that the published arrangements should be strictly adhered to, and if they are on the very day, almost at the very hour of sale, altered at the mere request of a decree-holder, without notice of any kind to intending bidders, such alterations become, in our opinion, irregularities under Section 256.

Then as to the consequent injury.

On this point there can be no doubt whatever. Had Domraon, the estate first on the list, been put up in its proper order, the proceeds would have much more than provided for the whole amount of the debt due to the creditor, and the other two mouzahs would have been saved.

As it is, these two estates have been sold for ridiculously small prices. Dhanooa, which ought to have been sold last, but which was actually sold first, fetched Rupees 1,600 only, whereas there is evidence on the record—evidence which the Judge himself appears to believe, that the debtor had already been offered Rupees 15,000 for his share of the property, and that one of the persons who was too late for the sale, in consequence of the Judge's change in the arrangements, was empowered to bid as far as 20,000 rupees for the estate.

There is also evidence to show that Mouzah Eranlee was worth very much more than the amount it fetched at the sale, and that, when it was put up, intending bidders had not arrived. Indeed, the Court below admits fully that there was very substantial damage done to the judgment-debtor, but considers that damage not to have resulted from any irregularity in the sale-proceedings.

The person who benefited by these irregularities appears to have been the decree-holder himself; at all events, it is a very suspicious circumstance that, in consequence of his application to have Mouzah Dhanooa sold first instead of last, that estate should have been knocked down to his own brother at one-tenth of its proved value.

We are of opinion that the sales of all these estates were vitiated by irregularity in conducting those sales, and that, as that irregularity caused substantial injury to the debtor, the sales should be set aside, the purchasers receiving back their money in full.

The appeal is allowed, and the Judge's order reversed, with all costs.

The 6th August 1869.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Pottah—Consideration.

Case No. 1025 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 23rd February 1869, reversing a decision of the Sudder Ameen of Mozufferpore, dated the 15th August 1868.

Roop Narain Singh and another (Plaintiffs), *Appellants,*

versus

Chatooree Singh and others (Defendants), *Respondents.*

Moonshee Mahomed Yusuff for Appellants.

Baboo Debendro Narain Bose for Respondents.

In a suit to recover certain land alleged to have been granted under a pottah, the Judge, finding that no consideration had been given by the plaintiff, pronounced the contract a *nudum pactum* on which no action would lie.

HELD that, as defendant had admitted the grant of the pottah, and contended that the whole of the lands had been made over to plaintiff's possession, no question of consideration could arise.

Glover, J.—THIS was a suit to recover 10 beegahs of land alleged to have been granted by the defendant under a pottah, dated 23rd February 1867. The whole amount of land covered by the pottah was 23 beegahs, of which the plaintiff states the defendant only gave him possession of 13 beegahs.

The defence was that the whole of the 23 beegahs had been made over to the plaintiff, but that the plaintiff wanted to exchange 10 of these beegahs for other land which was in the possession of a third party; and because the defendant refused to make this exchange, the present false suit was brought.

The first Court gave a decree for the plaintiff. The Judge, on appeal, did not go into the plaintiff's or the defendant's case on the merits; but finding that, no consideration had been given by the plaintiff for the pottah, he held the contract to be a *nudum pactum* on which no action would lie.

It appears to us that the Judge was wrong in his decision. The defendant admits that he granted the pottah. His allegation is that the whole of the lands had been made over to the plaintiff's possession. After such an admission, no question of consideration could arise, and the Lower Appellate Court was not justified in making a case against the plaintiff which the defendant himself never pleaded. The plaintiff's right to have 23 beegahs being admitted by the defendant, the only remaining question was whether he got possession of that amount of land.

We think, therefore, that the plaintiff is entitled to prove, if he can, that 10 beegahs of land were never given to him by the defendant, and that the case must go back for decision on that point. The costs will follow the result.

The 6th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Estoppel—Declaratory decree—Section 2, Act VIII., 1859.

Case No. 116 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 15th March 1869, reversing a decision of the Moonsiff of Tajpore, dated the 28th August 1868.

Bhyro Singh and another (Plaintiffs), *Appellants,*

versus

Oodee Kurn Singh (Defendant), *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

A Collector's judgment as to the genuineness of a pottah cannot be pleaded as an estoppel in the Civil Court in an action for declaration of title.

Glover, J.—THE plaintiff in this case sued for confirmation of possession and for a declaration of his title in 8 beegahs 10 cottahs of jerât land, his cause of action being the slur cast upon his title by the decision of the Collector in a suit brought by the defendant under Clause 6, Section 23, Act X. of 1859, in which the defendant was declared to have been illegally ejected by the zemindar.

In that suit, the defendant got a decree on the strength of a pottah said to have been given to him by the plaintiff's vendor.

The Judge, on appeal, has held that the present suit is identical with the one already decided by the Collector, inasmuch as in both the genuineness of the pottah was the point at issue, and has dismissed the plaintiff's suit as barred by Section 2, Act VIII. of 1859.

There is, no doubt, a decision of this Court in the case of Ram Bhunjun Bhuggut *versus* Ketai Raca Chowdhry, 6 Weekly Reporter 22, in favor of this position. But that decision has been subsequently overruled by the Full Bench in the case of Gooroo Doss Roy *versus* Ram Narain Mitter, 7 Weekly Reporter 186, in which it was laid down that Clause 6, Section 23, Act X. of 1859, refers only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title, and seeks to have his right declared and possession given in pursuance of that title. "Full meaning," the learned Judges say, "may and we think must be given to "the words 'illegally ejected' without "treating them as giving a wider sense to "the words above mentioned." And another case, Aradhun Dey *versus* Gholam Hossein, 8 Weekly Reporter 487, is exactly in point with this, and rules that a Collector's judgment as to the genuineness of a pottah cannot be pleaded as an estoppel in the Civil Court in an action for ejectment.

There appears to be no difference, *quoad* the principle indicated, between an action

for ejectment and one for declaration of title, and we, therefore, think that the Judge's decision was wrong. The appeal is allowed with costs, and the case remanded to the Lower Appellate Court for trial on the merits.

The 6th August 1869.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Execution—Sections 223 and 224, Code of Civil Procedure—Pleas.

Case No. 251 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 25th May 1869.

Banee Muhtoon and others (Objectors), *Appellants,*

versus

Gopee Bhuggut and others (Decree-holders), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Tarucknath Dutt for Respondents.

Where a decree-holder who had received possession under Section 224, Code of Civil Procedure, and gave the usual acknowledgment, was refused khas possession of part of the land which defendants claimed to hold as ryots, it was HELD that his proper course was an application under Section 223, although the case had been struck off the execution-file; and that, defendants' allegation of purchase (their sole plea at the trial) having failed, they could not afterwards set up a ryotee title.

Glover, J.—THE decree-holder in this case sued originally for possession of an 8-annas share of Mouzah Enayetpore, and to set aside a sale made by a Hindoo widow, who had a life-interest in the estate, on the ground that the sale had not been made on account of any such necessity as was allowed by the provisions of Hindoo law.

The plaintiff, the purchaser and the judgment-debtor in this appeal, alleged that the sale was valid.

His objections were, however, overruled, and the reversioner got a decree for possession on the 27th of January 1864, and received possession under Section 224 of the Civil Procedure Code, giving the usual acknowledgment that he had got possession in accordance with the decree. This was in August 1865.

In November of that year, he made a further application to the effect that the defendants refused to give him khas possession of some 40 beegahs, on the ground that they held that land as ryots. This application was rejected, and the petitioner was referred to a regular suit on the ground, apparently, that, as the execution-proceedings were terminated, and the case struck off the file, no further action could be taken in the miscellaneous department.

The decree-holder then brought a regular suit, in which he succeeded in both the Lower Courts.

On special appeal, however, to the High Court, it was held (November 23rd, 1868, Phear and Hobhouse, JJ.)* that the suit must fail, because the plaintiff had not been able to show that he had any other cause of action than the one he had already sued upon. And the Court intimated that the proper course would have been an application to be put in possession under Section 223 of the Procedure Code.

The decree-holder then made an application under that Section, and the Judge decided it in his favor.

I think that the Judge was right. I had at first some doubts as to whether the decree-holder had not lost his remedy in consequence of his former admissions, but on further consideration I am of opinion that he is entitled to succeed.

In the original suit, the defendant rested his defence solely on the allegation of purchase, and, that being given against him, the decree-holder had no reason to suppose that there was any ryotee title such as is now set up behind, and was, therefore, quite justified in asking for that kind of possession contemplated in Section 224.

The present allegation of ryotee title cannot be allowed. The defendant was bound at the first trial to have disclosed all his right to hold the land, and as he was content to rest his case on purchase, he cannot now be allowed to shift his ground and to plead an entirely different state of things, merely to defeat the decree which has been passed against him. He has through his own laches lost the opportunity of proving that he held a portion of the estate under two different titles, and cannot resist the decree-holder's right to have khas possession of the land, which he (the

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defendant) all along claimed by purchase only.

The objection of limitation appears to me to have no weight. The last application was made on the 29th of August 1865, and this was preferred on the 16th of December 1868, and in any case the regular suit would have been, in accordance with the ruling of the Full Bench, a *bond-fide* proceeding sufficient to keep the original decree alive.

It appears to me, therefore, that, as the first proceedings in execution were incomplete—if they were incomplete, solely through the omission of the judgment-debtor to disclose what he now says is his other title to the possession of the land—there was nothing illegal or irregular in the present application.

I would reject the appeal with costs.

Mitter, J.—I concur. I do not think that, under the circumstances stated, the decree-holder was precluded from applying to the Court to obtain possession under Section 223, merely because the execution-case had been struck off the file. He might have once taken possession under Section 224; but if he found it insufficient, there seems to be no reason why he should not be allowed to revive the execution-proceedings in order to realize the full benefit of his decree, when there is nothing to show that, in taking possession under Section 224, he had been actuated by any fraudulent or improper motives.

As to the plea of limitation, I observe that, even if we were to hold that the subsequent regular suit was not a proceeding within the meaning of Section 20, Act XIV. of 1859 (on which point I express no opinion), other *bond-fide* proceedings were taken by the decree-holder within three years prior to the date of the last application.

The 6th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Procedure—Limitation.

Case No. 1180 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 25th February 1869, affirming a decision of the Moonsiff of Soodharam, dated the 24th January 1868.

Mahomed Azim and others (Plaintiffs), *Appellants,*

versus

Sumeerooddee and others (Defendants), *Respondents.*

Baboo Nursingh Chunder Mitter for Appellants.

Baboo Kashee Kant Sein for Respondents.

The ordinary rule of law is that a plea of limitation should be tried before a plaintiff can go into the merits, but there may be cases (*e. g.*, in a boundary dispute) in which it is right first to get at the facts, and then to apply the Law of Limitation.

Bayley, J.—THIS special appeal must be dismissed with costs.

There is a clear finding of fact upon the evidence by both the Courts below against the plaintiff, special appellant, and there is nothing to show that this finding is erroneous in law, nor is there anything in the grounds of special appeal which would justify our interference in special appeal against this finding of fact.

As to the plea of limitation being tried with the merits, we think that it is a matter quite within the discretion of the Lower Appellate Court either to try it as a separate plea in bar or in connection with the merits of the case. The ordinary rule is that the plea of limitation, as one in bar, should be tried separately, as the principle of law is that, until the bar is removed, the plaintiff cannot go into the merits; but certainly there may be cases in which it is not only necessary but right first to get at the facts, as in the case of a boundary-dispute, and then to apply the Law of Limitation on the facts so ascertained.

In this view, we do not think that this is a case which would justify our interference in special appeal, and we, therefore, dismiss this appeal with costs.

The 6th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Transfer of rights.

Case No. 1139 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 13th March 1869, reversing a decision of the Moonsiff of Mozufferpore, dated the 5th September 1868.

Kalika Sahoy and another (Defendants), *Appellants,*

versus

Gouree Sunkur (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondent.

Where members of a Hindoo family are so far separate in estate that each collects his quota of rent separately, there is no reason why one of them should not make over, either in exchange or sale, his right of receiving a part of the rents.

Glover, J.—THIS was a suit to set aside an exchange made by the plaintiff's brother, defendant No. 2, to a third party, defendant No. 1, of 2 biswas and 10 dhoors of land, on the ground that this land was part of a joint family-property, and could not be made the subject of an exchange with a third party, without the consent of the family generally.

The defence was that the plaintiff and the defendant No. 2 were separate in estate, and that the plaintiff himself had sold portions of what had been the family-property, on the ground of its being separate, to other persons.

The first Court dismissed the plaintiff's claim, considering that separation had been proved; but the Judge thought that the exchange-transaction was contrary to the provisions of the Hindoo law inasmuch as the disputed land was held by the plaintiff and his brother in joint and undivided estate.

It appears to us that, except in one point, this decision was substantially correct. On the finding that these 2 biswas and 12 dhoors of land formed part of 5 biswas of joint undivided family property, it is clear that one brother, at any rate, did take his share of that land, and make it over bodily to a third party either in sale or exchange; but at the same time, as both brothers are admittedly so far separate that they each of them collect their quota of rent separately, there was no reason why the defendant No. 2 should not make over, either in exchange or sale, to any one he chose, such separate right as he undoubtedly possessed, that is to say. the right of receiving one-half of the rents of those 5 biswas of land. To this extent, therefore, the Judge's order is modified. The exchange will not be wholly set aside, but will be declared valid only to the extent of enabling the defendant No. 1 to exercise the right of collecting separately the rent, which right the defendant No. 2 had in the said land. Under the circumstances of this case, each party will pay his own costs.

The 7th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Breach of contract—Right of action.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 9th July 1869.

The Court of Wards, *Plaintiff,*

versus

Nrito Kalee Debia and another, *Defendants.*

Defendants received a mowrosee lease from plaintiff and an advance on account of salamee and rent, and agreed that, if they did not register the lease, the whole amount was to be recovered with interest. They failed to register the lease, and plaintiff took possession of the land. He then sued to recover the advance.

HELD that plaintiff was entitled to recover the stipulated amount notwithstanding he took possession, though he might be liable to pay the defendants a reasonable amount for the use and occupation of the land while he was in possession.

Reference.—THIS is an action brought by the Court of Wards to recover from the defendant Rupees 156-5-6 under the circumstances mentioned in the plaint, which runs as follows:—

For the recovery of Rupees 156-5-6 due on an *ikrar* or agreement, dated the 21st Cheyt 1272, which Brojo Lall Banerjee, the predecessor of the defendants, had executed in favor of Rajah Protab Chunder Singh Bahadoor, the predecessor of the minor plaintiffs. The said *ikrar* was executed on account of salamee and advance received on granting an incomplete mowrosee lease in the name of Benode Lall Singh. The clause contained in the *ikrar* was that, if the lease

were not duly registered in time, the whole amount was to be recovered with interest in Srabun 1273; but as the deed is incomplete on account of its not being duly registered, the minors are entitled to recover the amount claimed with interest.

At the trial I found as a fact that the *ikrar* sued upon had been executed by Brojo Lall Banerjee, and that he had received the amount mentioned therein as salamee and advance-rent; that in Assar or Srabun of 1273, he, as well as Gooroo Churn Banerjee and the parties who granted the pottah, accompanied by Benode Lall Singh, the party to whom the mowrosee pottah is addressed, and who in exchange granted a kubooleut, proceeded to Nurrail in order to have the pottah registered; that there Benode Lall was given to understand by the amlahs of the Registrar's office and other parties that the pottah could not be registered without a bundwara or boundary-paper; consequently, it was not presented to the Registrar or Sub-Registrar for registration; that Brojo Lall, Gooroo Churn, and their sharers promised to supply the same, but that it was not supplied, and the time for registration passed away without the pottah or kubooleut being registered; that notwithstanding the Court of Wards took possession of the property mentioned in the pottah from Joisto of 1273, and continued in possession down to Aughran 1275, when they voluntarily relinquished it as the same proved unremunerative, and by their zemindary-books they show a loss of Rupees 17-5 annas sustained as follows:—

Total jumma due to six shareholders for four years at Rupees 201-4 per year ...	Rs			805	0	0
Deduct on account of sudder rent paid by the lessees ...	„			598	1	6
Balance	„			206	14	6
Deduct on account of Kochoobareah, &c., which have been decreed to a third party ...	Rs.	97	10 6			
Deduct on account of jummas denied by the ryots ...	„	104	13 0			
Deficit after collating the hustbood ...	„	21	12 0			
				224	3	6
				17	5	0

The question, therefore, arises whether, on the facts as found, the present suit is maintainable.

When the pottah was granted, the Registration Act, No. XVI. of 1864, was in operation; and under the provisions of Section 13, the mowrosee pottah was an instrument which, unless registered according to the provisions of that Act, could not be received in evidence in any civil proceeding. I therefore think it was incumbent on Benode Lall Singh to have presented the pottah to the Registrar or Sub-Registrar of Nurrail under Section 15, and if he refused to register the same on the ground that no boundaries were set forth, and if the objection was not well founded, Benode Lall Singh could, under that Section, have brought a regular suit to enforce registration. However, as it appears that the sharers consented to furnish boundaries, and did not do so, I think, in the absence of possession having been taken by the plaintiffs, the present suit would have been well maintainable on the breach of the agreement to register; as it is, I do not think the suit is maintainable in its present form.

There are many cases in the Law Books which show that the count for money had and received is not maintainable if the contract has been in part performed, and the plaintiff has derived some benefit, and by receiving a verdict the parties cannot be placed in the exact situation in which they respectively stood when the contract was entered into; and I think the present is one of those cases, as plaintiff, by having continued in possession of the property down to Aughran 1275, deprived the sharers of the use and enjoyment of the same and of the rents and profits which they might have derived had no such possession been taken.

It is urged that the *ikrar* does not provide for possession being taken of the property by the plaintiffs, and, that if they did take possession of it, they, in their turn, will be liable to the sharers for any damage they may have sustained by such occupation. I cannot assent to this reasoning, as it appears to me that the agreement to register was a condition precedent to plaintiffs' taking possession of the property, but it ceased to be so by the subsequent conduct of the plaintiffs in having taken possession of the property, and every contract is to be interpreted in connection with surrounding circumstances; and the acts done by the contracting parties in fulfilment of the contract

may be regarded in order to see what interpretation they have themselves put upon it, and what conditions have been waived or performed, and the construction of the instrument may thus be varied by matter *ex post facto*.

Thus, it appears to me that, as there has been no failure of consideration, the present suit, as laid, is not maintainable. I have, therefore, given a verdict in defendant's favor subject to the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—It appears to the Court that the plaintiff is entitled to recover the sum claimed, *viz.*, Rupees 156-5-6. The defendants agreed that, if they should fail to register the deed, they would refund to the plaintiffs that amount. The plaintiffs took possession of the land, and it is, therefore, said that the plaintiffs are not entitled to enforce the agreement. We think that the plaintiffs are entitled to enforce the agreement, notwithstanding they took possession. They may be liable, however, to the defendants to pay them a reasonable amount for the use and occupation of the land during the time that they were in possession. This case appears to us to stand on the same footing as that of a purchase. If a purchaser should agree to purchase, and should pay down the purchase-money taking an agreement from the vendor that, if he should not register the conveyance, he should return the purchase-money, the purchaser would be entitled to receive his purchase-money back if the vendor should fail to register the conveyance. If the purchaser should have been let into possession of the land agreed to be purchased, he might be liable to the vendor to pay him a reasonable amount for the occupation of the land, but that would depend upon the particular circumstances of the case.

In this case, there is no set-off pleaded, charging that the plaintiffs were indebted to the defendants for the use of the land, and under those circumstances, if the defendant is, upon the whole facts of the case, entitled to any remuneration for the use and occupation of the land, he must resort to a cross-action in which that question as well as the amount, if any, which he may be entitled to recover will be settled.

The only answer we can give to the Judge of the Small Cause Court is that the defendants were bound to return the money in default of their registering the mowrosee; and not having registered it, the plaintiffs are entitled to recover the amount which the defendants stipulated to pay.

There will be no costs of the argument before this Court.

The 7th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Unregistered kubooleut—Right of action—Liability of lessee.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 7th July 1869.

Puroma Soonduree Dossee, *Plaintiff*,

versus

Prollad Chunder Dass and another, *Defendants*.

Where a house is let for a term exceeding a year, the registration of the kubooleut is compulsory; and no action will lie for the recovery of the rent stipulated to be paid under the kubooleut if that document is unregistered.

A party who retains and holds a building under such unregistered kubooleut is nevertheless bound to pay a reasonable compensation for the use and occupancy thereof.

Reference.—THE plaintiff sued the defendants for the recovery of Rupees 13-8, alleged to be due on account of rent of a building for four months and odd days which was let to the defendants for a term of three years under a kubooleut dated the 20th Srabun 1274 B. S.

Among other objections, the defendants urge that the action cannot lie, as the kubooleut filed by the plaintiff not being registered is inadmissible as evidence.

The question at issue is whether the registration of the kubooleut alluded to was compulsory.

The registration of leases for immoveable property for terms exceeding a year is rendered compulsory by Clause 4, Section 17 of Act XX. of 1866, which appears from Section 98 to have come into operation on the 1st May 1866, and consequently the kubooleut in question, which bears a subsequent date, *viz.*, the 20th Srabun 1274 B. S., corresponding to the 4th August 1867, was executed after the Act had been in force for more than a year.

Had the kubooleut been executed when the Act XVI. of 1864, which was silent with respect to kubooleuts, was in force, the registration of it would have been optional (*vide* ruling in the case of Amjad Ali, appellant, printed at page 537 of the Weekly Reporter, Volume IX.), but this privilege has been removed by Section 2 of Act XX. above referred to, which defines a kubooleut to be a lease within the meaning of the Act.

The argument raised by the plaintiff to the effect that the provision of Act XX. cited above is only confined to leases for land seems untenable, inasmuch as a building is said to be an immoveable property in Section 2 of the said Act. It is, therefore, as necessary to register a kubooleut for building as that for land, when its term exceeds 12 months; and the plaintiff's claim is not maintainable in consequence of the non-registration of the kubooleut upon which her title rests. The plaintiff is, however, very anxious to have the opinion of the Hon'ble Judges of the High Court, and has presented a petition to that effect. The case is, therefore, dismissed contingent upon the orders of the High Court.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the registration of the kubooleut was compulsory, and that the plaintiff cannot sue for the rent stipulated to be paid under it.

The defendants, however, are not entitled to retain and hold the plaintiff's building for nothing; they are bound to pay a reasonable compensation for the use and occupation of it, although no strict legal tenancy for the term agreed upon was created by the unregistered document.

The 7th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Res adjudicata—Cause of action.

Case No. 559 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 10th December 1868, affirming a decision of the Moonsiff of Pundooah, dated the 27th July 1868.

Chunder Narain Mojoomdar (one of the Defendants), *Appellant,*

versus

Prithanund Asrum (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Ashootosh Chatterjee for Respondent.

Where a suit for damages for the cutting down of certain trees on land alleged to belong to plaintiff was dismissed by a Small Cause Court which found that the plaintiff had no right to the land:

HELD that the decision did not conclude the plaintiff in the matter of his title, but gave him a new cause of action against the defendant.

Hobhouse, J.—THIS was a suit for declaration of the plaintiff's title to certain lands, and to obtain damages.

Both the Courts below have refused damages to the plaintiff, and have given him a declaration of his title to the lands.

In special appeal, it is urged, *firstly*, that there is no new cause of action disclosed in this case; *secondly*, that, when the Courts found that the plaintiff was not in possession up to the time of suit, then, inasmuch as there was no such possession with the plaintiff, no decree could be given to him based on an allegation that he was in possession; and, *thirdly*, that the Lower Appellate Court has misapplied and misconstrued against the special appellant a certain decision of the year 1863—misapplied it in the sense of making it evidence against the special appellant, and misconstrued it as to its effect.

The meaning of the *first* objection is that, when the plaintiff sued, as he did, in the Small Cause Court, for the damages claimed in this suit, his allegation then was that his cause of action was the cutting of certain

trees: and inasmuch as his allegation was to the same effect in this particular suit, so no new cause of action was disclosed. This objection was not taken in either of the Courts below; and even if it had been, it is, upon the statement of the plaintiff's case, as given by the special appellant's pleader himself, no valid objection.

The plaintiff sues the defendant as in the Small Cause Court, alleging that the land in question was his; that a certain tree on the land was also his; that the defendant had cut down that tree; and that, therefore, he was entitled to damages for the value of that tree.

The Judge, sitting as a Small Cause Court, necessarily went into the question as to whether the plaintiff had any right to the land, and finding that he had none, dismissed his suit for damages. Of course, that decision did not conclude the plaintiff in the matter of his title, but it clearly gave the plaintiff a cause of action against the defendant by his setting up an adverse title, in which he disputed the plaintiff's title to the land in a Court of Justice. This clearly gave the plaintiff a new cause of action.

In regard to the *second* objection * * * *

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The 9th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Mortgage—Contribution—Proportion.

Case No. 276 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 16th December 1868, reversing a decision of the Moonsiff of Bishenpore, dated the 6th July 1868.

Bhyrub Chunder Mudduck (Plaintiff), *Appellant,*

versus

Nuddiar Chand Paul and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Respondents.

Two properties were mortgaged by *G* to *R*. Subsequently, a judgment-creditor, in executing his decree against *G*, attached the properties, and sold them separately; plaintiff becoming the purchaser of one, and defendant of the other. After the purchasers had got into possession, *R* sued them and the mortgagor *G* for the purpose of enforcing his lien on the properties. His suit was decreed in appeal. Defendant then, on getting a discharge from *R*, surrendered a portion of the property he had purchased. Plaintiff objected, representing that the defendant and himself were not liable in equal shares, and he paid into Court what he represented to be the amount of his liability. Notwithstanding this the sale was ordered to take place, and plaintiff paid a further sum to get his property released. He then sued to recover that sum from the defendant, on the ground that both were liable in proportion to the value of their respective properties.

HELD that the effect of joining these properties together in one mortgage-bond was to make every portion of them equally liable for the debt, as if they had been one single property, and that the case was analogous to that of a suit for contribution between the several holders of a single lot, one of whom has paid the whole revenue. Plaintiff, having been compelled to pay a sum of money in discharge of a burden which defendant was legally compellable to discharge, was entitled to recover it from defendant.

HELD that, in determining their liabilities, no other proportion would be so equitable in this case as that of the respective values of the properties at the date of the auction-sale.

Markby, J.—IN this case the facts, as stated before us by the plaintiff, appellant, and not contested by the defendant, respondent, were these. One Gopal Shebait was possessed of two properties, which, for brevity's sake, I will call No. 1 and No. 2. Both these properties were mortgaged by him to one Ramnarain by one simple mortgage-bond. Subsequently to the execution of this mortgage-bond, a creditor of Gopal Shebait obtained a decree against him, and in execution of that decree, the creditor attached the properties Nos. 1 and 2, and proceeded to get them sold. The properties were lotted and sold separately; the plaintiff in this suit becoming the purchaser of No. 1 for Rupees 212, and the defendant in this suit becoming the purchaser of No. 2 for Rupees 522. The plaintiff and defendant respectively got into possession; and after they had done so, Ramnarain in one suit sued Gopal Shebait (the mortgagor), the present plaintiff, and the present defendant, for the purpose of recovering his loan by enforcing his lien on these two properties. He failed in the first Court, and his suit was dismissed, but on appeal this decision was reversed; no decree, however, was drawn up except the unintelligible one of "appeal decreed." Ramnarain seems first to

have attached or threatened to attach the larger property No. 2. The defendant in this suit, who had purchased that property, thereupon came to terms, and on getting a discharge from Ramnarain, surrendered to him a portion of the property No. 2, and in consequence satisfaction was entered up for half the amount which was due under Ramnarain's decree. When the present plaintiff heard of this, he at once objected. He represented to the Court that he and the defendant were not liable in equal shares; and he paid into Court the sum of Rupees 222, which, he said, represented the full amount of his liability. Ramnarain, however, disregarding this, took steps to sell the plaintiff's property No. 1, and notwithstanding the opposition of the plaintiff, the sale was ordered to take place. The plaintiff thereupon paid Rupees 187 to get his property released.

He then brought the present suit to recover this Rupees 187 from the defendant, on the ground that he and the defendant were liable for the debt in proportion to the value of their respective properties, and that this Rupees 187 which he had been compelled to pay was really due from the defendant. The defendant denies his liability.

Some confusion has arisen by the plaintiff, in his plaint, and by both plaintiff and defendant in the course of this argument, speaking as if the result of Ramnarain's suit had been to make the plaintiff and the defendant liable for a sum of money, whereas, if that decree had been properly drawn up, it would have been a money-decree against Gopal only, with a declaration that the properties Nos. 1 and 2 were liable to be sold, clear of subsequent incumbrances, in satisfaction of the mortgage bond-debt. The real effect of the decree, if it had been thus drawn up, would have been, not to have made either plaintiff or defendant directly liable for any sum of money at all, but it would nevertheless have made them both indirectly liable to pay the whole of what was due under the decree; as otherwise their property could be sold in satisfaction of it. What I understand the plaintiff to urge in this case, and what I think he has urged throughout, though not always in language legally precise, is this: that the debt due under the mortgage-bond with its accumulations was a general burden upon the two properties for which no portion of those two properties was presumably more liable than another; that, as between the plaintiff and defendant, the liability of the two properties ought to be considered, not as joint, but as several, being divided in proportion to the respective values of the properties; and that, the plaintiff having been compelled to discharge a burden for which the property purchased by the defendant was legally liable, he may recover the amount so paid from the defendant.

I have come to the conclusion that this is a sound argument. I take it, though it does not appear in evidence, that these two properties were not contiguous, or ever formed one parcel of land, yet that the effect of joining them together in one mortgage-bond was to make every portion of them equally liable for the debt, and that the legal result is the same as if they had been one single property.

The principal question is whether the liability of the two properties, which, as between the owners of those properties and the mortgagee, is undoubtedly joint, is, as between the plaintiff and defendant, to be considered as several; in other words, whether this joint liability is, as between the owners of the two properties, to be apportioned. I think that it is.

The pleader for the plaintiff, in support of this proposition, relied upon certain passages in Story on Equity and the general principles of what is called "equity and good conscience." In this case, however, I think, it is not necessary to resort to anything so vague or so distant. I think this case is exactly analogous to one that occurs every day in our own Courts of Justice, and may be decided on principles already adopted in India. I see no distinction in principle between this case and that of a suit for contribution between the several holders of a single lot, one of whom has paid the whole revenue. The only difference is that in one case the liability of the land to be sold in satisfaction of the claim is created by the law; in the other (the case before us), the same liability is created by the act of private persons competent for the purpose. But to my mind this is a difference which is wholly immaterial. The liability in both cases is complete, and the same reason for apportionment seems to me to exist in both cases; namely, the injustice of allowing a mere accident to cast upon a particular portion of land, and therefore upon the owner of that portion, a burden which was originally, and ought still to be, fairly laid equally on all. I also think the liability should be divided

in the proportion of the value of the two properties at the time of the purchase. The case of contribution for revenue does not here afford an exact analogy; for, if the separation of ownership is into undivided shares, of course the liability to the revenue is considered to be in proportion to the shares; whereas, if the separation is by an actual partition of the property, the liability to the revenue is, I believe, almost invariably apportioned by the parties themselves, with or without, but generally with, the sanction of the Revenue Officers, upon principles similar to those on which the revenue was originally assessed. It seems to me, however, that no other proportion can be suggested in this case which is so equitable as that of the respective values at the date of the division, that is, at the date of the auction-sale. Neither a division according to the respective areas, nor a division according to any combination of area and value, would be satisfactory. I therefore think the liability should be thus apportioned; and having arrived so far, the next step in the argument needs no demonstration. The plaintiff, if his figures are correct, has clearly been compelled to pay a sum of money in discharge of a burden which the defendant was legally compellable to discharge; and it is a well-established principle of law, in support of which I may again refer to the practice in revenue-cases, that under such circumstances the defendant is bound to refund the plaintiff the sum of money so paid.

The only objections which the defendant has made to the application of these principles to the present case are (1) that the property No. 2 was, by the arrangement between Ramnarain and the defendant, completely discharged from all liability to be sold under the decree; and (2) that there was never any decree of the Court which compelled the plaintiff to pay this money to Ramnarain, but only the unmeaning declaration that *the appeal was decreed.* But, in my opinion, both these objections fail—the first upon the manifest principle that no arrangement between Ramnarain and the defendant can in any way affect the rights of the plaintiff, unless he assented to that arrangement; whereas the plaintiff in this case, as soon as he heard of that arrangement, at once objected to it. The second also fails, because, in fact, the plaintiff was not bound to resist the claim of Ramnarain, and drive him to take legal proceedings. That claim was altogether irresistible, and the plaintiff's right as against the defendant would have been just as complete, if he had paid Ramnarain the Rupees 187 on demand, without going into a Court of law at all.

The only question which remains is as to the figures; the parties seem to be agreed as to the amount which was due upon the mortgage bond-debt to Ramnarain, although that sum was not, as it ought to have been, ascertained in the decree which he obtained. As regards the respective values of the properties Nos. 1 and 2, the first Court found that they were in proportion to the prices paid for them at the auction-sale, and, if so, these prices would have afforded a correct criterion for the apportionment of the liability. But the defendant, in appeal to the Court below, objected to this valuation, and that ground of appeal has, in consequence of the suit having been altogether dismissed, not yet been adjudicated on. The case must, therefore, go back in order that the Lower Appellate Court may consider whether there is any reason for disturbing the finding of the Moonsiff on the question of value, unless, as I cannot help hoping may be the case, the parties will have the good sense to settle that matter amicably.

Kemp, J.—I concur.

The 9th August 1869.

Present:

The Hon'ble G. Loch, *Judge.*

Appeals to the Privy Council—Practice—Vacation.

Luchmun Chunder Gir and another, *Appellant to England,*

versus

Kalee Churn Singh and others, *Respondents to England.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Romesh Chunder Mitter and *Nuleet Chunder Sein* for Respondents.

If the period within which an appeal is required by law to be filed expires while the High Court is closed for the vacation, parties are allowed to file their petitions of appeal on the first open day after the vacation.

Loch, J.—The judgment of the High Court in this case was passed on 15th April 1868, and the six months allowed by Section 2, Regulation XVI. of 1797, within which an appellant to Her Majesty in Council can

file an appeal, expired on the 15th October 1868. The High Court was closed for the long vacation in September 1868, and a notification to the effect was issued that pleaders would not be required to file petitions or other papers in civil cases between the 15th September and 9th November 1868. It is the practice of this Court that, if the period within which an appeal is required by law to be filed expire during the time that the Court is closed for the vacation, parties are allowed to file their petitions of appeal on the first day that the Court opens after the vacation. In this case, the appellant to England was, by the notification of this Court, dated 2nd September 1868, allowed till the 9th November to file his petition, but he did so on the 7th. Notwithstanding, therefore, the objection now made to the admission of this appeal, I think that it should be admitted subject to any orders their Lordships of the Privy Council may be pleased to pass upon it, and subject also to any objection that may be taken by the respondents before their Lordships.

The 9th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Suretyship—Effect of first arrangement.

Case No. 1171 of 1869.

Special Appeal from a decision passed by the Judge of Patna, dated the 17th March 1869, affirming a decision of the Moonsiff of that District, dated the 30th July 1868.

Seetaram Sahoo (Plaintiff), *Appellant,*

versus

Mr. J. DaCosta and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Kishen Succa Mookerjee and *Umernath Bose* for Respondents.

Money was lent on the security of a third party who died before the loan was re-paid. The lender then took a fresh acknowledgment from the borrower for the sum due.

HELD that the subsequent arrangement, which did not contemplate the continuance of the third party's security, cancelled his liability.

Glover, J.—THE plaintiff in this case sued to recover certain sums of money which he had lent from time to time to a Mrs. Cameron upon four separate receipts. It appears that a Mr. Bowbear stood security for the loans, but that he died before they were re-paid, and the plaintiff then took a fresh acknowledgment from Mrs. Cameron for the lump-sum due to him. Mrs. Cameron likewise died without the money being re-paid, and the plaintiff now sues the heirs of Mrs. Cameron and the heirs of Bowbear also. It has been found by the Court below that Mrs. Cameron's heirs inherited nothing, and were therefore not liable, and that Bowbear's heirs were exonerated from all responsibility by the plaintiff having entered into a fresh arrangement with Mrs. Cameron for the payment of the money after Bowbear's death.

This decision appears to us to be perfectly correct. With regard to Mrs. Cameron's heirs, there could be no question. With regard to Bowbear's heirs, it is contended that, as Bowbear was himself responsible, so his estate was saddled with that responsibility. Now, in the first place, it is proved that the original arrangement between the plaintiff and Mrs. Cameron was, after Bowbear's death, altered by a subsequent arrangement, which did not contemplate the continuance of Bowbear's security. Moreover, it appears to me (although it is not necessary to rely on the fact, as the suit does not turn upon it) that Bowbear's liability was a personal one only, and ceased at his death, and could not by any means be saddled upon his heirs.

The special appeal will be dismissed with costs.

The representative of Mrs. Cameron, Mr. DaCosta, was unnecessarily made respondent in this appeal, inasmuch as it was held that he had inherited nothing from his mother, and that finding was never objected to. The special appellant will, therefore, pay his costs as well as the other costs of the appeal.

Mitter, J.—I concur in dismissing this appeal. I express no opinion as to whether the representatives of Mr. Bowbear would not have been liable for the debt, if the creditor had not entered into a fresh engagement with the principal debtor, Mrs. Cameron.

The 10th August 1869.

Present:

he Hon'ble J. P. Norman and E. Jackson, *Judges.*

Rent—Payment by instalments.

Case No. 2841 of 1869.

pecial Appeal from a decision passed by the Judge of Dinagepore, dated the 11th July 1868. reversing a decision of the Sudder Ameen of Maldah, dated the 31st March 1868.

Radha Monee Chowdhrain (Defendant), *Appellant,*

versus

Mr. James Gray (Plaintiff), *Respondent.*

Mr. S. Vertannes and *Baboo Nursingh Chunder Mitter* for Appellant.

aboos Juggadanund Mookerjee and *Sreenath Doss* for Respondent.

Where a putneedar's rent is payable in monthly instalments, he agreeing to pay the revenue out of the nt, and to file the Collector's receipts as payment, he is t entitled to deduct from an instalment of rent any rtion of the Government revenue which may not be yable until after the instalment is due. He is bound pay either in cash or partly in revenue-receipts; failg to pay in both shapes, he may be sued for an arrear rent.

Norman, J.—In my opinion, this is a very mple case. The plaintiff is a putneedar. he plaintiff's rent under the putnee pottah s Rupees 7,800, payable by instalments. here were stipulations that he should pay the Government revenue, Rupees 4,751, agreeably to the instalments, at least 15 days before the last day of payment, out of the putnee jumma payable by him, and that he should, out of the putnee jumma, pay the Government revenue according to the instalments into the Collectorate, take receipts, produce the receipts to the defendant, and get a deduction from the putnee jumma receivable by the defendant.

At the close of the year, the putnee rent being in arrear, the defendant proceeded to bring the tenure to sale for arrears of rent under Regulation VIII. of 1819. The plaintiff claimed to deduct the amount of the public revenue for the month of Chyet, which he had not paid, and which, under his kubooleut, he was not bound to pay till the 13th of June, *i. e.*, 15 days before the last day allowed by the Government for that purpose. The defendant not having allowed the plaintiff to make the deduction, the plaintiff paid the whole amount to save his tenure from sale, and now sues to recover back the amount so paid by him.

I think it quite clear that the suit is not maintainable. Under the terms of the pottah, the plaintiff's obligation to pay the rent by the kists named is absolute and unconditional. His right to set off, or rather to deduct any sums for Government revenue paid by him, arises only on his making the payment. The pottah contains no provision that the plaintiff is to keep money in hand to provide for future payments. The result is that, in my opinion, the decision of the Lower Court must be reversed, and the suit dismissed with costs in all the Courts.

Jackson, J.—The plaintiff in this suit holds a lease of certain villages under the defendant. The rent payable under the terms of the kubooleut by the plaintiff is Rupees 8,016-10 per annum, in monthly instalments, which are detailed at the end of the kubooleut; but there is also an agreement that out of that sum the plaintiff shall pay the Government revenue due for these villages into the Collectorate, amounting to Rupees 4,751-13; and that, on presenting to the defendant the receipts he obtains from the Collector, such receipts shall be considered as payments to the defendant. When the attachment for Chyet 1274 fell due, the defendant applied under Act VIII. of 1819 to have the plaintiff's tenure brought to sale for the arrears then due upon it, claiming in addition to what the plaintiff admits was due a sum of Rupees 667-10-5. The plaintiff, to save his tenure from sale, paid in the whole amount to the Collectorate. His present suit is brought to recover the excess sum of Rupees 667-10-5, on the allegation that it was not due to the defendant under the terms of the lease. There is no little confusion in the wording of the plaint, but the first question at issue between the parties is whether the plaintiff is bound to pay the instalments detailed in the kubooleut by the dates therein mentioned, either in cash or by presenting receipt for Government revenue, or whether he is entitled to deduct from the instalments any portion of the Government revenue which may not be payable until after the instalment is due. The instalments in the kubooleut are monthly. The instalments of Government revenue are quarterly. The last in-

stalment of the Government revenue is not payable until nearly three months after the end of the Bengalee year. The plaintiff claims a right to retain in his hand at the end of the Bengalee year whatever sum is necessary for the payment of the Government revenue at the next instalment.

Both the Lower Courts have decreed the plaintiff's claim, holding that he is entitled to retain such sums in hand. The special appeal is urged on the ground that this view is not consistent with the terms of the agreement between the parties. There might be some tangible ground for the plaintiff's claim, if the Government revenue could not be paid into the Collectorate until the latest date. But this is not the case. The plaintiff can pay in the Government revenue at any time he chooses. He is bound to pay the instalments detailed in the kubooleut to the defendant on the dates named. He may pay them wholly in cash or partly by revenue-receipts. But if he does not pay either in the one shape or the other, the instalment is due; and there is an arrear of rent for which the defendant is entitled to sue. It is quite possible that the defendant may object to the plaintiff not paying in the Government revenue until the latest date for such payment. I would, therefore, reject the plaintiff's claim to retain in his hands any portion of the instalments due by the kubooleut after the dates on which they are due.

The Lower Courts have been in error in giving the plaintiff a decree for the sums which he alleges he has in this manner paid before the proper time—and I concur in reversing those decisions, and in dismissing the plaintiff's suit with costs.

The 10th August 1869.

Present :

The Hon'ble G. Loch, *Judge.*

High Court's powers—Security from decree-holder pending appeal to Privy Council.

Sooruj Monee Dayee, *Appellant to England,*

versus

Sudanund Mohapattur, *Respondent to England.*

Mr. R. T. Allan for Appellant.

Mr. J. W. B. Money for Respondent.

The High Court can on cause shown require security from a decree-holder who has been put in possession in execution of a decree against which an appeal has been preferred to Her Majesty in Council, and is still pending.

It is not imperative on the High Court, under such circumstances, to take security from the decree-holder in possession, unless it be shown that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or unless some other good cause be given.

Loch, J.—SUDANUND MOHAPATTUR obtained a decree for possession of certain estates, the property of his father, on 5th May 1869, and applied for execution on 7th June 1869. In the meantime, the petitioner Sooruj Monee had preferred an appeal to the Privy Council on 28th May, and opposed the execution, which the Subordinate Judge disallowed referring the decree-holder to the High Court for permission to execute his decree. An application was made to the High Court on the 14th June last by the decree-holder, when the Subordinate Judge was informed that, as the appeal of Sooruj Monee to the Privy Council had not up to that time been *admitted*, he was wrong in refusing to allow the decree-holder to execute his decree. On obtaining this order, the Subordinate Judge directed his Nazir to give possession to the decree-holder.

On 5th July 1869, the appeal of Mussamut Sooruj Monee Dayee to the Privy Council was admitted, she having made the requisite deposit for costs, and at the same time application was made to this Court to call upon the decree-holder to give security before he was allowed to execute his decree; and on that day he was called upon to show cause why he should not give security, as prayed for by the appellant to England, and the Subordinate Judge was directed to stop further proceedings in execution till further orders.

Mr. Money appears to show cause for Sudanund Mohapattur, and under the impression that possession of all the estates had been taken before the appeal of the petitioner to the Privy Council had been admitted, he contended that this Court had no authority to call upon the decree-holder to give security after possession had been obtained in execution of the decree as had been ruled by a Full Bench of this Court in the case of Joy Narain Pattur, appellant, reported in 8 Weekly Reporter, page 144, and he insisted that the only course for the petitioner was to apply to the Privy Council, that the Privy Council had author-

ity to require security, and had exercised that authority where it had been shown that the party in possession was committing waste, but had refused to interfere where there had been merely an allegation of waste. The cases quoted by the learned Counsel were from 5 Moore's Indian Appeals, page 300, 7 Moore, page 329, and 10 Moore, page 202, and he further contended that the last case referred to did not give authority to the High Court to call for security after possession had been taken in execution, and on its being pointed out that the decree-holder had not obtained possession of the whole property, but only of six properties, he informed the Court that he was prepared to give security for those estates, possession of which had not been given to the decree-holder.

On the other hand, Mr. Allan for the petitioner contended that, even if possession had been given, this Court had, under the authority of the case reported in 10 Moore, page 202, authority to demand security; and further that, under the provisions of Section 4, Regulation XVI., 1797, it was not necessary for the appellant to England to wait till her appeal was admitted before she could ask the Court to require security from the decree-holder before permitting him to execute his decree.

In disposing of this question, it is unnecessary to refer further to the cases quoted from 5 and 6 Moore, as it is not disputed that the Privy Council have authority, whenever it appears to their Lordships to be necessary, to require security from the party who has obtained possession of property in execution of a decree of the High Court regarding which an appeal is pending before them; but these cases do not determine that the High Court cannot demand security after possession has once been given. We must look elsewhere for the solution of this question, and for this purpose it will be sufficient to confine our attention to a Full Bench case reported in 6 Weekly Reporter, page 84, Misc., 8 Weekly Reporter, page 144, and 10 Moore, page 202.

I refer to the judgment in Volume VI., Weekly Reporter, to show what this Court considered to be the authority vested in the Subordinate Courts with regard to decrees passed by the High Court against which appeals had been preferred to the Privy Council, and it was held that the Lower Court had power to execute a decree of this Court whether an appeal has been preferred or not, unless restrained by an order of this Court, but that such Court would not be exercising a proper discretion should it, after being informed that an appeal to the Privy Council had been admitted, proceed to execute the decree; that the proper course for the Court to follow under such circumstances would be to stay its hand, and allow time to the parties to apply to the High Court, which Court alone can make an order in such cases requiring security from the one party or the other under the provisions of Section 4, Regulation XVI., 1797.

In 1866, the question which is now before me came before a Full Bench of this Court on a reference made by Mr. Justice L. S. Jackson, *viz.*, whether, after execution has gone under a decree of the High Court, the party in possession cannot be called upon to give security under Regulation XVI. of 1797. The Full Bench (see report in 8 Weekly Reporter, page 144) held that, after execution has once gone out under a decree of the High Court subsequently appealed to Her Majesty in Council, it is beyond the power of the High Court, and not within the scope of Section 4, Regulation XVI., 1797, *to set aside the execution.* In the course of argument at the hearing of that case, it had been urged that, if the Court was unable to act after execution had gone out, a decree-holder would be able to take out execution before the defendant could stop him by putting in an appeal, because Section 4, Regulation XVI., 1797, does not require the Court to take the alternative pointed out in it until the appeal has been admitted. The Court doubted whether this was a right construction of the Section, but declined passing any opinion, as the question was not before it.

Since this judgment was pronounced, there has been a ruling of the Privy Council in the case of Mussamut Jairat-ool-Butool *versus* Mussamut Hosseinee Begum, reported in 10 Moore's Indian Appeals, pages 196—202.* This was a petition of appeal from an order passed by the Sudder Court of Agra rejecting the application of the petitioner to take security from the respondent. The order of the Sudder Court of Agra, dated 20th November 1863, is in these words: "The "first point to be considered is whether we "can take this application into considera-"tion. On this point, we are of opinion "that, as this application is preferred under "Section 4, Regulation XVI., 1797, it is un-"necessary to refer to the provisions of Act "VIII. of 1859 relative to reviews of

* 10 W. R., Privy Council, p. 10.

"judgment. The next point is whether "this application can be granted. On this "point we are of opinion that, as execution "of decree has been completed, the Court "are not in a position to call upon the "decree-holder to furnish security. Had "the application been made in due time "before execution of the decree had taken "place, there would have been no difficulty "in complying with it. The law above quot-"ed does not contemplate the case of decrees "already executed. Section 92, Act VIII. "of 1859, is, in our opinion, inapplicable. "We accordingly reject the application." Their Lordships held that an order might be made on the application of the petitioner to the Privy Council, and they thought the proper order to be made should be one which should leave it as far as possible in the discretion of the Sudder Dewanny Adawlut as to what proceedings or what steps should be taken; and their Lordships proposed therefore to make the order in this form: "Their "Lordships being of opinion that it is "expedient that sufficient security should "be taken from the respondent for the due "performance of such order and decree as "Her Majesty may make on this appeal, "*and that it is competent to the Sudder* "*Dewanny Adawlut to require such* "*security to be given or otherwise to* "*provide for the protection and security* "*of the property in question pending this* "*appeal, notwithstanding that execution* "*had issued before his appeal was allowed;* "and that the appellant be at liberty to "apply to the Sudder Dewanny Adawlut "for such security to be given, or such "provision to be made as she may admit."

The words I have underlined appear to me to recognize an authority in the Sudder Court to take security, or otherwise to provide for the safety of the property during the pendency of the appeal, notwithstanding that execution be taken out before an appeal to the Privy Council be admitted. Their Lordships not only expressed an opinion that they considered it expedient that security should be taken in that case, but also, so it appears to me, held that the Sudder Court was competent of itself to take security, when necessary, though execution had been taken out. Had this not been the meaning of their order, would not its terms have been drawn up in another form? After expressing their opinion as to the expediency of requiring security, would their Lordships not have proceeded to *direct* the Sudder Court to require it or to take other steps for the safety of the property? But instead of doing so, they express an opinion that the Sudder Court is competent to do so. If Mr. Money's contention be correct, that the Privy Council alone, on sufficient cause shown, can order security to be taken after possession has been obtained in execution, this Court had no authority to demand security, as it did in McQueen's case (Chief Justice and Mr. Justice Mitter) on 10th July last. No doubt, the circumstances in that case were peculiar; but as possession had been taken before the appeal to the Privy Council had been admitted, this Court, if Mr. Money's interpretation of the order of the Privy Council be correct, had no authority to take security.

The Chief Justice in McQueen's case says: "The case cited from 10 Moore's Indian Ap-"peals, page 202, is not at variance with the "Full Bench case which has been cited, but "I think the case goes to this extent, that in "case execution of a decree of the High Court "has been executed, the Court, upon appeal "to Her Majesty in Council against that "decree, has a discretion, if it thinks fit, to "compel the party who has executed the "decree to give security." I quite concur in the view taken by the Division Bench of this Court as to the meaning of the order of the Privy Council in the case reported in 10 Moore, page 202, and hold that this Court, on cause shown, can require the decree-holder who has been put into possession in execution of decree against which an appeal has been preferred to Her Majesty in Council, and is still pending, to give security.

Now, as to requiring security after possession has been given, it appears to me that, following the course pursued by the Privy Council in the case in 6 Moore's Indian Appeals, page 329, it is not imperative on the Court to require security from the decree-holder in possession. In that case, their Lordships held that no case for requiring security had been made out, and unless it be shown to the Court that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or some other good cause be given, it is not imperative on the Court to take security. With regard to the property of which possession has not been taken, the decree-holder by his Counsel offers to give security, so that it is unnecessary to determine in this case whether the Court are bound under the terms of Section 4, Regulation XVI., 1797, to require security

in all cases before execution be taken out. Has then any case been made out by the petitioner? Mr. Allan has filed a petition with a number of copies of decrees for sums due to various parties by the decree-holder, and he now prays that the estates might be placed under the management of the Collector. Notice has been served on the decree-holder to show cause why the application of the petitioner should not be complied with; and after the decree-holder has shown cause, the Court will determine whether security shall be required from him for such of the property as he has acquired possession of.

The 9th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Receipt of rents—Ratification of lease—Alienation of debuttur land—Powers of a shebait.

Case No. 32 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 12th November 1868.

Juggessur Buttobyal and others (Defendants), *Appellants,*

versus

Rajah Roodro Narain Roy (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss, Hem Chunder Banerjee* and *Umurnath Bose* for Appellants.

Baboos Ashootosh Dhur and *Mohendro Lall Shome* for Respondent.

If a person, being aware that another is in possession claiming to hold under a lease, accepts rent from him, he does thereby ratify the lease so far as he has the power to do so; and if he wishes to protect himself from the ordinary inference that he recognizes the lease, he is bound to give distinct notice to the tenant that he intends to dispute its validity, so as to leave the tenant an opportunity of refusing payment.

The case of a person alienating property which he holds as the shebait of an idol is analogous to that of a Hindoo widow alienating ancestral property; and the question as regards the power of a shebait to grant a putnee of the debuttur land is whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was shebait; and in estimating the validity of a purchase of the putnee rights, it ought to be considered whether the purchasers satisfied themselves, as far as they could, that there was a fair and sufficient ground of necessity for the alienation.

Markby, J.—This suit was brought by a person of the name of Rajah Roodro Narain Roy to set aside a putnee lease granted to the defendants by the mother of the plaintiff, the Ranee Myna Koowaree Beebee, who held this property as shebait of an idol called Radha Kristo. The plaintiff alleges that the granting of this putnee lease was in contravention of his mother's power as such shebait, and claims as the rightful heir of his great-grandmother, who originally created the endowment, the right to institute this suit to set aside that putnee lease and recover possession of the property as debuttur property.

The defendants allege in the first place that the plaintiff himself has received the amount of the putnee rents for the year 1273, and that consequently he cannot be allowed now to make any claim that the putnee should be set aside. They then proceed to state certain circumstances which they contend show that the mother of the plaintiff who granted the putnee had power to do so. The issues were drawn substantially raising these two grounds of defence, and subsequently it appears that the Subordinate Judge allowed a further objection to be taken by the defendant to the effect, as I understand it, that the plaintiff, not having shown his appointment as shebait, had no *locus standi* to represent the idol in this contest, and to maintain this suit.

Now, the history of what has been done with this property prior to the year 1268 appears to me only to require notice in its most important features. It seems that, in the year 1256, a lady of the name of Isshuree Beebee granted this property, which was already given out on lease, to the predecessors of the defendants for debuttur purposes, and she appointed as shebait a relation of the name of Motee Lall Baboo with power to Motee Lall Baboo to substitute such person as he might deem fit in his place as shebait, should he have occasion to relinquish that office. Motee Lall Baboo, in the year 1267, being about to go upon a pilgrimage, appointed Myna Koowaree Beebee, the mother of the plaintiff, shebait in his room; and in the following year, 1268, Myna Koowaree Beebee granted an izarah pottah to the defendants for 30 years, the terms of which I shall have to revert to and notice more particularly subsequently. Then, in the year 1270, she granted the putnee lease now in dispute, under which putnee lease the defendants are still in possession.

"judgment. The next point is whether "this application can be granted. On this "point we are of opinion that, as execution "of decree has been completed, the Court "are not in a position to call upon the "decree-holder to furnish security. Had "the application been made in due time "before execution of the decree had taken "place, there would have been no difficulty "in complying with it. The law above quot-"ed does not contemplate the case of decrees "already executed. Section 92, Act VIII. "of 1859, is, in our opinion, inapplicable. "We accordingly reject the application." Their Lordships held that an order might be made on the application of the petitioner to the Privy Council, and they thought the proper order to be made should be one which should leave it as far as possible in the discretion of the Sudder Dewanny Adawlut as to what proceedings or what steps should be taken; and their Lordships proposed therefore to make the order in this form: "Their "Lordships being of opinion that it is "expedient that sufficient security should "be taken from the respondent for the due "performance of such order and decree as "Her Majesty may make on this appeal, "*and that it is competent to the Sudder* "*Dewanny Adawlut to require such* "*security to be given or otherwise to* "*provide for the protection and security* "*of the property in question pending this* "*appeal, notwithstanding that execution* "*had issued before his appeal was allowed;* "and that the appellant be at liberty to "apply to the Sudder Dewanny Adawlut "for such security to be given, or such "provision to be made as she may admit."

The words I have underlined appear to me to recognize an authority in the Sudder Court to take security, or otherwise to provide for the safety of the property during the pendency of the appeal, notwithstanding that execution be taken out before an appeal to the Privy Council be admitted. Their Lordships not only expressed an opinion that they considered it expedient that security should be taken in that case, but also, so it appears to me, held that the Sudder Court was competent of itself to take security, when necessary, though execution had been taken out. Had this not been the meaning of their order, would not its terms have been drawn up in another form? After expressing their opinion as to the expediency of requiring security, would their Lordships not have proceeded to *direct* the Sudder Court to require it or to take other steps for the safety of the property? But instead of doing so, they express an opinion that the Sudder Court is competent to do so. If Mr. Money's contention be correct, that the Privy Council alone, on sufficient cause shown, can order security to be taken after possession has been obtained in execution, this Court had no authority to demand security, as it did in McQueen's case (Chief Justice and Mr. Justice Mitter) on 10th July last. No doubt, the circumstances in that case were peculiar; but as possession had been taken before the appeal to the Privy Council had been admitted, this Court, if Mr. Money's interpretation of the order of the Privy Council be correct, had no authority to take security.

The Chief Justice in McQueen's case says: "The case cited from 10 Moore's Indian Ap-"peals, page 202, is not at variance with the "Full Bench case which has been cited, but "I think the case goes to this extent, that in "case execution of a decree of the High Court "has been executed, the Court, upon appeal "to Her Majesty in Council against that "decree, has a discretion, if it thinks fit, to "compel the party who has executed the "decree to give security." I quite concur in the view taken by the Division Bench of this Court as to the meaning of the order of the Privy Council in the case reported in 10 Moore, page 202, and hold that this Court, on cause shown, can require the decree-holder who has been put into possession in execution of decree against which an appeal has been preferred to Her Majesty in Council, and is still pending, to give security.

Now, as to requiring security after possession has been given, it appears to me that, following the course pursued by the Privy Council in the case in 6 Moore's Indian Appeals, page 329, it is not imperative on the Court to require security from the decree-holder in possession. In that case, their Lordships held that no case for requiring security had been made out, and unless it be shown to the Court that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or some other good cause be given, it is not imperative on the Court to take security. With regard to the property of which possession has not been taken, the decree-holder by his Counsel offers to give security, so that it is unnecessary to determine in this case whether the Court are bound under the terms of Section 4, Regulation XVI., 1797, to require security

in all cases before execution be taken out. Has then any case been made out by the petitioner? Mr. Allan has filed a petition with a number of copies of decrees for sums due to various parties by the decree-holder, and he now prays that the estates might be placed under the management of the Collector. Notice has been served on the decree-holder to show cause why the application of the petitioner should not be complied with; and after the decree-holder has shown cause, the Court will determine whether security shall be required from him for such of the property as he has acquired possession of.

The 9th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Receipt of rents—Ratification of lease—Alienation of debuttur land—Powers of a shebait.

Case No. 32 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Midnapore, dated the 12th November 1868.

Juggessur Buttobyal and others (Defendants), *Appellants,*

versus

Rajah Roodro Narain Roy (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss, Hem Chunder Banerjee* and *Umurnath Bose* for Appellants.

Baboos Ashootosh Dhur and *Mohendro Lall Shome* for Respondent.

If a person, being aware that another is in possession claiming to hold under a lease, accepts rent from him, he does thereby ratify the lease so far as he has the power to do so; and if he wishes to protect himself from the ordinary inference that he recognizes the lease, he is bound to give distinct notice to the tenant that he intends to dispute its validity, so as to leave the tenant an opportunity of refusing payment.

The case of a person alienating property which he holds as the shebait of an idol is analogous to that of a Hindoo widow alienating ancestral property; and the question as regards the power of a shebait to grant a putnee of the debuttur land is whether, looking to all the circumstances of the case, the alienation was a prudent and wise act in respect of the purposes for which he was shebait; and in estimating the validity of a purchase of the putnee rights, it ought to be considered whether the purchasers satisfied themselves, as far as they could, that there was a fair and sufficient ground of necessity for the alienation.

Markby, J.—THIS suit was brought by a person of the name of Rajah Roodro Narain Roy to set aside a putnee lease granted to the defendants by the mother of the plaintiff, the Ranee Myna Koowaree Beebee, who held this property as shebait of an idol called Radha Kristo. The plaintiff alleges that the granting of this putnee lease was in contravention of his mother's power as such shebait, and claims as the rightful heir of his great-grandmother, who originally created the endowment, the right to institute this suit to set aside that putnee lease and recover possession of the property as debuttur property.

The defendants allege in the first place that the plaintiff himself has received the amount of the putnee rents for the year 1273, and that consequently he cannot be allowed now to make any claim that the putnee should be set aside. They then proceed to state certain circumstances which they contend show that the mother of the plaintiff who granted the putnee had power to do so. The issues were drawn substantially raising these two grounds of defence, and subsequently it appears that the Subordinate Judge allowed a further objection to be taken by the defendant to the effect, as I understand it, that the plaintiff, not having shown his appointment as shebait, had no *locus standi* to represent the idol in this contest, and to maintain this suit.

Now, the history of what has been done with this property prior to the year 1268 appears to me only to require notice in its most important features. It seems that, in the year 1256, a lady of the name of Isshuree Beebee granted this property, which was already given out on lease, to the predecessors of the defendants for debuttur purposes, and she appointed as shebait a relation of the name of Motee Lall Baboo with power to Motee Lall Baboo to substitute such person as he might deem fit in his place as shebait, should he have occasion to relinquish that office. Motee Lall Baboo, in the year 1267, being about to go upon a pilgrimage, appointed Myna Koowaree Beebee, the mother of the plaintiff, shebait in his room; and in the following year, 1268, Myna Koowaree Beebee granted an izarah pottah to the defendants for 30 years, the terms of which I shall have to revert to and notice more particularly subsequently. Then, in the year 1270, she granted the putnee lease now in dispute, under which putnee lease the defendants are still in possession.

Now, with regard to the first point, namely, as to the right of the plaintiff to maintain this suit, in the view which I take of the other two points in the case, it does not appear to me necessary that we should express any opinion. Assuming for the purposes of this case that the plaintiff has the right, whether as *de-facto* shebait in possession, as it was put by one of the vakeels who argued the case, or as the heir of the person who originally created the endowment, as it was put by the other vakeel—whether he is shebait or not—it seems to me very clear that this suit must fail.

The first ground of defence that the plaintiff, by receiving rent subsequent to his mother's death, and after the time when he assumed the right to get possession of the property as shebait, is now estopped (as it is called) from disputing the validity of the putnee lease, was disposed of by the Court below as follows : after adverting to the payment of the putnee rent for the year 1273 to the plaintiff's mookhtear, Hurry Krishto Mytee, and stating his opinion that the inference is clear that that money was taken, either with the consent of the plaintiff or by his order or under written instructions from him ; that is to say, after a finding of fact on this point in favor of the defendants he refuses to draw the inference that the plaintiff thereby ratified the lease, and holds that the plaintiff had no other choice than so to receive the rent from the defendants until such time as he could get rid of them by setting aside the putnee lease, executed by his late mother. Now, I think that mode of dealing with the facts found by the Subordinate Judge is wrong in point of law, for it seems to me that, if a person, being aware that another is in possession claiming to hold under a lease, accepts rent from him, he does thereby ratify the lease so far as he has the power to do so, and I think that, if he wishes to protect himself from the ordinary inference that by the acceptance of the rent he recognizes the lease, he is bound to give distinct notice to the tenant that he intends to dispute the validity of the lease under which he claims to hold ; because, if he intends to dispute the tenant's title, he ought to leave to the tenant an opportunity of refusing payment of the rent under the lease. If the fact of receipt of rent by the plaintiff is established, I think that the inference of a recognition on his part of the putnee lease clearly follows. And upon the evidence, which it is not necessary to advert to at length, for I agree with the conclusion arrived at on that evidence by the Subordinate Judge, I think it is clear that the malikanah was, after the death of Myna Koowaree, paid to the plaintiff's mookhtear, Hurry Krishto Mytee, and I think it has been rightly inferred that the plaintiff, whose own mookhtear has sworn that the money was received by him, had full knowledge of such payments, and that the money was applied to his use and benefit. Therefore, on that ground I should say that the plaintiff is now prevented from contesting this lease.

But I think that by far the strongest ground of the defendant in this case is upon what may be called the merits of the transaction. As I understand the position of affairs in the year 1268, when the plaintiff's mother granted the izarah lease, it was this that there was a debt, which I do not understand it to be disputed was a valid and binding debt, upon this property, amounting to Rupees 3,000: and as I understand the izarah lease which was then granted, it was an arrangement very much in the nature of an usufructuary mortgage of the profits of this property in respect of that debt. I think it is clear that the lease recites that the estimated collections of the mehal taking one year with another, and supposing there to be no extraordinary calamities, would be Rupees 1,041 : the Government revenue and the payments made to the Government for keeping up certain bunds in repair are Rupees 635 ; and the balance of Rupees 406 was to be divided as follows: namely, Rupees 226 to go towards the principal and interest of the money due on the izarah lease, and the remaining sum of Rupees 180 was to go to the lady herself for the purpose of carrying on the expenses connected with the idol; that izarah, which would have expired in the year 1297, was in substitution of a previous one, the terms of which have not been fully stated, but under which, I understand, the sum of money secured to the izaradar was somewhat less. The izarah of 1268, besides the arrangement about the distribution of the collections, provided also that any loss which might be incurred in consequence of droughts or the bursting of the Company's embankments, should be ascertained by an Ameen according to custom, and the deduction in favor of the lessee made accordingly, and it was in consideration of that that the izaradar undertook to discharge the Phoolbundee. Well, two years after that, one of these calamities did occur —there was an inundation which, there does not seem to have been any question, did

occur at the time, and which was caused by one of the circumstances contemplated in the izarah actually occurring, namely, the bursting of the Company's bund, and the consequence was that a claim would have arisen for compensation for the loss incurred as therein provided. In addition to that, it was alleged that some repairs had become necessary to the temple, and that a further sum of money was required for that purpose. Under these circumstances, it seems that what was actually done was that a putnee was granted by Myna Koowaree Beebee to the defendants; that is to say, a permanent interest was substituted for the 30 years' lease; in consideration of this, the whole of the debt was extinguished; all possible liability or responsibility for such accidents as droughts or inundations caused by the bursting of the embankments was got rid of, and all claim for the past calamity, that is, for the losses occasioned by the previous inundation, was also extinguished. Myna Koowaree also received a sum of Rupees 598 in ready money besides a slight increase of about Rupees 16 and from Rupees 180 to Rupees 196-12 in the annual malikanah of the property.

Now, the question which we have to decide is, whether or not that was an arrangement which Myna Koowaree Beebee in her position as shebait of the idol had the power to make. The Subordinate Judge says that, "the fact being that there is no proprietor, "and that there *is* property for the worship "of the thakoor, there can be no reason "why in such a case there should be any "debts at all. The property cannot be made "liable for any debts contracted at any time "by the shebait for the time being, and the "defendants are unable to give any proofs "that the debts were contracted on account "of the worship of the thakoor. Although "the defendants have through their wit-"nesses spoken of some repairs done to the "temple of the thakoor, it does not appear "from that that any debt was incurred on "that account; consequently that does not "justify the giving of the putnee." Then, after adverting to the fact of the inundation, he says: "By the Hindoo Shastras, the "acts of a Hindoo widow and shebait as "shebait cease to have effect after their "death. Myna Koowaree was simply the "shebait, and she had no authority to pass "the property to other hands, and the grant-"ing of a putnee is in a certain sense a sale "for which she had no power."

Now, it is not necessary for us in the case to enter very minutely into the rights which a shebait possesses as to the disposal of the property under his charge; for, notwithstanding that the appellants in their eleventh ground of appeal have taken some objections to the reference which the Court below made to the case of a Hindoo widow as analogous to this case, Mr. Allan, who appeared before us as pleader for the appellants, has accepted the analogy, for the purposes of this argument, between a case of alienation by a widow and by a shebait; and that view of the question has not been contested, and I think that it may well be accepted, and very fairly accepted, as an analogous case. The question, therefore, which we have before us in this case, as in the case of a Hindoo widow alienating a portion of her husband's estate under a legal necessity, is, as regards the power of Myna Koowaree to grant the putnee which it is now sought to set aside, whether, looking to all the circumstances of the case, her act was a prudent and a wise act in respect of the purposes for which she was shebait; and in estimating the validity of the defendant's purchase of the putnee rights in the property in dispute, we shall have to consider whether they, acting as *bonâ-fide* and prudent purchasers would have acted, satisfied themselves, as far as they could, that there was a fair and apparently sufficient ground of necessity made out for this alienation, which is certainly an unusual and an exceptional exercise of the powers which, by law, either a shebait or a Hindoo widow would hold.

It seems to me that, looking to all the circumstances of the case, there was such an apparent case of necessity as would justify them in purchasing those putnee rights. The pleader for the respondent has tried to make out that, under the terms of the izarah lease, the property would revert to the shebait, after the expiry of the 30 years, free from the debt of Rupees 3,000, with which it was burdened in 1268; but there is nothing of the kind in the deed. The deed is silent as to what is to take place at the expiration of its term of 30 years; and considering that the sum of Rupees 226, which is all that would come annually into the hands of the izaradar under the terms of the izarah lease, is only about $7\frac{1}{2}$ per cent. upon the capital debt; and looking to what is generally considered to be the usual rate of interest in this country, it seems to me most improbable that so large a debt and the interest due upon it could be satisfied by the annual payment of a sum of

226 rupees only for 30 years. It is true that the instrument says that the sum of Rupees 226 to be retained annually by the izaradar is for both principal and interest; but from a passage in Macpherson on Mortgages, page 9, which says that it is usual in usufructuary mortgages to make principal and interest chargeable on profits alone expressly for the purpose of making it clear that there is no personal liability on the part of the mortgagor, I think, although, no doubt, the words of this instrument are peculiar, that the true explanation of the meaning of these words is that Rupees 226 is to be paid in respect of interest only, and not in part-reduction of the debt; but that no part of the property except this margin of profits is to be a security for the principal or interest. This appears to me to be a far more probable construction than that the yearly payment of 226 rupees should in 30 years discharge so large a debt as 3,000 rupees with the accruing interest. This being so, it really follows (and it was at one time almost so admitted) the value of the reversion, which was all the idol had when this putnee lease was granted, must have been exceedingly small; and it seems to me that it was by no means an improper or imprudent arrangement, and the defendants may have been fully justified in believing that Myna Koowaree was acting with perfect good faith in the interest of her trust when the izarah for 30 years was converted into a permanent interest in their favor by the grant of a putnee lease which by its terms relieved her entirely from the old debt with which the property was admittedly burdened; which relieved her of all claims in respect of the losses incurred on account of the previous inundation; which increased to some extent the annual sum receivable by her; whilst the sum of money in hand which she would receive as balance of the consideration would provide for the repairs which it had become necessary to make to the temple of the idol.

Therefore, taking this case upon the ground I have taken it, that it is analogous to the case of a Hindoo widow, and that the defendants who purchased from Myna Koowaree Beebee as shebait are precisely in the same position as the purchaser from a Hindoo widow would be, I think that the defendants have made out a case upon which they are entitled to a finding that their purchase of the putnee rights in the property in suit was a *bond-fide* purchase made by them in the full belief that there was a legal necessity for the alienation; and that they have shown good *primâ-facie* grounds for such a necessity; and in the absence of any evidence on the part of the plaintiff to counteract that adduced by the defendants, and to show that the small sum of money received by Myna Koowaree on granting this putnee was applied by her to anything else but the expenses of the idol. I think that we are fully justified in holding that there was power in this case to make the alienation and create the putnee lease; that the appeal ought to be decreed, and this suit dismissed with costs in this Court and in the Court below.

Kemp, J.—I concur in this judgment. In the eleventh ground of appeal to this Court the appellants state that the Lower Court was wrong to apply the rules in cases of alienations by a Hindoo widow to this case. By this, I understand that they considered that test to be too strict a test with reference to the circumstances of this case; but as shown by Mr. Justice Markby, even submitting their case to that test, they have shown, in my opinion, most satisfactorily that, putting their case even as high as that of a Hindoo widow, the putnee was made under legal necessity. I, therefore, concur in reversing the decision of the Subordinate Judge. Plaintiff's suit is dismissed, and this appeal decreed with costs.

The 11th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Pleadings—Practice of High Court.

Case No. 132 of 1869.

Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and W. Markby, on the 7th March 1869, in Special Appeal No. 2278 of 1866.

Messrs. M. S. Rousseau and another, Defendants (Appellants), *Petitioners,*

versus

Nuboo Kishore Bhudro and another, Plaintiffs (Respondents), *Opposite Party.*

Mr. M. L. Sandel for Petitioners.

Baboos Kalee Mohun Doss and *Nuleel Chunder Sein* for Opposite Party.

Where an appellant had been heard at length, and the respondent heard partly in answer, and the Court came to a conclusion after research into the record without any new matter being brought forward by the respondent, it was considered unnecessary to hear the appellant in reply.

Markby, J.—I THINK that this application for review must be rejected. The second ground of review which suggests an error in the judgment itself has not been very much relied on, but, even if it had, it would not be a tenable ground, inasmuch as the point referred to in that ground of review was a point which has been considered and determined by the judgment of this Court, and we have (I should go so far as to say) no power to admit a review upon the mere allegation that our judgment is erroneous on a point which we have considered.

Upon the other point, which relates to a matter of procedure in the course of the enquiry, the complaint is that, having heard the respondent's argument in answer to the appellant, we refused to hear the appellant's reply.

Now, I really do not think there is any doubt as to what is the practice of the Court. The practice of the Court is substantially what is laid down in the book referred to, containing the rules of practice of the Presidency Sudder Court published by Carrau in 1856. The appellant begins, the respondent is then heard, and the appellant has a reply to the respondent's answer; but that reply is not, at least ought not to be, a reiteration of the arguments in support of the appeal, but simply in refutation of the new matter brought forward by the respondent in his answer. In this case, after having heard the appellant for a considerable length of time, the portion of the day which remained was occupied by the respondent, and the litigation having been a very long one, and the facts of the case somewhat complicated, one of us, in the course of time which intervened from the rising of the Court to the time of its sitting again on the next day, went carefully through all the papers; and before coming into Court, on a consultation held between us, we came to the conclusion that the special appellant's objections could not prevail. We came to that conclusion entirely upon our own researches in the record and on the arguments of the special appellant, and not upon any new matter opened up by the respondent's pleader; upon that, we decided not to hear the respondent any further, and it became, therefore, unnecessary to hear the appellant in reply. The course we adopted is, I believe, in perfect accordance with the practice of this Court and of every other Court with which I am acquainted. No new matter of any kind was brought forward by the respondent, and to hear the appellant again would have been simply to allow a reiteration of the arguments already heard. We, therefore, think that this ground also entirely fails, and that this application for review must be rejected with costs.

Kemp, J.—I am of the same opinion.

The 12th August 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Encumbered property—Registration—No notice—Caveat emptor.

Case No. 364 of 1869.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 18th November 1868, reversing a decision of the Principal Sudder Ameen of that District, dated the 9th April 1868.

Doollub Sircar and another (two of the Defendants), *Appellants,*

versus

Kristo Coomar Bukshee (Plaintiff), *Respondent.*

Baboos Tara Prosunno Mookerjee and *Kalee Mohun Doss* for Appellants.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondent.

S mortgaged an estate to *M* by a bond which was registered. After registration, *M* having obtained a money-decree against *S* attached the estate in execution, and sold it without making any mention of the mortgage. He afterwards obtained a decree on his registered bond, and sold it to a party who attached the estate in execution. The purchaser of the estate intervened under Section 246, Code of Civil Procedure.

HELD that the purchaser of *M's* decree stood in the same position as *M*, who could not set up the lien under his bond as against a purchaser who had been induced by *M* himself to buy the property in the belief that *S's* title was a valid one.

Norman, J.—THIS is a suit by the plaintiff to establish his title as purchaser of kismut Joypoora against the defendant, who is seeking to bring the property to sale in execution of a decree on a bond by which the property had been pledged by the prior

owner before the date of the plaintiff's purchase. The facts are as follow:—

One Kudum Sircar mortgaged kismut Joypoora to Ram Joy Mojoomdar by a bond which was registered under the provisions of Section 53 of Act XX. of 1866. Subsequently to the registration of the bond, Ram Joy, having obtained a money-decree in a suit against Kudum Sircar, caused kismut Joypoora to be attached and sold in execution of the decree. In describing and particularizing the property to be sold, he made no mention of the mortgage, but allowed the property to go to sale as if it had been unencumbered. The plaintiff purchased the property for a large sum, Rupees 1,500.

Ram Joy Mojoomdar afterwards obtained a decree on his registered bond, which he sold to the defendant. In execution of that decree, the defendant caused kismut Joypoora to be attached. The plaintiff intervened under Section 246 without success.

The question in the present suit is whether the defendants have a right to sell the property under the decree which they have purchased.

The Judge, reversing the decision of the Principal Sudder Ameen, holds that the defendants must be considered as standing in the same position as Ram Joy Mojoomdar, and that they have no such right.

The defendants appeal. They contend that only the rights and interests of Kudum Sircar were sold under the decree, that the plaintiff's purchase was subject to the lien under the bond, and that, the bond having been duly registered under Section 53, the plaintiff must be deemed to have bought with notice of the charge created by it.

We think that the decision of the Judge is correct.

By causing the property of Kudum Sircar to be sold in execution of a decree, having not only made no objection to the property being sold as the absolute property of Kudum Sircar, but actually suppressing the fact of the charge upon it created by the bond, Ram Joy Mojoomdar induced the plaintiff to buy the property in the belief that the title of Kudum Sircar was a valid one, and that, so far at least as he was concerned, there was nothing to prevent a purchaser from acquiring a good title as owner. We may add that Ram Joy Mojoomdar apparently had the full benefit of the money realized by the sale which took place.

Under these circumstances, Ram Joy could not set up the lien under his bond as against a purchaser who bought the right of Kudum Sircar. The right was allowed by Ram Joy for his own purpose to appear to be that of an absolute owner, and Ram Joy could not now, to the prejudice of the plaintiff, say that it was not so. The defendants who are merely executing Ram Joy's decree, can have no greater right than Ram Joy himself.

The appeal is dismissed with costs.

The 12th August 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Relinquishment of right of occupancy—Zemindar's rights.

Case No. 691 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 23rd December 1868, affirming a decision of the Deputy Collector of that District, dated the 5th September 1868.

Huro Doss and another (Plaintiffs), *Appellants.*

versus

Gobind Bhuttacharjee and another (Defendants), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Grija Sunkur Mojoomdar for Respondents.

A ryot having left his homestead in his zemindar's village and built a new house elsewhere, the zemindar sent him a letter inquiring why he had run away, and giving him notice to appear and arrange about the jote. The ryot gave no answer, and did nothing in the matter. The zemindar then gave a fresh pottah to a new ryot.

HELD that the ryot had abandoned the land, and the zemindar had the right to re-let it to another.

Norman, J.—THIS is a suit for possession of a tenure consisting of rather more than one drone of land of which the plaintiff alleges that he has a right of occupancy.

The facts are shortly these. In Aughran 1274, or in other words, November 1867, the plaintiff left his homestead in the defendant's village, and built a new house in a village belonging to another zemindar. On the 11th Pous, the defendant, who was the zemindar, caused a letter to be sent to the plaintiff, asking him why he had run away, saying that he did not know why plaintiff had run away, and giving him notice that he was required to be present within seven days in the zemindary cutcherry to make some arrangement about the settlement of his jote. The plaintiff gave no answer whatever to this letter, and in Maugh the defendant granted a pottah of the land to a new ryot, considering that the plaintiff had abandoned his tenure.

The plaintiff brought his suit praying to be restored to possession, on the 6th August 1868. That suit was dismissed by the Deputy Collector, and his decision was affirmed by the Judge of Rungpore.

The plaintiff appeals specially to this Court.

We think that the decision of the Lower Courts is perfectly correct. The right of occupancy given by Section 6 is simply what it professes to be- a right to *occupy and hold the land.* If the ryot of his own free will quits and abandons the land, it appears to us that there is nothing in Section 6 to prevent the zemindar from re-letting the land and getting the rent to which he is entitled from a new tenant.

The evidence of abandonment in the present case is quite satisfactory. In leaving the village of the defendant, the plaintiff ceased to be a *khood-khast* ryot of his village. The zemindar had no security as to when he would come back; and the plaintiff, when applied to, refused to state whether he would come back or cultivate the land. After the expiration of a month from the date of his letter, the zemindar granted a fresh pottah to a new ryot to cultivate for the year 1275. He certainly could not be bound to keep the land vacant, to suit the convenience of a ryot who had run away, and who not only did not answer the defendant's letter, but who down to August did not take any steps to assert his alleged title to hold the land.

That being so, the Judge was right in holding that the plaintiff had abandoned the land. The suit was properly dismissed. The appeal is also dismissed with costs.

The 12th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Execution—Joint liability.

Case No. 285 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 11th June 1869, affirming an order of the Subordinate Judge of the District, dated the 31st August 1868.

Sreenath Ghose (Judgment-debtor), *Appellant,*

versus

Saheb Ram and others (Decree-holders), *Respondents.*

Bama Churn Banerjee for Appellant.
No one for Respondents.

In a joint-decree the execution-creditor is at liberty to proceed against all or any of his judgment-debtors as he may choose. If a landlord and his gomashtah are declared jointly liable, the decree-holder is not wrong in law in proceeding against the gomashtah in the first instance.

Kemp, J.—Two points are taken in special appeal, *first,* "that the Lower Courts have "misconstrued the decree sought to be exe-

"cuted, in holding that your petitioner was "liable under it, whereas the decree when "read with the judgment on which it is "based clearly shows that the ijaradars, "namely, Lalla Hureehur Pershad and "Baboo Buree Singh, were the parties made "liable under the decree, and not your peti-"tioner;" and, *secondly*, "that even if it be "considered that your petitioner was liable "along with the ijaradars, the decree should "not be allowed to be executed against "your petitioner unless it is in the first "instance executed against the ijaradars "who are the parties chiefly interested." These grounds are given in the words of the petition of appeal.

On the first ground, I think, after hearing the decretal order read, that the petitioner, the special appellant, is jointly liable with the lessees under the decree. There can be no question that the distraint was an illegal one, and that it admittedly was so appears from the fact that an issue was raised as to whether the lessees were liable for the illegal act of their gomashtah, the special appellant before us; and it does not follow that because the liability of the lessees is established, the gomashtah is relieved from all liability. The decretal order being very clear as to the liability of the special appellant, I think that the Court below has not misconstrued the decree, and the first ground of appeal therefore fails.

On the second ground, we have been referred to a case which is not published, but an authenticated copy of which has been filed with the record, and which was decided on the 13th September 1865 by Justices Loch and Glover. That was a case in which the Court of Wards and their surburakar, Mr. Gregor Grant, were sued for wassilat, and a decree was passed against both jointly. The learned Judges in that case were of opinion that execution could not be taken out against Grant until every means had been taken to recover the amount covered by the decree from the Court of Wards. The Judges did not express any very decided opinion in the matter, and whatever the law may be as between the Court of Wards and a surburakar, it is very clear that in the present case between a landlord and his gomashtah, who both have been guilty of an illegal act, and both have been held to be jointly liable, the Lower Courts were not wrong in law in allowing the decree-holder to proceed against the gomashtah, the appellant before us.

The appeal is therefore dismissed, but without costs, as no body appears for the respondents.

Markby, J.—I am of the same opinion. With regard to the case that has been cited upon the second point, I am very much inclined to think that if we had any thing more than the short judgment of the Court before us, it is very possible that that case might be explained; but even if it could not, I must say, although with great respect for the Judges who decided that case, that I should have some difficulty in coming to a conclusion that in a joint decree against the Court of Wards and the servants of the Court any control could be exercised as to which party the execution-creditor should proceed against. I consider that in a joint decree in every case the execution-creditor is at liberty to proceed against all or any of his judgment-debtors as he may choose. But as has been pointed out by Mr. Justice Kemp, this is not a case between the Court of Wards and their servant, but a case between an izaradar and his gomashtah, so that it is not necessary to say decisively in this case whether or no the former decision of this Court quoted above is right.

I am quite clear that in this case execution may proceed against the gomashtah.

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The 12th August 1869.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Certificates under Act XXVII., 1860—Section 101, Act VIII., 1859.

Case No. 250 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 15th May 1869.

Ameerunnissa Beebee (Objector), *Appellant,*

versus

Afeeutoonissa Beebee and others (Petitioners), *Respondents.*

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Appellant.

Baboos Gopeenath Mookerjee and *Mohesh Chunder Bose* for Respondents.

A certificate under Act XXVII. of 1860 cannot be granted to any number of representatives of the deceased either under the Hindoo or the Mahomedan Law; as it would not facilitate the collection of debts to grant certificates to separate applicants entitled to fractional shares of the estate.

If some of the shareholders do not consent to one certificate being granted to all, it is within the competency of the Court under Act XXVII. of 1860 to select one or more of those shareholders who would consent to act, and appoint him or them as representatives of the deceased. If this could not be done, a Receiver might be appointed under Section 101 of Act VIII., 1859.

Kemp, J.—This was an application for a certificate under the provisions of Act XXVII. of 1860 on the part of Afeeutoonissa, Nadertunnissa, and Halemunnissa; the first party alleging herself to be the wife, and the two latter parties alleging themselves to be the daughters of the late Golam Hossein *alias* Haree Meah. In the petition applying for a certificate, the shares which the applicants considered themselves entitled to under the Mahomedan Law are set forth, and it is said that debts and the sums to be received by the deceased in proportion to the shares of the applicants amount to about 1,000 rupees per annum. The application was opposed by the widow of the deceased, who alleges that the applicants are not the married wife and the legitimate daughters of the deceased, and therefore not entitled to a certificate.

The Judge, after taking evidence on both sides, has come to the conclusion that the applicants are the wife and the legitimate daughters of the deceased, and he, therefore, granted them a certificate. The question which arises in this case, although not taken in the Court below or in the grounds of appeal, is one which we think we ought to express an opinion upon. Under Section 6 of Act XXVII. of 1860, the granting of a certificate may be suspended by this Court. It is in the discretion of the Court to declare the party to whom the certificate should be granted, or it may direct such further proceedings for the investigation of the title as it shall think fit. As this, therefore, is a matter in which the Court has discretion, we think it proper although this point was not taken in the Court below, to allow it to be taken in this stage of the case.

It appears to me a matter of great doubt whether a certificate to collect fractions of debts due to a deceased party can be granted under the provisions of the Act. It appears that the Act was passed to provide for the greater security of persons paying debts due to the representatives of a deceased Hindoo or Mahomedan. It was also passed to facilitate the collection of such debts by removing all doubts as to the title of the representatives to demand and receive the sums due. It appears to me that the Legislature did not intend that a certificate should be granted to any number of representatives of the deceased under either the Hindoo or the Mahomedan Law. It is notorious that under the Mahomedan Law the deceased's estate might be split up into a great number of estates of a very trifling extent, and it therefore would not, in my opinion, be facilitating collections of such debts, which was the object of the law, to grant certificates to any number of separate applicants, simply because under the Mahomedan Law they may be entitled to a seham or fractional share in the estate of the deceased. I am supported in this view by a decision published in the 10th Volume, Weekly Reporter, page 105, in which the learned Judges, Justices Bayley and Macpherson, held that a certificate cannot be granted for the collection of a fraction of the debts of the deceased.

A decision has been mentioned by the pleader for the respondent which is to be found at page 62 of the same Volume, but

in that case the question before us was not raised. It appears that in that case it was said that the applicant was entitled only to a small portion, if entitled to anything, and that as the respondent had a greater interest the certificate ought to be given to her. The point now before us was not raised and was not decided in that case.

It also appears in this case very clear to me that this is not a *bond-fide* application for a certificate to enable the parties to collect debts, but is an attempt under cover of application under the Act to get possession of the shares claimed by the applicants in the estate of the deceased which is now in the possession of the opposite party. Looking to the great delay in bringing the application before the Court, to the manner in which the application is made in which the shares are set forth in great detail and the debts are in no way specified, I think that the application ought to have been rejected, and that the applicants ought to have been referred to a regular suit. I would, therefore, reverse the decision of the Judge, and decree this appeal with costs.

Markby, J.—I am entirely of the same opinion. I agree with Mr. Justice Kemp as to both the grounds on which he thinks this certificate ought to be refused, and I fully concur in all the reasons which he has given in support of his judgment. The only thing I wish to add is with reference to the objection made by the vakeel for the respondent, that, unless a certificate be allowed for a share to the party entitled to such share, it will be impossible for him in case of differences between himself and his co-shareholders to proceed at all. As I understand the Act, I do not think that would be the case. If a shareholder could not, having established his right to a share, prevail upon his co-shareholders to consent to one certificate being granted to all the shareholders, I think it would be within the competency of the Court under Act XXVII. of 1860 to select one or more of those co-shareholders who would consent to act, and appoint him or them as the representatives of the deceased, taking of course proper security for the safe custody of the amount of debts that might be realized; but even if this could not be done, and if there should be any difficulty in appointing one or more of the co-shareholders, I apprehend there would be no difficulty whatever in taking steps to have a Receiver appointed under Section 101 of Act VIII. of 1859.

The 12th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Costs—Section 209, Code of Civil Procedure.

Case No. 278 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 27th November 1868, affirming an order of the Subordinate Judge of that District, dated the 23rd March 1868.

Issur Chunder Mookerjee (Judgment-debtor), *Appellant,*

versus

Mun Mohun Chowdhry (Decree-holder), *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Lukhee Churn Bose for Respondent.

When a decree in favor of an appellant describes a set of costs as due by the appellant to the respondent, it means, not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only should be recovered under the decree.

Section 209, Code of Civil Procedure, has no application in such a case.

Markby, J.—In this case, I do not think it necessary to say what the construction of Section 209 is, because, upon looking at the proceedings, it is perfectly clear that there was only one decree, and therefore Section 209, which applies to cross-decrees, has no application in this case.

The suit was originally brought for wassilat, and in the first Court was dismissed altogether. Upon appeal by the plaintiff, the Appellate Court made a decree that the decision of the Principal Sudder Ameen should be reversed, and that the plaintiff, out of the 501 rupees claimed, should get Rupees 270 with interest from the date of the suit up to date of decision, or total Rupees 327, with interest on that sum up to date of realization, and costs of both Courts to be rateably paid. The costs were then calculated, and the costs due to the appellant were fixed at Rupees 168 and Rupees 104, and the costs due to the respondent were fixed at Rupees 58 and Rupees 13.

Now, it is contended before us that the party who was respondent in that case may take out execution in respect of the sums of money which are found due to him in respect of costs. I think that this is an entirely mistaken view of that decree. There was but one decree upon which one person alone could execute, namely, the plaintiff, who would be entitled to take out execution for what remained due to him after giving credit to the defendant for the amount of costs awarded in his favor. It appears that the plaintiff has not thought fit to execute that decree, and that it has become barred by limitation, but that in no way affects the rights of the defendant, nor can it create a right in him to execute a decree which did not award any sum to be paid to him. The decree, when it describes a set of costs as due by the appellant to the respondent, means not that any sum should be actually paid to the respondent, but that the appellant should only recover the net sum due under the decree, that is, the sum which would remain after deducting from the gross amount decreed the amount of costs payable by the appellant. I therefore think that there is no decree in existence such as the defendant, who is the respondent before us, now seeks to execute. I think, therefore, that no execution can issue in this case. The order of the Lower Appellate Court and of the Principal Sudder Ameen (which is unintelligible) will be reversed. The application for issue of execution will be dismissed; and the applicant will pay the costs in this Court and in the Courts below.

Kemp, J.—I am of the same opinion.

The 13th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Joint liability—Specification.

Case No. 1316 of 1869.

Special Appeal from a decision passed by the Judge of Sarun, dated the 23rd March 1869, reversing a decision of the Subordinate Judge of that District, dated the 15th June 1868.

Munraj Muhton and others (Defendants), *Appellants,*

versus

Mr. E. Hudson (Plaintiff), *Respondent.*

Baboo Kally Kissen Sein for Appellants.

Mr. R. T. Allan for Respondent.

In a suit to recover the value of the produce of land from defendants, who had agreed to cultivate it, but had failed to do so, it was held that, as defendants were jointly liable, a specification of liability was not required.

Glover, J.—In this case, the plaintiff sued four persons on a contract to grow indigo on a certain quantity of land. The defendants agreed to grow indigo on 250 beegahs, but neglected or refused to carry out their bargain and left 54 beegahs uncultivated. The plaintiff sues for the value of the produce of these 54 beegahs.

The first Court dismissed plaintiff's case, but the Judge, on appeal, held that the pottah or contract was proved, and that the defendants were jointly liable under it.

It is objected in special appeal that there being no specification of liability in the pottah, the suit would come under Section 8, Regulation VI. of 1823.

This objection, we observe, was never taken in either of the Courts below, but if it had been, it would not have assisted the defendants' case. The Section quoted refers only to cases where a joint contract is made with several persons having separate interests and liabilities in the subject-matter of the contract; but where the interests and liabilities are joint, there is no reason whatever why the names of all the parties should not be included, for where there is no separate liability, no specification is required.

In this case, all four defendants are admitted to have a joint interest in the contract, and there is, therefore, no reason why they should not be sued on that contract.

The pottah is found by the Judge as a fact on the evidence to be a genuine instrument duly executed by the contracting parties, and that being so, and as there is no ground in law for allowing the defendants to resile for want of specification, we reject this special appeal with costs.

The 13th August 1869.

Present :

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Rent-suits—Jurisdiction—Section 20, Act VI., B. C., 1862.

Case No. 516 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 3rd December 1868, modifying a decision of the Deputy Collector of Alipore, dated the 10th July 1868.

Poorno Chunder Chatterjee (one of the Defendants), *Appellant,*

versus

Mr. C. MacArthur (Plaintiff) and another (Defendant), *Respondents.*

Baboo Debendro Chunder Ghose for Appellant.

Baboo Poorno Chunder Shome for Respondents.

Suits for rent should be instituted in the Sub-division in which the cause of action arose.

The authority which a Collector has to transfer suits from one Court to another subordinate to him does not enable him to give authority to a Deputy Collector to try a suit which has been illegally instituted in his Court.

Macpherson, J.—THE plaintiff brought a suit for arrears of rent in 1865 against the appellant and another, in the Collector's Court, Alipore, 24-Pergunnahs, and obtained an *ex-parte* decree against him. On the 20th April 1867, an application for a re-hearing was made, which was (after an appeal to this Court) ultimately granted on 11th June 1868. The appellant, having got the order that his case should be re-heard, on 1st July 1858 filed a petition objecting to the jurisdiction of the Deputy Collector of the Sudder Sub-division, on the ground that the fishery for which rent was demanded was situated in the Sub division of Buseerhaut—which, as appears from the *Government Gazette* of 8th January 1861, was the name by which the then existing Sub-division of Metterhaut was afterwards to be called—and therefore the suit, as required by the provisions of Section 20, Act VI. of 1862 (B. C.), should have been instituted in the Revenue Office of the Sub-division. The Deputy Collector, after consulting the Collector, who directed him to try the case, disallowed the objection, and, going into the merits, gave a decree in favor of the plaintiff. This judgment was affirmed by the Lower Appellate Court, the Judge considering that the conclusion come to by the Deputy Collector on the question of jurisdiction was correct.

In special appeal, the question of jurisdiction is the point relied on. Looking at the terms of Section 20, Act VI. of 1862 (B. C.)—"Suits under this Act, or under Act "X. of 1859, shall be preferred in the Re-"venue Office of the district, *or when a Sub-"division of a district has been placed under "the jurisdiction of a Deputy Collector, in "the Revenue Office of the Sub-division* in "which the cause of action shall have "arisen," &c., &c., it appears to us that the conclusion come to by the Courts below is opposed to the words and intention of the law. The words distinctly require that, where a Sub-division has been created, suits for rent are to be instituted in the Sub-division where the cause of action arose; and the law does not allow parties any alternative as to the *forum* in which the suit is to be instituted. It is urged in the present case that the Collector gave the Deputy Collector of the Sudder Sub-division authority to try the case. The Collector has, no doubt, under the provisions of Section 20 of Act VI. of 1862 (B. C.) authority to transfer suits, when properly instituted, from one Court to another subordinate to him. But the authority thus given him by law does not enable him to override that other part of the law which points out the Courts in which alone suits for rent can be legally instituted. The authority given by the Collector in this case to the Deputy Collector to try the suit does not correct the defect of the original erroneous institution. This Court has so decided in several cases. See Ranee Shurut Soonduree Debee *versus* Khemunkurree Debee, 5 Weekly Reporter, page 87 (Act X. Rulings); Phillip *versus* Bundhoo Sircar, 7 Weekly Reporter, page 170; Nesoo Sircar *versus* Phillipe, 10 Weekly Reporter, page 454. A case, however, reported in 5 Weekly Reporter, page 29 (Act X. Rulings), has been quoted as showing that a different view of this matter has been taken. The question involved in that case is not precisely the question which is now before us. The Judges held that the Collector had, under the circumstances, jurisdiction, though he exercised it

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irregularly; and they declined to interfere in special appeal, as the defendant admittedly had no real defence, and had sustained no sort of injury from the suit having been originally irregularly instituted. There is no such conflict between the decision in that case (which turned chiefly on the special circumstances under which the parties were before the Court) and the decisions in the other cases we have referred to, as would, in our opinion, justify us in sending this case to be decided by a Full Bench.

We decide in favor of the appellant, and dismiss the plaintiff's suit as against him with costs in all the Courts.

The 14th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Act XI. of 1865—Jurisdiction—Appeal to Commissioner under Section 25.

Case No. 1268 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 13th March 1869, affirming a decision of the Moonsiff of that District, dated the 21st November 1868.

Munjina Khatook and others (Plaintiffs), *Appellants,*

versus

The Collector of Jessore and others (Defendants), *Respondents.*

Baboo Grija Sunkur Mojoomdar for Appellants.

Babous Juggadanund Mookerjee, Bungshee Dhur Sein, and *Greedhur Sein* for Respondents.

It is a condition precedent to the exercise of any authority by the Collector under Act XI. of 1865, or the institution by him of any proceedings under that Act, that there should be an arrear of revenue due to Government.

The appeal to the Commissioner required by Section 25 is only necessary where proceedings have been legally taken, and against an irregularity occurring after the sale has been ordered.

Bayley, J.—I AM of opinion that this case must be remanded to the Lower Appellate Court to try on the evidence on the record whether there were any arrears of Government revenue due to the plaintiffs at sunset of the last day of payment.

The plaintiffs sued for the recovery of possession of a certain talook and for the reversal of a sale held for the realization of arrears of Government revenue. The plaint stated that there was a sum of Rupees 14 odd annas in deposit with the Collector of Furreedpore in the plaintiffs' favor; that the sum alleged to have been due to them (plaintiffs) on account of arrears of Government revenue was Rupees 10 odd annas; and thus the plaint, though it did not make any distinct allegation in so many express words that there were *no arrears of revenue due* by the plaintiffs, did, in fact, aver that, if the above sum of Rupees 14 odd had been duly credited in the plaintiffs' favor, it would have been more than sufficient to meet the arrears of revenue, and thus that there were none. There were other averments in the plaint as to irregularities in the notice and such like, but for the purposes of our present judgment, it is not necessary to make any further specific observation as to them.

The plea of the defendants, the Collector of Jessore and the auction-purchaser, was that there *were* certain arrears due by the plaintiffs; that, as under Section 25, Act XI. of 1869, no appeal was made by the plaintiffs against the sale, so, with reference to the provisions of Section 33 of that Act, the plaintiffs were not in a position to contest the legality of the sale before any Court of Justice.

Both the Lower Courts have held that, as in this case no appeal was made to the Commissioner under the provisions of Section 25, Act XI. of 1859, within 15 days of the sale, so the provisions of Section 33 of that Act barred the jurisdiction of the Civil Courts to give the plaintiffs any redress, and accordingly dismissed the plaintiffs' suit.

The plaintiffs appeal specially to this Court, and the plea taken is that, as there were no arrears of revenue due, so the provisions of Act XI. of 1859 do not in any way apply to this case, and consequently the Lower Appellate Court's judgment refusing jurisdiction with reference to the provisions of that Act was erroneous in law.

There is a Full Bench decision reported at page 66, Volume X., Weekly Reporter, Full Bench Rulings, where, though not on a precisely similar state of facts, the principle has been laid down that, where there is no evidence of any arrears of Government revenue being due, the provisions of Act XI. of 1859 do not apply, as the sale cannot

be said to have taken place under the provisions of that Act.

We fully concur in the principle laid down in that decision that, where there are no arrears of Government revenue due, it cannot be said that an Act relating to sales for arrears of Government revenue would apply. This is also the view which we understand has been in a recent case taken by Kemp and Markby, JJ.* The whole question, therefore, before us is as to whether there were any arrears of revenue due to the plaintiffs by the Government, and in order to a finding on this point we think that the ordinary and proper course would be to remand the case to the Lower Appellate Court. But before we do this, we think it necessary to see whether there is any evidence on the record on the part of the plaintiffs, which can form the basis of a judicial finding on this point. Now, the plaintiffs have in the first place filed certain accounts which are not attested either upon their own oath or upon that of any witnesses. These, therefore, can be no legal evidence in their favor.

There are then certain challans of the Collectorate filed by the plaintiffs, purporting to show that the annual jumma payable and paid for a certain number of years was 89 rupees 1 anna 1 pie; and on a calculation made upon this basis, it would appear that the challans of remittances made by the plaintiffs would be some evidence in the plaintiffs' favor in order to show that the demand for Government revenue had been in many instances satisfied on the calculations adopted by plaintiffs on the present occasion. There is then also an allegation on the part of the plaintiffs that the practice would be for the money to be deposited with the Collector of Furreedpore, who would make remittances to the Collector of Jessore.

On the other hand, it is alleged by the defendants that the plaintiffs' plea simply was that, owing to the fault of the putneedars, the sums had not been paid in due time.

On the whole, however, I think there is evidence upon which the Lower Appellate Court could come to a finding whether arrears of revenue existed or not, and so whether the provisions of Act XI. of 1859 would be applicable or not.

* *Ante*, p. 276.

The case is, therefore, remanded to the Lower Appellate Court to find upon the evidence on the record and on a comparison of the accounts, whether or not there was a balance of Rupees 10 odd annas due from the plaintiffs to the Government on account of revenue, for which their estates would be legally liable to sale under Act XI. of 1859.

If it is found that there was no balance due to Government, the Lower Appellate Court will consider that the provisions of Act XI. of 1859 do not apply to this case, and will take jurisdiction and set aside the sale as not made under that law. If, on the other hand, the Court finds that there *was* a balance due to the plaintiffs by Government on account of revenue, it will consider whether the legal effect of the provisions of Act XI. do apply, and in that case it would be right in refusing to take cognizance of the plaintiffs' suit, or give them any relief on the ground that no appeal had been made to the Commissioner within the 15 days absolutely prescribed by the law.

The costs of this appeal will follow the result.

Hobhouse, J.—I am of the same opinion. I confess I am not without doubts on the subject, but I think, on the whole, that we ought to remand this case to be tried on the issue which Mr. Justice Bayley has laid down. It seems to me that it is a condition precedent to the exercise of any authority by the Collector under Act XI. of 1859, and it may be said a condition precedent to the assumption by him of any power under that Act, that there should be an arrear of revenue due before he can institute proceedings under that Act. Sections 2, 3, and 5 of that Act read together seem to me to be conclusive on this point. The doubt which I have is with reference to the wording of Section 25, which would seem to say that any irregularity committed by the Collector *must* be the subject of an appeal to the Commissioner, and that, unless such an appeal be made within a certain time, the Civil Courts are barred jurisdiction by the provisions of Section 33.

On the whole, however, I am inclined to think that the words in Section 25 cannot be held to apply to anything except to proceedings legally taken under the Act, and so do not apply to that declaratory part of the Act by which jurisdiction is given to the Collector to institute proceedings at all. The words are these: "The Commis-

"sioner shall be competent in every case of "an appeal so preferred to cancel a sale "which would appear to him not to have "been conducted according to the provi-"sions of this Act;" so that the appeal would rather seem to be against the irregularity of the proceedings after the sale shall have been ordered, and would seem not to refer to the provision in the Act which gives jurisdiction to proceed to sale; and so again the provisions of Section 33 allude to the irregular conduct of the sale, and not to that part of the Act which gives jurisdiction to conduct the sale; and certainly the principle laid down in the Full Bench ruling, which Mr. Justice Bayley has quoted, is just as applicable as a principle to the facts before us as it was to the facts of the case before the Full Bench. When reduced to its shortest compass, the principle of the Full Bench ruling seems to me to be comprised in these words to be found at page 71 of the judgment delivered by Mr. Justice Macpherson. "In the present case, no arrear of revenue "was due, nor anything which could legally "be levied as such. Act XI. of 1859, "therefore, did not apply to the case at all, "and the sale did not take place under its "provisions." If, therefore, we could say in this case that no arrear of revenue was due, we should, if we followed that ruling, be obliged to say that Act XI. did not apply, and that any thing done, therefore, under its provisions was null *ab initio;* and we are quite certain that, at any rate, we are putting an equitable construction on the law, for if it is found as a fact that there was no arrear of revenue due at sunset of the last day of payment, then there should have been no sale; and if, on the other hand, it be found as a fact that there was no arrear of revenue due, then every body will be kept in the position that he ought to hold, and the only sufferer will be the person who never ought to have brought this suit, *viz.*, the plaintiff.

If the Judge should find an arrear of revenue to have been due, he will give the plaintiff a decree; and, if not, he will dismiss his suit.

The 16th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Cause of action—Act VIII. (B. C.), 1865—Amendment of plaint—Section 32, Code of Civil Procedure.

Case No. 1206 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 29th March 1869, reversing a decision of the Moonsiff of that District, dated the 29th January 1869.

Luckhee Prea Debia (Defendant), *Appellant,*

versus

Brindabun Dey (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Ashootosh Chatterjee for Respondent.

A putneedar, in execution of a decree for rent against his mouroseedar, attached certain property belonging to the latter, including a parcel of land belonging to plaintiff who, in order to save the parcel from sale, paid the whole amount due under the decree, and then sued the mouroseedar to recover the amount. The suit having been dismissed on the ground that there had been no obligation on plaintiff to pay the amount, she appealed, alleging that her parcel was within and subordinate to the holding of the mouroseedar, and the sale would possibly have jeopardized her right.

HELD that the case was rightly remanded by the Lower Appellate Court, but that the issue to be tried was whether the plaintiff was a party who came under the provisions of Section 6, Act VIII. (B.C.), 1865, read with Section 13, Regulation VIII. of 1819, more particularly with Clause 3.

HELD that, if the plaint did not sufficiently disclose the cause of action, the plaintiff should have been allowed to amend it under Section 32, Code of Civil Procedure; not having been so allowed, he was at liberty to prove any cause of action which was not inconsistent with the plaint.

Kemp, J.—THE plaintiff, special respondent, brought a suit to recover Rupees 122 12 annas against the defendant, Luckhee Prea Debia. The plaint is a very short one, and to this effect, that one Rajmohinee, the putneedar, having obtained a decree for rent against Luckhee Prea, the mouroseedar, attached and advertised for sale certain property belonging to her judgment-debtor, and amongst this property the 12½ beegahs belonging to the plaintiff; that the plaintiff, in order to save her 12½ beegahs from sale, paid the whole of the amount due under the decree obtained by Rajmohinee against Luckhee Prea.

The first Court dismissed the plaintiff's suit, holding that, as the plaintiff was not liable under the decree obtained by Rajmohinee against Luckhee Prea, and as there was no obligation on the part of the plaintiff to pay the sum due by Luckhee Prea to Rajmohinee, the claim of the plaintiff was untenable.

The Lower Appellate Court, the Subordinate Judge of East Burdwan, has remanded the case for trial on two issues, namely, *first*, "whether the payment of the amount under claim by the plaintiff was unnecessary and voluntary; and, *secondly*, whether the plaintiff was legally bound to deposit the said amount, and whether the defendant had been benefited thereby." These issues are taken word for word from the decision of the Subordinate Judge.

In special appeal, it is contended that the Subordinate Judge was wrong in remanding the case, to enable the plaintiff to make out a new case for herself which her plaint does not set up; that the Moonsiff was right in dismissing the suit; that the issues framed by the Subordinate Judge for trial on remand do not arise upon the pleadings, and are not proper issues in the case. There can be no doubt that, looking to the plaint alone, the plaintiff sued on the footing that the 12½ beegahs belonging to her were attached, and were about to be sold as belonging to the judgment-debtor; but in the grounds of appeal to the Lower Appellate Court it is very clear that the plaintiff alleged that her 12½ beegahs were within and subordinate to the holding of Luckhee Prea, the judgment-debtor, and that she paid in the whole amount due by Luckhee Prea in order to prevent the sale of the superior mourosee holding, which sale would possibly have jeopardized her rights, that is to say, the plaintiff's rights over the 12½ beegahs.

I, therefore, think that the Subordinate Judge was right in remanding the case, but I think that the issue that ought to be tried in this case is whether the plaintiff is a party who comes under the provisions of Section 6 of Act VIII. of 1865 (Bengal Council) read with Section 13 of Regulation VIII. of 1819, more particularly with reference to Clause 3 of that Section The decision of the Lower Appellate Court, therefore, is amended to this extent, that the issue for trial on remand will be that laid down by this Court. Costs to follow the result.

Markby, J.—I am of the same opinion. There is no doubt that the plaint in this case, if it was a compliance at all, was a somewhat meagre compliance with the provisions of Section 26 of the Code of Civil Procedure; but if the Court thought that the plaint did not sufficiently disclose the cause of action, the proper course was not to dismiss the suit altogether, but to reject and return the plaint to the plaintiff, or more properly still to allow it to be amended under Section 32; not having done so, I think the plaintiff was at liberty to prove any cause of action which was not inconsistent with the plaint. Now, I do not think that it was inconsistent with the plaint (although the plaint certainly did not disclose that circumstance) to show that the plaintiff was a person interested to prevent the sale of the defendant's tenure under the provisions of Section 6 of Act VIII. of 1865, Bengal Council. The only thing which embarrassed me was the conflicting statements of the Judge in the Lower Appellate Court as to the contentions of the plaintiff before him; but all doubt as to the plaintiff's real contention has been cleared up by the passage pointed out by Mr. Justice Kemp in the plaintiff's petition of appeal to the Lower Appellate Court. Having amended the issue in the form laid down by Mr. Justice Kemp, I think the case ought to be remanded as directed by the Lower Appellate Court.

I therefore concur in remanding the case.

b

The 16th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Title—Possession—Evidence—Objections—Special appeal.

Case No. 853 of 1869.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 15th June 1868, affirming a decision of the Moonsiff of Serampore, dated the 31st August 1867.

Joykishen Mookerjee and others (Defendants), *Appellants,*

versus

Rajkishen Mookerjee (Plaintiff), and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Pearee Mohun Mookerjee, Kali Mohun Doss,* and *Mohinee Mohun Roy* for Appellants.

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Respondents.

In a suit to recover immoveable property in the possession of the defendant, a plaintiff cannot ordinarily succeed merely by showing that the title has accrued to him.

Where a plaintiff seeks to recover possession upon a title recently acquired, he is not invariably required to prove the origin of his vendor's title. Long and undisturbed possession on the part of the vendor, when positive evidence of title cannot be had, may in many cases constitute proof of title.

Before an objection to the validity of a document filed as evidence in a case can be admitted as a ground of special appeal, it must be shown to have been made pressed at every stage in the Courts below.

Markby, J.—BEFORE I proceed to give judgment in this case, I wish to make one observation. Mr. Paul, in arguing the case for the appellant, made some remarks upon the mode in which this case has been disposed of in the Lower Appellate Court, which, I must say, on reading the judgment of that Court, seem to me wholly unwarranted, and I very much regret that they were made. As far as I see, the Judges, both of the first Court and of the Lower Appellate Court, have carefully and properly disposed of this case.

The suit was to recover a small piece of land upon which a hut had been built, and which was used as a shop, and also to recover damages for pulling down the hut. The suit was brought against three defendants, Joykishen Mookerjee, Modhoo Soodun, and one Hem Chunder Sautra. The plaintiff purchased from one Woomesh Chunder, the son of Gobind Chunder, who derived his title under a pottah granted to Gobind Chunder by the plaintiff himself and two other persons, Issur Chunder and Deb Narain. The defendant Joykishen Mookerjee expressly disclaims all title, saying that the disputed land, which consists of half a cottah only, stood in the name of Ram Chand Mitter; that Kalee Doss Mitter, his son, who had a shop on it, sold the land to Gora Chand Burnick; that Gora Chand Burnick sold it to the defendant Modhoo Soodun, and Modhoo Soodun to the defendant Hem Chunder Sautra.

Both Courts have found in favor of the plaintiff, and upon the case coming on here in special appeal, Mr. Paul appeared and argued the case for the defendant-appellant. His argument resolved itself into five objections: *firstly*, that the plaint disclosed no cause of action; *secondly*, that the title of the plaintiff was not proved; *thirdly*, that the possession of the plaintiff was not proved; *fourthly*, that the pottah of Bysack 1258 ought not to have been received in evidence; and, *fifthly*, that there had been no proper enquiry as to the quantity of land.

The case was adjourned at the end of Mr. Paul's argument, and when the hearing was resumed to-day, Baboo Kalee Mohun Doss, who, we were told on the previous occasion, would follow up Mr. Paul's argument, did not appear, whereupon we directed the Baboo, who appeared for the special respondent, to confine himself to the fourth ground taken by Mr. Paul, and which we thought was the only point requiring an answer, and then, somewhat deviating from the usual practice, we have heard Baboo Kalee Mohun Doss in reply, in the place of Mr. Paul.

As regards the first point taken, namely, that the plaint discloses no cause of action, that point was not taken strictly in the written grounds of appeal. The one which comes nearest to it is the first ground, but that was obviously drawn to raise a different objection, and this is a point on which I should hold the party strictly to his ground of appeal as taken. I am not aware if it is a settled question in these Courts whether or no a plaintiff who sues for a dispossession must, as against a defendant who denies his title, prove that there has been a denial of the plaintiff's title by the defendant prior to the suit.

then pass any order upon that application. When the case came before the Lower Appellate Court upon the appeal of the defendant, and this omission on the part of the first Court was brought to his notice, the Judge directed the first Court to entertain that application and consider whether or no it ought to be granted; and if it ought to be granted, then to summon the plaintiff into Court, and record his evidence. The first Court failed in its attempt to cause the attendance of the plaintiff, but apparently thought that it was an application which ought to be granted, for it issued a summons to bring the plaintiff into Court. The Deputy Collector then informed the Lower Appellate Court of the issue of the summons and the failure to serve it.

Now, the first complaint made before us in special appeal is that that was wrong in point of procedure. It has been argued before us, not precisely upon the first ground taken in special appeal, but upon one which in substance comes within it, namely, that the Judge ought himself to have disposed of the application to examine the plaintiff, and himself to have summoned the plaintiff, if he thought it was a case in which that application ought to be granted. Now, there is not possibly in the Code of Civil Procedure any exact provision applicable to this case, for I do not think it was a case in which the Lower Appellate Court intended to act under the provisions of Section 351 or of Section 354, which relate to remands, or under Section 355, which relates to the taking of fresh evidence. But I take it that the view which the Lower Appellate Court took of this matter was this—that the application brought to its notice being one entirely undisposed of by the first Court, the Lower Appellate Court thought, and in my opinion properly thought, that the best course to take was to refer that point back to the first Court for disposal; for there are many cases, and this may well have been one of them, in which the first Court is in the best position to decide whether or no it is actually necessary to summon the plaintiff. I see nothing irregular in taking this course, although there is nothing which provides specially for it in the Code of Civil Procedure. It seems to me that an Appellate Court, when it finds an application of this nature wholly undisposed of by the Court of first instance, may, if it thinks it desirable to do so, send back the case and order the first Court to dispose of that application instead of disposing of it itself. It seems to me, therefore, that the proceeding of the Judge was perfectly regular so far as concerns his sending back this application to be disposed of by the first Court. As to the other part of this ground of special appeal, it has not been relied on before us, and, in fact, it has been admitted that it was competent for the Judge, when once it was decided that the plaintiff ought to be examined, either to direct the first Court to examine him or to summon and examine him himself under the provisions of Section 356.

The next ground taken is the fourth, namely, that there was no proper application made to the first Court under Section 162. The application made was probably one which we find inserted with some incongruity together with some objections taken to the report made by an Ameen, but I do not think that Section 162 requires that any special formalities shall be observed in making the application. It simply directs that an application shall be made, and points out the proper manner of disposing of that application. The Lower Appellate Court has found on this point that there was a request, and that that request has not been disposed of, and I think we ought to act upon that finding. If the application had been objected to as informal, the Court might have accepted a fresh one, and at all events it is now too late to make any objections to its informality.

The next ground argued was that no legal summons was served upon the plaintiff, and that, therefore, no inference ought to have been drawn against him from his non-appearance by the Lower Appellate Court. The Lower Appellate Court says "that after the failure "on the part of the first Court to serve the "summons personally on the plaintiff, and as "the summons had actually not been served, "the case could not be decided against the "plaintiff under the provisions of Section "170 of Act VIII. of 1859. Although the "fact of his absenting himself when he was "summoned must to some extent add "strength to the defendant's case, for consi-"dering the processes that have been is-"sued, it must be presumed that the talook-"dar was aware of the issue of the sum-"mons." I do not think there can be any doubt as to what the Judge meant to say, though there is a very slight discrepancy in the language. I think it is quite clear that he means to say that, as a legal summons has not been served upon the plaintiff, he cannot take advantage of the provision of Section

170, and on the ground of that party's non-attendance alone dismiss the suit against him, but he says, nevertheless I am satisfied that he must have known that his attendance in Court was desired, and I am perfectly justified to take the circumstance of his neglect to attend into consideration when deciding the case upon the facts.

I think that the Lower Appellate Court was perfectly justified in taking that course, and drawing the inferences which it has drawn; for although the law provides most necessary and proper precautions to protect parties from being summoned wantonly and for purely vexatious purposes, the Courts have full discretion in a matter of this kind to decide whether or no the parties are making use of that protection which the law affords them for the purpose of evading the giving of evidence which might be fatal to their case. In the latter view, any Court is perfectly justified in using the absence of the party most strongly against him.

As, therefore, all the grounds taken in special appeal fail, the appeal ought to be dismissed with costs.

Kemp, J.—I am of the same opinion.

The 18th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Trusts—Limitation—Cause of action.

Case No. 1232 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 5th March 1869, affirming a decision of the Moonsiff of that District, dated the 24th August 1868.

Rakhal Doss Mudduck (Plaintiff), *Appellant,*

versus

Modhoo Soodun Mudduck and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Plaintiff, having made over his property in trust to the defendant who was to look after it, and enjoy its profits till plaintiff's return, went abroad for more than 12 years, and then returned and demanded restoration of the property. Five years after such demand, he sued to recover possession.

HELD that the suit was brought within time from the date of the demand, and therefore was not barred by the Statute of Limitation.

Kemp, J.—THIS was a suit to recover possession of a certain property on the allegation that, under a deed dated the 22nd of Jeyt 1257, the plaintiff having no body to look after his property, and being obliged to go to Calcutta in search of service, he made over the property in dispute to the defendant, who is the plaintiff's father's sister's son, upon trust. The deed recites that the defendant was to pay the rent to the superior talookdar, that he was to look after the property and to enjoy the profits thereof until the plaintiff returned, when he was to give up the property to the plaintiff without any objection. It appears that the plaintiff was abroad for more than 12 years, and that this suit has been brought about 5 years after his return, after demanding restoration of his property.

The first Court dismissed the plaintiff's suit.

In appeal, the Subordinate Judge of East Burdwan states that he concurred generally with the decision of the Court below; but it appears to me clear that the Lower Appellate Court disposed of this suit upon the issue of limitation alone, for he says "that this document, that is to say, the deed of the 22nd Jeyt 1257, cannot be construed to mean that the plaintiff's right to the land in dispute existed within 12 years preceding the date of suit." Again, in another passage, he says: "It is evident that the plaintiff has been out of possession for a long time, and therefore his right has ceased to exist." There has been no finding by the Lower Appellate Court as to whether this document is a genuine and subsisting document, and whether the lands in dispute are comprised in the document or not.

I have no manner of doubt that, assuming this to be a genuine and subsisting document, the plaintiff's suit is not barred by the Statute of Limitation. The document is not a kubooleut, for there is no provision for the payment of rent by the defendant to the plaintiff. If the document be genuine, the defendant was a trustee for the plaintiff and bound to give up the land upon the plaintiff's return. The suit of the plaintiff is brought within time from the date of the demand for the restoration of the property.

The Lower Appellate Court was, therefore, wrong in dismissing the plaintiff's suit on the ground that it was barred by the Statute of Limitation, and the case must go back for the Lower Appellate Court to find whether the deed is a genuine and subsisting document, and also whether the lands claimed in this suit are comprised in it.

Costs to follow the result.

Markby, J.—I am of the same opinion. It is clear that, if, as the plaintiff alleges, the defendant came into possession of the land under this document, there could be no cause of action which would be the commencement of a period of limitation at least until there had been a demand on the part of the plaintiff and a refusal on the part of the defendant to give up the land, or else a distinct assertion of adverse title.

The Lower Appellate Court does not find that the plaintiff's title was barred on any such view as this, but appears to me to find on the terms of the document itself that the suit was brought more than 12 years after the defendant had entered into possession of the property under the deed. I think this is an entirely erroneous view of the transaction, and I agree that, if the document was a genuine document, and had not been put an end to more than 12 years before the commencement of this suit, the plaintiff's claim is in no way barred by limitation. The case must, therefore, go back to be heard and disposed of on the issues mentioned by Mr. Justice Kemp.

The 19th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Enhancement of rent of talook—Section 51, Regulation VIII. of 1793—Onus probandi—Section 16, Act X., 1859.

Case No. 1351 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 2nd February 1869, modifying a decision of the Deputy Collector of that District, dated the 31st October 1868.

Nubo Kristo Mojoomdar and another (Plaintiffs), *Appellants,*

versus

Tara Monee and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Mohinee Mohun Roy* for Appellants.

Baboos Chunder Madhub Ghose and *Nuleet Chunder Sein* for Respondents.

A notice of enhancement of the rent of a talook on the simple ground of the rents having become less by degrees is not based on the "abatement" contemplated by Section 51, Regulation VIII. of 1793, or any of the other grounds specified in that Section.

In a suit for enhancement, the burden of proof that a tenure is protected under Section 16, Act X., 1859, is on the defendant, and it is only for the plaintiff to rebut any presumption which the defendant may make out under that Section.

Bayley, J.—In this case the plaintiff sued to enhance the rents of what is admitted by both the parties to be a shikmee talook. In his notice, the plaintiff stated that, as the rents had gradually run down from Rupees 68 to Rupees 2-14, he had a right to enhance the rents. The plaint disclosed no other cause of action.

The defendant pleaded that he was protected from liability to enhancement by reason of the rents at which he held the lands not having been changed for a period of 20 years before suit; in other words, the defendant pleaded Section 16, Act X. of 1859.

The first Court raised two issues: *viz.*, whether the notice was sufficient in law; and, secondly, whether the provisions of Section 16 protected the tenure from enhancement.

On this second issue, the first Court did not come to any specific judgment, but it merely stated in a general way that the rents of the tenure could be enhanced; but, going upon the first issue, the Court found that the notice was not legally sufficient, and disclosed no good cause of action, and the first Court, therefore, dismissed the plaintiff's suit.

On appeal, the Lower Appellate Court held that, as the notice under which the plaintiff sought to enhance the rents was no legal notice, he was not, therefore, entitled to enhance the rents under it; but at the same time the Lower Appellate Court held that the provisions of Section 16, Act X. of 1859, protected the defendants from liability to enhancement. In this view, while dismissing the plaintiff's suit on the ground of the informality and insufficiency of his notice, the Lower Appellate Court declared the defendant's non-liability to enhancement.

There are, in fact, two grounds taken in special appeal: *firstly*, that the notice in

question is sufficient in law; and, *secondly*, that, while dismissing the plaintiff's suit on the ground of the insufficiency of the notice, the Lower Appellate Court should not have declared the non-liability of the defendant to enhancement, as the plaintiff had no opportunity given him to rebut the evidence on that point, and the first Court did not specifically adjudicate upon it.

On the *first* point, it is quite clear that neither the plaintiff nor the notice did set forth the grounds specified in Section 51, Regulation VIII. of 1793. The simple statement of the plaintiff was that, as by degrees the rents became less, he was entitled to claim an enhancement. Now, this is not the "*abatement*" contemplated by Section 51 of the Regulation above named, nor is any one of the other grounds specified in that Section at all adverted to by the plaintiff in his notice. So far, then, I think that the notice was not good, and that the plaintiff's case to enhance the rents upon it was rightly dismissed.

On the next question it is clear that the burthen of proof that the tenure is protected under the provisions of Section 16, Act X. of 1859, is upon the defendant, and it is only for the plaintiff to rebut any presumption which the defendant can make out in his favor under that Section. Apparently, however, the Lower Appellate Court has in this case stopped short of affording the plaintiff the opportunity of going to his evidence on this point at all. It declares the defendant's right absolutely on the bare presumption which Section 16 contemplates, but it does not, in full, carry out the provisions of that Section which render it a protection merely in case where the party seeking to enhance is unable to rebut the presumption by showing that the rate of rent has been changed. Ordinarily, therefore, this case would be remanded for re-trial on this point, but, under the circumstances of this case I think that it ought not to be remanded, for, if after the remand the Judge upon the evidence finds that the plaintiff has no right to enhance, the plaintiff will still have a right to have his title enquired into in a regular suit. On the other hand, if we simply uphold the orders of the Lower Courts dismissing the plaintiff's suit on the ground of the insufficiency of the notice, the plaintiff's right will be insufficiently adjudicated.

I think that the proper order will be to dismiss this special appeal, so far as it impugns the judgment of the Lower Appellate Court dismissing the plaintiff's suit on the ground of the insufficiency of the notice, and at the same time to expunge so much of the decision of the Lower Appellate Court as declares the defendant's non-liability to enhancement under the provisions of Section 16, Act X. of 1859, *viz.*, that the "defendant is entitled to the benefit provided for by Section 16, Act X. of 1859."

Under all the circumstances of this case, I think that each party should bear his own costs in this Court.

Hobhouse, J.—I will state as concisely as I can my reasons for agreeing in the order which Mr. Justice Bayley has passed in this case. There were, as stated by Mr. Justice Bayley, two issues before the first Court. The second issue was as to whether or not the defendants had held at rates which had not been changed for a period of 20 years before the commencement of the suit, and whether, therefore, if this fact were proved, they were protected from enhancement.

The first Court held that they were not protected.

The Lower Appellate Court held that they were protected.

In spite of the fact that the first Court did come to a decision upon the issue, I cannot, on looking carefully into the record, persuade myself that the special appellant before us has had a fair and a full opportunity of rebutting whatever evidence the defendants may have given on this issue. The burthen of proof was on the defendants, and it seems to me that, when the first Court had heard the defendants' evidence, it must at once have come to an opinion upon this issue adverse to defendants, and must have communicated this opinion to the plaintiff, because, although the issue was a most material one, and although the plaintiff's witnesses were present in Court to give their testimony regarding it, still it was not received.

In this view of the case, I can have no doubt that the first Court did not think it necessary to call on the plaintiff for evidence on this point, and when, therefore, the Lower Appellate Court, resting upon the evidence of the defendants alone, gave judgment in favor of the defendants on the issue we are discussing, it seems to me that the Court did so without having given the plaintiff a fair opportunity of rebutting that evidence. I have no doubt, having special reference to the decision in an analogous case of a Full Bench which is to be found at page 523,

HELD that the case was rightly remanded by the Lower Appellate Court, but that the issue to be tried was whether the plaintiff was a party who came under the provisions of Section 6, Act VIII. (B.C.), 1865, read with Section 13, Regulation VIII. of 1819, more particularly with Clause 3.

HELD that, if the plaint did not sufficiently disclose the cause of action, the plaintiff should have been allowed to amend it under Section 32, Code of Civil Procedure; not having been so allowed, he was at liberty to prove any cause of action which was not inconsistent with the plaint.

Kemp, J.—THE plaintiff, special respondent, brought a suit to recover Rupees 122 12 annas against the defendant, Luckhee Prea Debia. The plaint is a very short one, and to this effect, that one Rajmohinee, the putneedar, having obtained a decree for rent against Luckhee Prea, the mouroseedar, attached and advertised for sale certain property belonging to her judgment-debtor, and amongst this property the 12½ beegahs belonging to the plaintiff; that the plaintiff, in order to save her 12½ beegahs from sale, paid the whole of the amount due under the decree obtained by Rajmohinee against Luckhee Prea.

The first Court dismissed the plaintiff's suit, holding that, as the plaintiff was not liable under the decree obtained by Rajmohinee against Luckhee Prea, and as there was no obligation on the part of the plaintiff to pay the sum due by Luckhee Prea to Rajmohinee, the claim of the plaintiff was untenable.

The Lower Appellate Court, the Subordinate Judge of East Burdwan, has remanded the case for trial on two issues, namely, *first*, "whether the payment of the amount under claim by the plaintiff was unnecessary and voluntary; and, *secondly*, whether the plaintiff was legally bound to deposit the said amount, and whether the defendant had been benefited thereby." These issues are taken word for word from the decision of the Subordinate Judge.

In special appeal, it is contended that the Subordinate Judge was wrong in remanding the case, to enable the plaintiff to make out a new case for herself which her plaint does not set up; that the Moonsiff was right in dismissing the suit; that the issues framed by the Subordinate Judge for trial on remand do not arise upon the pleadings, and are not proper issues in the case. There can be no doubt that, looking to the plaint alone, the plaintiff sued on the footing that the 12½ beegahs belonging to her were attached, and were about to be sold as belonging to the judgment-debtor; but in the grounds of appeal to the Lower Appellate Court it is very clear that the plaintiff alleged that her 12½ beegahs were within and subordinate to the holding of Luckhee Prea, the judgment-debtor, and that she paid in the whole amount due by Luckhee Prea in order to prevent the sale of the superior mourosee holding, which sale would possibly have jeopardized her rights, that is to say, the plaintiff's rights over the 12½ beegahs.

I, therefore, think that the Subordinate Judge was right in remanding the case, but I think that the issue that ought to be tried in this case is whether the plaintiff is a party who comes under the provisions of Section 6 of Act VIII. of 1865 (Bengal Council) read with Section 13 of Regulation VIII. of 1819, more particularly with reference to Clause 3 of that Section The decision of the Lower Appellate Court, therefore, is amended to this extent, that the issue for trial on remand will be that laid down by this Court. Costs to follow the result.

Markby, J.—I am of the same opinion. There is no doubt that the plaint in this case, if it was a compliance at all, was a somewhat meagre compliance with the provisions of Section 26 of the Code of Civil Procedure; but if the Court thought that the plaint did not sufficiently disclose the cause of action, the proper course was not to dismiss the suit altogether, but to reject and return the plaint to the plaintiff, or more properly still to allow it to be amended under Section 32; not having done so, I think the plaintiff was at liberty to prove any cause of action which was not inconsistent with the plaint. Now, I do not think that it was inconsistent with the plaint (although the plaint certainly did not disclose that circumstance) to show that the plaintiff was a person interested to prevent the sale of the defendant's tenure under the provisions of Section 6 of Act VIII. of 1865, Bengal Council. The only thing which embarrassed me was the conflicting statements of the Judge in the Lower Appellate Court as to the contentions of the plaintiff before him; but all doubt as to the plaintiff's real contention has been cleared up by the passage pointed out by Mr. Justice Kemp in the plaintiff's petition of appeal to the Lower Appellate Court. Having amended the issue in the form laid down by Mr. Justice Kemp, I think the case ought to be remanded as directed by the Lower Appellate Court.

I therefore concur in remanding the case.

b

The 16th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Title—Possession—Evidence—Objections—Special appeal.

Case No. 853 of 1869.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 15th June 1868, affirming a decision of the Moonsiff of Serampore, dated the 31st August 1867.

Joykishen Mookerjee and others (Defendants), *Appellants,*

versus

Rajkishen Mookerjee (Plaintiff), and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Pearee Mohun Mookerjee, Kali Mohun Doss,* and *Mohinee Mohun Roy* for Appellants.

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Respondents.

In a suit to recover immoveable property in the possession of the defendant, a plaintiff cannot ordinarily succeed merely by showing that the title has accrued to him.

Where a plaintiff seeks to recover possession upon a title recently acquired, he is not invariably required to prove the origin of his vendor's title. Long and undisturbed possession on the part of the vendor, when positive evidence of title cannot be had, may in many cases constitute proof of title.

Before an objection to the validity of a document filed as evidence in a case can be admitted as a ground of special appeal, it must be shown to have been made pressed at every stage in the Courts below.

Markby, J.—BEFORE I proceed to give judgment in this case, I wish to make one observation. Mr. Paul, in arguing the case for the appellant, made some remarks upon the mode in which this case has been disposed of in the Lower Appellate Court, which, I must say, on reading the judgment of that Court, seem to me wholly unwarranted, and I very much regret that they were made. As far as I see, the Judges, both of the first Court and of the Lower Appellate Court, have carefully and properly disposed of this case.

The suit was to recover a small piece of land upon which a hut had been built, and which was used as a shop, and also to recover damages for pulling down the hut. The suit was brought against three defendants, Joykishen Mookerjee, Modhoo Soodun, and one Hem Chunder Sautra. The plaintiff purchased from one Woomesh Chunder, the son of Gobind Chunder, who derived his title under a pottah granted to Gobind Chunder by the plaintiff himself and two other persons, Issur Chunder and Deb Narain. The defendant Joykishen Mookerjee expressly disclaims all title, saying that the disputed land, which consists of half a cottah only, stood in the name of Ram Chand Mitter; that Kalee Doss Mitter, his son, who had a shop on it, sold the land to Gora Chand Burnick; that Gora Chand Burnick sold it to the defendant Modhoo Soodun, and Modhoo Soodun to the defendant Hem Chunder Sautra.

Both Courts have found in favor of the plaintiff, and upon the case coming on here in special appeal, Mr. Paul appeared and argued the case for the defendant-appellant. His argument resolved itself into five objections: *firstly,* that the plaint disclosed no cause of action; *secondly,* that the title of the plaintiff was not proved; *thirdly,* that the possession of the plaintiff was not proved; *fourthly,* that the pottah of Bysack 1258 ought not to have been received in evidence; and, *fifthly,* that there had been no proper enquiry as to the quantity of land.

The case was adjourned at the end of Mr. Paul's argument, and when the hearing was resumed to-day, Baboo Kalee Mohun Doss, who, we were told on the previous occasion, would follow up Mr. Paul's argument, did not appear, whereupon we directed the Baboo, who appeared for the special respondent, to confine himself to the fourth ground taken by Mr. Paul, and which we thought was the only point requiring an answer, and then, somewhat deviating from the usual practice, we have heard Baboo Kalee Mohun Doss in reply, in the place of Mr. Paul.

As regards the first point taken, namely, that the plaint discloses no cause of action, that point was not taken strictly in the written grounds of appeal. The one which comes nearest to it is the first ground, but that was obviously drawn to raise a different objection, and this is a point on which I should hold the party strictly to his ground of appeal as taken. I am not aware if it is a settled question in these Courts whether or no a plaintiff who sues for a dispossession must, as against a defendant who denies his title, prove that there has been a denial of the plaintiff's title by the defendant prior to the suit.

Marshall's Reports, that the Lower Appellate Court, had the evidence on both sides been before it, would have been justified in coming to a decision on the issue in question, and it is admitted by the pleader for the special appellant that the Lower Appellate Court had jurisdiction to determine such an issue.

The question, then, that remains is whether we shall remand the case to the Court of first instance to commence the litigation, so far as the plaintiff is concerned, *de novo* upon this issue, or whether we shall not rather declare that the judgment dismissing the suit shall stand, such part of it as is a determination on this issue being declared to be void.

On the whole, I think it will tend to protract a litigation of which we do not see the end, if we were not to remand the case. Supposing the Judge were to find, after taking the evidence of the plaintiff, that the defendants were still protected, that would not bar the plaintiff from his remedy by a suit in another Court. He would still have the right to proceed to the Civil Court, and to raise the question as to whether he might not have his right declared to enhance the rents of the tenure. It is possible that in that suit any decision which might be come to in this suit might be put in as a bar, but he would not the less have the right to sue and to have the question determined. There would undoubtedly be a conflict of jurisdiction such as is unfortunately already too rife as between Revenue and Civil Courts, and if the parties must sue again, we cannot shut our eyes to the fact that there would be a more certain and rapid and complete end to this litigation, if the plaintiff should elect to sue in the Civil Court or under that amalgamated jurisdiction of the Civil and Revenue Courts which is now passing under our eyes through the Legislative Council. It is for these reasons that I prefer, on the whole, not to remand the case.

The 20th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Suits for measurement—Act VI. (B. C.), 1862—Sections 25 and 77, Act X., 1859.

Case No. 1380 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 31st March 1869, modifying a decision of the Deputy Collector of that District, dated the 21st January 1869.

Jonaye Sirdar and others (Defendants), *Appellants,*

versus

Dwarkanath Roy (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Any suit instituted under Act VI. (B. C.) of 1862 may be considered as instituted under Act X. of 1859, even though it be a suit for measurement of land; and an intervenor in such suit, who claims the right to receive the rent, is entitled to have his claim determined under the express terms of Section 77, Act X. of 1859.

An order passed by a Collector under Section 24, Act X. of 1859, has not the force and effect of a Civil Court's decree, and is not binding as against an intervenor in a suit under that Act.

Bayley, J.—We think that the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded for re-trial.

The plaintiff sued under the provisions of Section 9, Act VI. of 1862 (Bengal Council), to measure the defendant's lands.

A third party intervened, and denied the right and power of the plaintiff-landlord.

The first Court gave the plaintiff a decree.

The Lower Appellate Court has reversed that decree, and held that, whereas there was an order passed by the Collector under Section 25, Act X. of 1859, issuing proclamation to the tenants to pay rents to the intervenor, that is conclusive; and the question as to whether the intervenor or the plaintiff was in actual receipt and enjoyment of the rent need not be gone into. In this view, the

Lower Appellate Court dismissed the plaintiff's suit.

In special appeal, it is urged that the Lower Appellate Court is wrong in holding that the order of the Collector under Section 25 has the force and effect of a Civil Court decree, and is binding as against the special appellant, and in not adjudicating upon the question of the actual receipt and enjoyment of the rent as provided by Section 77, Act X. of 1859.

We are of opinion that the special appellant is right in his contentions.

In the first place, the Lower Appellate Court was clearly wrong in holding that the effect of an order passed by the Collector in his executive capacity under Section 25 was that of a Civil Court decree, and was, therefore, binding as against the intervenor. But irrespective of that, we think that the Lower Appellate Court was wrong in not adjudicating the case under the provisions of Section 77, Act X. of 1859. Section 21, Act VI. of 1862 (Bengal Council), distinctly declares that that Act shall be read with and taken as part of Act X. of 1859. Under the provisions, therefore, of this Section, any suit instituted under Act VI. of 1862 (Bengal Council) may be considered as instituted under Act X. of 1859, and as such the present suit may be considered a suit under Act X.

Now Section 77, Act X. of 1859, says: "When in *any suit* between a landholder "and a ryot or under-tenant *under this* "*Act*, the right to receive the rent of the "land or tenure cultivated or held by the "ryot or under-tenant is disputed, and such "right is claimed by, or on behalf of, a third "person, on the ground that such third person "or a person through whom he claims has "actually and in good faith received and "enjoyed such rent before, and up to the "time of, the commencement of the suit, "such third person shall be made a party to "the suit, *and the question of the actual* "*receipt and enjoyment of the rent by such* "*third person* shall be enquired into, and "the suit shall be decided according to the "result of such enquiry."

It is contended by the special respondent that this being a suit for *measurement* of the lands, and not for the *rents* thereof, cannot be considered to be such a suit as is contemplated by Section 21, Act VI. of 1862 (Bengal Council), to be coming under Act X. of 1859, but we see that there is no restriction either in the terms of Section 21, Act VI. or of Section 77, Act X. It is true that Section 77 does speak of an intervenor claiming as if in actual receipt and enjoyment of the rents, but the receipt of rent is only the result to be obtained under Act X. of 1859, either by a suit for measurement and ascertainment of the data on which the rent can be claimed, or in a similar manner, as by a suit for a kubooleut, which, although it is not a suit for rent, still has as its clear and definite object a decree for rents. Reading, therefore, Section 21, Act VI. of 1862, and Section 77, Act X. of 1859, together, we are of opinion that the intervenor was entitled to have his claim determined under the express terms of Section 77.

In this view, we think that the case must be remanded to the Lower Appellate Court to put in issue, and try on the evidence on the record, whether the intervenor has been actually and in good faith in the receipt and enjoyment of the rent before and up to the time of the commencement of the suit.

The costs of this appeal will follow the result.

The 21st August 1869.

Present:

The Hon'ble G. Loch, *Judge.*

Appeal—Ministerial Officer in Magistrate's Office.

Petition of Poorbhoo Narain Singh, late a Mohurrir in the Court of the Magistrate of Patna, praying that the Magistrate's order dismissing him from his post may be set aside.

Moulvie Mahomed Yusuff for the Petitioner.

An appeal from an order of a Magistrate dismissing a ministerial officer in his establishment lies to the Commissioner of the District, and not to the High Court.

Loch, J.—THE question that has been raised before me is whether, from an order of a Magistrate dismissing a ministerial officer in his establishment, an appeal lies to the Commissioner of the District or to the High Court.

To determine this point we need to go back to the old law on the subject, and we find that, under the provisions of Section 15, Regulation V. of 1804, native officers em-

Marshall's Reports, that the Lower Appellate Court, had the evidence on both sides been before it, would have been justified in coming to a decision on the issue in question, and it is admitted by the pleader for the special appellant that the Lower Appellate Court had jurisdiction to determine such an issue.

The question, then, that remains is whether we shall remand the case to the Court of first instance to commence the litigation, so far as the plaintiff is concerned, *de novo* upon this issue, or whether we shall not rather declare that the judgment dismissing the suit shall stand, such part of it as is a determination on this issue being declared to be void.

On the whole, I think it will tend to protract a litigation of which we do not see the end, if we were not to remand the case. Supposing the Judge were to find, after taking the evidence of the plaintiff, that the defendants were still protected, that would not bar the plaintiff from his remedy by a suit in another Court. He would still have the right to proceed to the Civil Court, and to raise the question as to whether he might not have his right declared to enhance the rents of the tenure. It is possible that in that suit any decision which might be come to in this suit might be put in as a bar, but he would not the less have the right to sue and to have the question determined. There would undoubtedly be a conflict of jurisdiction such as is unfortunately already too rife as between Revenue and Civil Courts, and if the parties must sue again, we cannot shut our eyes to the fact that there would be a more certain and rapid and complete end to this litigation, if the plaintiff should elect to sue in the Civil Court or under that amalgamated jurisdiction of the Civil and Revenue Courts which is now passing under our eyes through the Legislative Council. It is for these reasons that I prefer, on the whole, not to remand the case.

The 20th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Suits for measurement—Act VI. (B. C.), 1862—Sections 25 and 77, Act X., 1859.

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Jonaye Sirdar and others (Defendants), *Appellants,*

versus

Dwarkanath Roy (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellants.

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Any suit instituted under Act VI. (B. C.) of 1862 may be considered as instituted under Act X. of 1859, even though it be a suit for measurement of land; and an intervenor in such suit, who claims the right to receive the rent, is entitled to have his claim determined under the express terms of Section 77, Act X. of 1859.

An order passed by a Collector under Section 24, Act X. of 1859, has not the force and effect of a Civil Court's decree, and is not binding as against an intervenor in a suit under that Act.

Bayley, J.—We think that the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded for re-trial.

The plaintiff sued under the provisions of Section 9, Act VI. of 1862 (Bengal Council), to measure the defendant's lands.

A third party intervened, and denied the right and power of the plaintiff-landlord.

The first Court gave the plaintiff a decree.

The Lower Appellate Court has reversed that decree, and held that, whereas there was an order passed by the Collector under Section 25, Act X. of 1859, issuing proclamation to the tenants to pay rents to the intervenor, that is conclusive; and the question as to whether the intervenor or the plaintiff was in actual receipt and enjoyment of the rent need not be gone into. In this view, the

Lower Appellate Court dismissed the plaintiff's suit.

In special appeal, it is urged that the Lower Appellate Court is wrong in holding that the order of the Collector under Section 25 has the force and effect of a Civil Court decree, and is binding as against the special appellant, and in not adjudicating upon the question of the actual receipt and enjoyment of the rent as provided by Section 77, Act X. of 1859.

We are of opinion that the special appellant is right in his contentions.

In the first place, the Lower Appellate Court was clearly wrong in holding that the effect of an order passed by the Collector in his executive capacity under Section 25 was that of a Civil Court decree, and was, therefore, binding as against the intervenor. But irrespective of that, we think that the Lower Appellate Court was wrong in not adjudicating the case under the provisions of Section 77, Act X. of 1859. Section 21, Act VI. of 1862 (Bengal Council), distinctly declares that that Act shall be read with and taken as part of Act X. of 1859. Under the provisions, therefore, of this Section, any suit instituted under Act VI. of 1862 (Bengal Council) may be considered as instituted under Act X. of 1859, and as such the present suit may be considered a suit under Act X.

Now Section 77, Act X. of 1859, says: "When in *any suit* between a landholder "and a ryot or under-tenant *under this* "*Act*, the right to receive the rent of the "land or tenure cultivated or held by the "ryot or under-tenant is disputed, and such "right is claimed by, or on behalf of, a third "person, on the ground that such third person "or a person through whom he claims has "actually and in good faith received and "enjoyed such rent before, and up to the "time of, the commencement of the suit, "such third person shall be made a party to "the suit, *and the question of the actual* "*receipt and enjoyment of the rent by such* "*third person* shall be enquired into, and "the suit shall be decided according to the "result of such enquiry."

It is contended by the special respondent that this being a suit for *measurement* of the lands, and not for the *rents* thereof, cannot be considered to be such a suit as is contemplated by Section 21, Act VI. of 1862 (Bengal Council), to be coming under Act X. of 1859, but we see that there is no restriction either in the terms of Section 21, Act VI. or of Section 77, Act X. It is true that Section 77 does speak of an intervenor claiming as if in actual receipt and enjoyment of the rents, but the receipt of rent is only the result to be obtained under Act X. of 1859, either by a suit for measurement and ascertainment of the data on which the rent can be claimed, or in a similar manner, as by a suit for a kubooleut, which, although it is not a suit for rent, still has as its clear and definite object a decree for rents. Reading, therefore, Section 21, Act VI. of 1862, and Section 77, Act X. of 1859, together, we are of opinion that the intervenor was entitled to have his claim determined under the express terms of Section 77.

In this view, we think that the case must be remanded to the Lower Appellate Court to put in issue, and try on the evidence on the record, whether the intervenor has been actually and in good faith in the receipt and enjoyment of the rent before and up to the time of the commencement of the suit.

The costs of this appeal will follow the result.

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Present:

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An appeal from an order of a Magistrate dismissing a ministerial officer in his establishment lies to the Commissioner of the District, and not to the High Court.

Loch, J.—THE question that has been raised before me is whether, from an order of a Magistrate dismissing a ministerial officer in his establishment, an appeal lies to the Commissioner of the District or to the High Court.

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Marshall's Reports, that the Lower Appellate Court, had the evidence on both sides been before it, would have been justified in coming to a decision on the issue in question, and it is admitted by the pleader for the special appellant that the Lower Appellate Court had jurisdiction to determine such an issue.

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The costs of this appeal will follow the result.

The 21st August 1869.

Present:

The Hon'ble G. Loch, *Judge.*

Appeal—Ministerial Officer in Magistrate's Office.

Petition of Poorbhoo Narain Singh, late a Mohurrir in the Court of the Magistrate of Patna, praying that the Magistrate's order dismissing him from his post may be set aside.

Moulvie Mahomed Yusuff for the Petitioner.

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To determine this point we need to go back to the old law on the subject, and we find that, under the provisions of Section 15, Regulation V. of 1804, native officers em-

Marshall's Reports, that the Lower Appellate Court, had the evidence on both sides been before it, would have been justified in coming to a decision on the issue in question, and it is admitted by the pleader for the special appellant that the Lower Appellate Court had jurisdiction to determine such an issue.

The question, then, that remains is whether we shall remand the case to the Court of first instance to commence the litigation, so far as the plaintiff is concerned, *de novo* upon this issue, or whether we shall not rather declare that the judgment dismissing the suit shall stand, such part of it as is a determination on this issue being declared to be void.

On the whole, I think it will tend to protract a litigation of which we do not see the end, if we were not to remand the case. Supposing the Judge were to find, after taking the evidence of the plaintiff, that the defendants were still protected, that would not bar the plaintiff from his remedy by a suit in another Court. He would still have the right to proceed to the Civil Court, and to raise the question as to whether he might not have his right declared to enhance the rents of the tenure. It is possible that in that suit any decision which might be come to in this suit might be put in as a bar, but he would not the less have the right to sue and to have the question determined. There would undoubtedly be a conflict of jurisdiction such as is unfortunately already too rife as between Revenue and Civil Courts, and if the parties must sue again, we cannot shut our eyes to the fact that there would be a more certain and rapid and complete end to this litigation, if the plaintiff should elect to sue in the Civil Court or under that amalgamated jurisdiction of the Civil and Revenue Courts which is now passing under our eyes through the Legislative Council. It is for these reasons that I prefer, on the whole, not to remand the case.

The 20th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Suits for measurement—Act VI. (B. C.), 1862—Sections 25 and 77, Act X., 1859.

Case No. 1380 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 31st March 1869, modifying a decision of the Deputy Collector of that District, dated the 21st January 1869.

Jonaye Sirdar and others (Defendants), *Appellants,*

versus

Dwarkanath Roy (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Any suit instituted under Act VI. (B. C.) of 1862 may be considered as instituted under Act X. of 1859, even though it be a suit for measurement of land; and an intervenor in such suit, who claims the right to receive the rent, is entitled to have his claim determined under the express terms of Section 77, Act X. of 1859.

An order passed by a Collector under Section 24, Act X. of 1859, has not the force and effect of a Civil Court's decree, and is not binding as against an intervenor in a suit under that Act.

Bayley, J.—We think that the judgment of the Lower Appellate Court in this case must be reversed, and the case remanded for re-trial.

The plaintiff sued under the provisions of Section 9, Act VI. of 1862 (Bengal Council), to measure the defendant's lands.

A third party intervened, and denied the right and power of the plaintiff-landlord.

The first Court gave the plaintiff a decree.

The Lower Appellate Court has reversed that decree, and held that, whereas there was an order passed by the Collector under Section 25, Act X. of 1859, issuing proclamation to the tenants to pay rents to the intervenor, that is conclusive; and the question as to whether the intervenor or the plaintiff was in actual receipt and enjoyment of the rent need not be gone into. In this view, the

Lower Appellate Court dismissed the plaintiff's suit.

In special appeal, it is urged that the Lower Appellate Court is wrong in holding that the order of the Collector under Section 25 has the force and effect of a Civil Court decree, and is binding as against the special appellant, and in not adjudicating upon the question of the actual receipt and enjoyment of the rent as provided by Section 77, Act X. of 1859.

We are of opinion that the special appellant is right in his contentions.

In the first place, the Lower Appellate Court was clearly wrong in holding that the effect of an order passed by the Collector in his executive capacity under Section 25 was that of a Civil Court decree, and was, therefore, binding as against the intervenor. But irrespective of that, we think that the Lower Appellate Court was wrong in not adjudicating the case under the provisions of Section 77, Act X. of 1859. Section 21, Act VI. of 1862 (Bengal Council), distinctly declares that that Act shall be read with and taken as part of Act X. of 1859. Under the provisions, therefore, of this Section, any suit instituted under Act VI. of 1862 (Bengal Council) may be considered as instituted under Act X. of 1859, and as such the present suit may be considered a suit under Act X.

Now Section 77, Act X. of 1859, says: "When in *any suit* between a landholder "and a ryot or under-tenant *under this* "*Act*, the right to receive the rent of the "land or tenure cultivated or held by the "ryot or under-tenant is disputed, and such "right is claimed by, or on behalf of, a third "person, on the ground that such third person "or a person through whom he claims has "actually and in good faith received and "enjoyed such rent before, and up to the "time of, the commencement of the suit, "such third person shall be made a party to "the suit, *and the question of the actual* "*receipt and enjoyment of the rent by such* "*third person* shall be enquired into, and "the suit shall be decided according to the "result of such enquiry."

It is contended by the special respondent that this being a suit for *measurement* of the lands, and not for the *rents* thereof, cannot be considered to be such a suit as is contemplated by Section 21, Act VI. of 1862 (Bengal Council), to be coming under Act X. of 1859, but we see that there is no restriction either in the terms of Section 21, Act VI. or of Section 77, Act X. It is true that Section 77 does speak of an intervenor claiming as if in actual receipt and enjoyment of the rents, but the receipt of rent is only the result to be obtained under Act X. of 1859, either by a suit for measurement and ascertainment of the data on which the rent can be claimed, or in a similar manner, as by a suit for a kubooleut, which, although it is not a suit for rent, still has as its clear and definite object a decree for rents. Reading, therefore, Section 21, Act VI. of 1862, and Section 77, Act X. of 1859, together, we are of opinion that the intervenor was entitled to have his claim determined under the express terms of Section 77.

In this view, we think that the case must be remanded to the Lower Appellate Court to put in issue, and try on the evidence on the record, whether the intervenor has been actually and in good faith in the receipt and enjoyment of the rent before and up to the time of the commencement of the suit.

The costs of this appeal will follow the result.

The 21st August 1869.

Present:

The Hon'ble G. Loch, *Judge.*

Appeal—Ministerial Officer in Magistrate's Office.

Petition of Poorbhoo Narain Singh, late a Mohurrir in the Court of the Magistrate of Patna, praying that the Magistrate's order dismissing him from his post may be set aside.

Moulvie Mahomed Yusuff for the Petitioner.

An appeal from an order of a Magistrate dismissing a ministerial officer in his establishment lies to the Commissioner of the District, and not to the High Court.

Loch, J.—THE question that has been raised before me is whether, from an order of a Magistrate dismissing a ministerial officer in his establishment, an appeal lies to the Commissioner of the District or to the High Court.

To determine this point we need to go back to the old law on the subject, and we find that, under the provisions of Section 15, Regulation V. of 1804, native officers em-

ployed in the several Courts of Judicature, Civil and Criminal, or under any public officer subject to the authority of the Court of Sudder Dewanny Adawlut and Nizamut Adawlut, whose salary or other allowance may amount to 10 rupees per mensem or upwards, and whose appointment and removal may not have been reserved to the Governor-General in Council, shall not be removed from their respective offices without the sanction of the Court of Sudder Dewanny Adawlut or Nizamut Adawlut.

By the provisions of Clause 1, Section 7, Regulation VIII. of 1809, the authority to confirm the appointment, removal, and resignation of the principal ministerial native officers of the Zillah and City Judges and Magistrates, as well as of the Record-keepers and the whole of the native officers of the Zillah Courts, Civil and Criminal, receiving a salary of 10 rupees per mensem or upwards, was vested in the Provincial Courts of Appeal and Circuit.

By Clause 1, Section 3, Regulation I. of 1829 (which Regulation constituted Commissioners of Revenue and Circuit, and by which the Provincial Courts of Appeal and Circuit were abolished), the said Commissioners possessed and exercised, each within the cities and districts comprised in the division placed under his authority, all the powers that were legally exercised by the Judges of Circuit when holding the Sessions of Jail Delivery, or *by the Courts of Circuit collectively.* And by Section 7 of the same law the offices of Superintendent of Police in the Lower and Western Provinces were abolished, and the Commissioners of Revenue and Circuit were authorized and exercised all the powers belonging to the Superintendent of Police within their respective divisions.

Under the powers conferred on the Commissioners by Clause 1, Section 3, Regulation I. of 1829, *viz.*, the powers of the Court of Circuit collectively, the removal of officers in Criminal Departments was subject to their authority, and it continued to be so until the enactment of the provisions of Act XXIV. of 1837. By that law it was enacted that whenever a Superintendent of Police shall be appointed under the Act, such parts of Section 7, Regulation I. of 1829, of the Bengal Code as vested the Commissioner of Revenue and Circuit with the duties and powers belonging to the Superintendent of Police, should cease to have effect in the territories which may be comprised within the jurisdiction of such Superintendent. And by Section 4 of the same Act, the powers exercised by the Commissioner of Circuit in virtue of the authority vested in them by Section 3, Regulation I. of 1829, of the Bengal Code in regard to the appointment, suspension, and removal of any ministerial or police-officer subordinate to any Zillah and City Magistrate or Joint Magistrate, were vested in the Superintendent of Police. And by Section 6 of that law, the order of the Superintendent of Police was not open to revision by the Nizamut Adawlut. Act XXIV. of 1837 continued in force until Act VIII. of 1868 called the "Repealing Act" was passed, when it, with other laws, was repealed.

It has been urged that as Act XXIV. of 1837 has been repealed, and as the same Act has virtually superseded the provisions of Sections 3 and 7, Regulation I. of 1829, therefore the only law now in force with regard to the appointment and removal of ministerial officers is the old law, Section 15, Regulation V. of 1840. This, however, is a mistake. Neither Section 3 nor Section 7 of Regulation I. of 1829 has been repealed. They have been modified so as to suit circumstances; for instance, with regard to the holding of Sessions, by Regulation VII. of 1831, the provisions of Regulation I. of 1829 were so far modified as permitted the Government to allow the Judges of Districts to hold the Sessions and try all cases committed to them by the Magistrates within their districts. So also, with regard to the provisions of Act XXIV. of 1837, it does nowhere repeal any part of Regulation I. of 1829, but merely says that, where a Superintendent of Police is appointed, the powers held by the Commissioners of Revenue and Circuit as Superintendent of Police shall cease to have effect. When that law is itself repealed, all the powers that were exercised by the Superintendent of Police must, in the absence of any other law directing the contrary, revert to the Commissioners of Circuit, who are still in existence, and who still, under the powers given to them by Regulation I. of 1829, have the powers of Courts of Circuit.

Looking, therefore, at the laws mentioned above, it appears to me that there can be no doubt that the Commissioners of Revenue and Circuit were vested with all the powers of the Courts of Circuit; that among other powers they held that of confirming the appointment and dismissal of the officers of the Magistrate's office; and that as Act XXIV. of 1837 by which their authority in this re-

spect had for a time been vested in the Superintendent of Police has been repealed, they have again become vested with that authority. Consequently, the Commissioner is the proper authority to whom an appeal lies from an order of a Magistrate dismissing a ministerial officer from his post, and the order of the Commissioner passed in appeal is final.

Under this view of the case, I reject this application.

The 23rd August 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Intervention—Section 77, Act X., 1859—Res adjudicata—Estoppel.

Case No. 1150 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 19th February 1869, reversing a decision of the Deputy Collector of that District, dated the 1st December 1868.

Bhyroo and others (Defendants), *Appellants,*

versus

Wuzeer Ally (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

Where the claim of an intervenor under Section 77, Act X., 1859, has been thrown out as not fit to be considered, but as belonging properly to the Civil Court, he is not prevented from coming in again in another suit between the same parties in respect to the same property.

Even if an intervenor's claim is, after inquiry, decided against him on the ground that he has not been in the receipt and enjoyment of rent, he is not thereby barred from coming into Court afterwards, and pleading receipt and enjoyment of rent in subsequent years.

Glover, J.—THIS was a suit by the plaintiff to recover the rent of certain *tak* and date trees. The special appellant intervened in the case under Section 77, Act X. of 1859, on the ground that he had been before and up to the time of suit in the receipt and enjoyment of that rent, and one of the defendants appeared and supported the intervenor's contention.

The Court of first instance dismissed the plaintiff's suit, on the ground that the intervenor had proved that he had been and was in the receipt of rent. There was a question apparently before the Deputy Collector with regard to the amount of shares which each party claimed, but, on the question under Section 77, the Deputy Collector found that the intervenor had been in the receipt of the rent which the plaintiff claimed.

The Judge, on appeal, held that, as in a previous suit for rent between these parties in 1860 the present special appellant had intervened under Section 77, and had failed in his intervention, and had been referred to the Civil Court, he was now concluded from intervening again in the same litigation, as no change was shown to have taken place in the *status* of the parties. He likewise found, with regard to an objection made by the special appellant as to the identity of the trees of which rent was claimed, that, as the plaintiff had filed the former decree, and alleged that it covered all the trees in the 6-annas share, it was for the defendant to give some evidence to the contrary; and as she did not give that evidence, he considered a decree should pass for the plaintiff.

It appears to me that the Judge's decision in this case is wrong, and should be reversed. Even if we were to admit for the sake of argument that the decree which was passed in December 1860 did decide against the intervenor on the ground that he was not at that time in the receipt and enjoyment of the rent, it does not follow that the intervenor should not at some subsequent period be able again to come into Court and make substantially the same defence. The words of the Section only make it necessary that the party who intervenes should prove that he "had in good faith received and enjoyed the rent before and up to the time of the commencement of the suit;" but there is no specific time mentioned in the Section within which such enjoyment is to be proved. It is quite possible, therefore, that, although the intervenor might not have been in the receipt and enjoyment of the rent of these trees in 1860, he might have been so in subsequent years, in 1866 or 1867 for instance; and there is nothing in the Section, as it appears to me, to prevent him from proving in a subsequent suit the

fact that he had been in such possession and enjoyment.

But, as a matter of fact, this objection does not arise in the case, because, on turning to the record of the Act X. suit decided in December 1860, I find that, although the intervenor objected in that case on the same ground as he does now, namely, that he had been in the receipt and enjoyment of the rent, his objection was thrown out, not on the ground that he had not proved such enjoyment, or, in fact, upon any ground at all. So far as we can discover, the judgment proceeded on the fact that the plaintiff was proved to be the proprietor; and the ryot, the defendant, was proved to be his tenant, and that, therefore, the latter was bound to pay rent to the former, and that the claims of the intervenor were not fit to be considered in the case, but properly belonged to the Civil Court. It is quite clear from this decision that there was no finding, as there ought to have been, under Section 77 of the Act. There was no enquiry as to whether the intervenor had been in the receipt and enjoyment of the rent; and his objection being thrown out in that case would be clearly no ground for preventing his making a similar defence when another suit is brought by the plaintiff for the same trees against the same defendant. What the Judge ought to have done, I think, was to have taken up the case under Section 77, and have decided it on the evidence as to whether there had been any receipt of rent on the part of the intervenor before and up to the time of the institution of this suit.

This being my opinion, it is unnecessary to take any notice of the second objection further than to say that the mere fact of the plaintiff's putting in the old decree, and alleging it to cover the trees in suit, was not sufficient to prove the plaintiff's case, unless there was something in that decree which marked down the position of the trees, and showed without the least doubt that they were the very ones the rents of which are now claimed. The mere putting in of the decree and the mere allegation of the plaintiff would not excuse him from giving that proof which every plaintiff must give before he can succeed, especially when the defendants clearly raised the objection that the trees were not the same. The case must be remanded to the Judge in order that he may pass a fresh decision. Costs will follow the event.

Macpherson, J.—I concur.

The 23rd August 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Sale under Act VIII. (B. C.), 1865.

In the matter of Dwarkanath Sein, *Petitioner,*

versus

Chunder Mohun Mitter, *Opposite Party.*

Baboo Anund Chunder Ghossal for Petitioner.

Mr. J. S. Rochfort for Opposite Party.

A sale under Act VIII. (B. C.) of 1865 is a proceeding within the meaning of Section 30 of that Act.

Mitter, J.—We are of opinion that this rule ought to be discharged. The sale under Act VIII. of 1865 (Bengal Council) is a proceeding within the meaning of Section 30 of that Act, and an appeal does lie to the Collector against that proceeding if held by the Deputy Collector. The words of Section 30 appear to us to be clear, and these words are to be read in conjunction with Section 50. There can be no doubt whatever that a sale under Act VIII. of 1865 (Bengal Council) was intended to come within the description of the proceedings as given in Section 30.

The rule will be discharged with costs.

The 23rd August 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Declaratory decree—Rights and interests.

Case No. 1442 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 30th March 1869, modifying a decision of the Moonsiff of that District, dated the 9th September 1868.

Ram Phul Ahir (one of the Defendants), *Appellant,*

versus

Bhugwan Dutt Paurey (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboo Obinash Chunder Banerjee for Respondent.

Plaintiff prayed for a declaration of title to, and confirmation of, his possession of 17 beegahs, which he claimed through *J* and five others. The Lower Court found that of these persons *J* only had ever any interest in the 17 beegahs, and gave plaintiff a decree declaring that he had purchased the right and interest of *J*, whatever that might be—

HELD that such a decree was had as not in any way declaring what interest plaintiff had in the 17 beegahs, or whether he had any; and that the Court ought to have decided what *J's* precise rights were which had passed to plaintiff.

Macpherson, J.—IN this case, the judgment of the Lower Court is almost unintelligible, and the real points decided by the Subordinate Judge cannot be ascertained from it.

The plaintiff sued for confirmation of his possession of 17 beegahs of land, and also for confirmation of possession of 2 beegahs of *gozashtah* land. The Lower Court has given a decree confirming his possession of the two beegahs of *gozashtah* land, and has made a declaration (in itself absolutely worthless) confirming the plaintiff's possession of the rights and share of one Jugdees Roy in 17 beegahs odd of land. I say that the decree, so far as it relates to the 17 beegahs, is perfectly worthless, for this reason that it can by no possibility be executed or made use of.

The plaintiff's case as regards these 17 beegahs is, that he purchased the rights of Jugdees Roy and some five other persons in this land, and that, having purchased it, he got possession. The Lower Court has found that of the persons named Jugdees alone is proved to have had any interest in the land. The Lower Court, without ascertaining what Jugdees Roy's interest was, and almost without ascertaining whether Jugdees really had any interest at all, finds in a vague and general way that the plaintiff purchased the right of Jugdees, whatever it may be, adding "only should the plaintiff "desire to establish a particular share of the "said Jugdees Roy, he must bring a distinct "suit, as it relates to a distinct cause of "action, and is deemed irrelevant here." The Subordinate Judge thought it convenient not to decide that which, if the plaintiff were entitled to a decree at all, ought to have been decided in the present suit, but to leave the plaintiff with a general declaration that he had some kind of interest in the land, suggesting that, if he wanted to know what that interest is, he had better bring another suit.

In special appeal, it is contended, not only that the decision of the case by the Lower Court is bad in itself, but that the plaintiff's suit ought to be dismissed outright, on the general ground that it is not shown that he is entitled to any portion of the relief which he seeks.

I think that the appellant is right; for the plaintiff has absolutely shown no title whatever to the relief for which he prays. The suit being for confirmation of possession of certain specified parcels of land, the plaintiff is not entitled to get a decree as to any one of those two parcels unless he distinctly proves both the fact of his being in possession at the time of the filing of the plaint, and his title to that possession. Now, in the present case, it is not proved that the plaintiff was in possession of any portion of the 17 beegahs claimed; and if it were for that reason only, and even supposing the plaintiff had proved his title, it seems to me that his suit in its present form ought to be dismissed.

But the plaintiff has not proved his title to any portion of these 17 beegahs. The Lower Court finds, as a fact, that the five persons through whom, in addition to Jugdees Roy, the plaintiff claims, had no title to these lands, and has declared that all that the plaintiff can have a right to is the right, whatever it may have been, of Jugdees Roy. It is impossible to say that the right of Jugdees Roy has been proved so that it can be with accuracy declared; and as a matter of fact, what the plaintiff relied upon was not merely the right of Jugdees Roy, but the right of Jugdees Roy and the others. The plaintiff has failed to prove his title or possession. He therefore cannot be entitled to any declaratory decree confirming his alleged possession.

Then as regards the two beegahs which are claimed under a different title, the Lower Court finds that, because it is not mentioned in the sale-certificate under which the defendants claim, therefore the plaintiff must be entitled to possession. But the plaintiff has proved neither his actual possession of the two beegahs, nor his title to the possession of the two beegahs, and therefore the suit as to them also failed, and ought to have been dismissed.

The plaintiff's pleader alleges that the plaintiff really is in possession. How that may be, I of course cannot say; but if he is in actual possession, nothing could be wilder or more foolish than his conduct in rushing into litigation in the reckless manner in which he has come into Court. It certainly does

seem to me that, where persons are in actual possession of land, it would be very much more for their interest to bear in mind the maxim "*melior est conditio possidentis*," and to remain quietly in that possession, than to come hurrying into Court asking for declarations of titles in support of which they scarcely seem to consider it necessary to give any evidence whatever. If the plaintiff really is in possession as alleged, the result of the present suit need not necessarily affect his position much. We are not deciding against him in an action of ejectment. All that we say is that, he having come as a volunteer into Court, and having asked for a declaration of his title, he has not laid before us any grounds to make us think that he is entitled to the declaration he asks for. The decree of the Lower Court will be set aside, and the plaintiff's suit will be dismissed with costs.

In the course of the observations which I have made, I have practically disposed of certain objections taken by way of cross-appeal.

Glover, J.—I concur in dismissing the suit with costs.

The 23rd August 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Sections 11 and 14, Act VIII., 1859.

Gour Soonduree Debia, *Petitioner,*

versus

Shumboo Chunder Mojoomdar and another, *Opposite Party.*

Baboo Issur Chunder Chuckerbutty for Petitioner.

Baboo Kishen Dyal Roy for Opposite Party.

Where a suit, the subject of which is partly without the jurisdiction of the Court in which it is instituted, is registered before the permission required by Section 11, Act VIII. of 1859 has been obtained, there is no good reason why the requisite sanction should not be applied for after the error has been discovered.

If any part of the property, however small, lie within the jurisdiction of the Court, it may try the whole case after obtaining the requisite permission.

Loch, J.—We think the judgment of the Court below must be reversed. The plaintiff in this case brought an action in the Court of the Subordinate Judge of Pubna, to recover possession, under Section 15, Act XIV. of 1859, of certain villages. The defendant pointed out to the Court that two of the villages were not within the jurisdiction of the Court, but in that of the Subordinate Judge of Rajshahye. On this, the plaintiff represented that the villages in question were very recently transferred to Rajshahye; but the Subordinate Judge, considering that, as the plaint had been registered, and the defendant had filed an answer, he could not proceed under the provisions of Section 11, Act VIII. of 1859, rejected the plaint.

The whole of the property appears to have been at one time under the jurisdiction of the Subordinate Judge of Pubna, and it is clear that, at the time this suit was brought, the Subordinate Judge had jurisdiction over that part of the property which was within the jurisdiction of the Pubna Court; and we see no reason why, because the plaint had been registered, the Subordinate Judge should not have applied under Section 11, Act VIII. of 1859, to the District Court for permission to try the case. It is true that the permission to try a suit, the subject of which is partly without the jurisdiction of a Court, is usually applied for before the plaint is registered, but it may happen, as in this case, that the error is not discovered till after the plaint is admitted; and when this is the case, there does not seem any good reason why sanction of the District Court or High Court, as the case may be, should not then be applied for. Section 14, Act VIII. of 1859, is not applicable to this case at all; that contemplates a case in which the question is whether the whole property is within or without the jurisdiction. If any part of the property be within the jurisdiction of the Court, however small it may be, the Court has jurisdiction, and can try the whole case on obtaining permission from the District Court.

We see no sufficient ground for rejecting the plaint on the reasons assigned by the Subordinate Judge, and direct him to proceed to try the case on obtaining permission from the District Court.

The petitioner will get his costs of this rule.

Mitter, J.—I concur.

The 24th August 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Attachment—Liability of Execution-creditor.

Case No. 2605 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 27th May 1868, reversing a decision of the Sudder Ameen of that District, dated the 30th November 1867.

Soobjan Beebee and others (Plaintiffs), *Appellants,*

versus

Shaikh Shureeutoollah (Defendant), *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Grish Chunder Ghose for Respondent.

If a decree-holder, having obtained a warrant for the attachment of the goods of *A*, points out to the officer of the Court the goods of *B* as those of *A*, and causes their attachment and removal, he is a wrong-doer who has procured the commission of a trespass, and is responsible, though he acts innocently or mistakenly.

If a Court, after having before it all the facts, were to adjudicate as to the right of a defendant to particular moveables, and to order the attachment of specified property, the order would be the act of the Court; and if the decree-holder had acted *bonâ fide* in bringing all the facts before the Court, he would not be liable.

In a suit to recover damages for loss incurred by the wrongful acts of the defendant, the plaintiff must show that the loss was the necessary and unavoidable consequence of those acts.

Norman, J.—THE plaint alleges that the defendant in execution of a decree in the Sudder Ameen's Court against one Khezar Buksh, on the 16th June 1866 caused certain cattle belonging to the plaintiffs to be attached; that the plaintiffs claimed the cattle under Section 246; and that their claim was allowed, and that the cattle were released, and all except three bullocks, which had died, were restored to the plaintiffs on the 28th of September 1866. The plaint goes on to state that as the cattle were attached at the time of cultivation, the plaintiff's jote remained uncultivated for the year. The plaintiffs claimed damages, Rupees 734, as the value of the crops which might have been raised, and Rupees 61 as the value of the three bullocks which died. The plaintiffs proved that the lands remained uncultivated during the year, and gave evidence as to the value of the crop which might have been raised.

The Moonsiff dismissed the suit. He finds that the plaintiffs were not under any necessity to leave the land uncultivated during the attachment; that the plaintiff might have cultivated the land by hiring other bullocks or settled it with some body, and as to the bullocks said to have died he did not believe the evidence that thirteen bullocks were attached.

The Principal Sudder Ameen reversed this decision on the ground that though the damages claimed by the plaintiffs were too remote, that was no ground for dismissing the suit altogether. He awarded in respect of the detention of the cattle for 3 months and 13 days, the sum of Rupees 57-13, being the sum which he considered would have been the cost to the plaintiff of hiring other cattle. He disallowed the claim for the value of the bullocks which died, on the ground that there was nothing to show that they had died from any neglect, as he considered it had been proved that they were properly fed while kept under attachment.

From that decision the plaintiffs have appealed.

It has been contended before us in special appeal on the part of plaintiffs, *first*, that the damages claimed in respect of the Aughunee crop ought to have been allowed; and, *secondly*, that the Principal Sudder Ameen ought to have awarded to the plaintiff the full value of the bullocks which died while under attachment.

The defendant on cross-appeal objected that he was not liable at all for the seizure of the cattle.

This case raises very important questions as to the liability of a decree-holder for the wrongful attachment of the goods of a stranger in the execution of a decree. One principal point has been touched on, and is supposed to have been decided by the Chief Justice in two cases to which I shall hereafter call attention.

In considering this case, it must be observed that it is a settled rule of law that every person who directs, orders, or procures, the commission of a trespass is liable as a wrong-doer and trespasser. If a decree-holder having obtained a warrant authorizing the attachment of the goods of *A*. points out to the officer of the Court, and causes him to attach and remove goods belonging to *B* as the goods of *A*, the decree-holder is a wrong-doer, and cannot in any way justify his proceedings under the warrant. In causing *B's* goods to be attached and taken out of his possession, he procures a trespass to be done to *B*. If a man for his own profit and advantage wrongfully or without any warrant in law trespasses on the land of another, takes away his goods, or procures his goods to be seized and taken out of his possession, he is responsible, even though he acts innocently or mistakenly. A party to a suit is liable if by his order the officer takes the goods of the wrong person, a stranger in execution. And in like manner he is responsible if his attorney or agent, in taking a step necessary to enable his client to get the fruits of the decree, inadvertently or ignorantly cause the person or property of a stranger to be seized by the officer of the Court. The cases of Jarmain *versus* Hooper, 6 M and G., 827, and Walley *versus* MacConnell, 13 Q. B, 903, are good illustrations of the rule to which I refer.

Under a system where any remedy against the officer executing the process of the Court would be utterly nugatory, it appears to me that it is peculiarly necessary not to relax the rule as to the liability of the decree-holder for his own acts, or those of his agents in causing the decree to be executed, because, if the decree-holder is not to be responsible, wrongs done to third persons under color of the process of the Court would be wholly without remedy.

If, therefore, the defendant directed the officer of the Court to seize the plaintiffs' goods under a warrant of attachment empowering the officer to seize the property of Khezar Buksh, the judgment-debtor, the defendant would, in our opinion, be clearly liable.

We do not know what was the form of the warrant under which the plaintiffs' goods were seized. But we think that in the present case, defendant is equally liable even if the goods were seized under a warrant issued on an application for an attachment accompanied by an inventory or list of the property to be attached. Whether there is an inventory or not, the usual course is for the Court simply to order on the application of the decree-holder that the property of the debtor should be attached, either generally, or such particular property of the debtor as the applicant has indicated in the list accompanying the tabular statement.

Neither the 214th Section of Act VIII. of 1859, nor the 15th Section of Act XXIII. of 1861, appears to contemplate any enquiry before the Court from which the execution is to issue, whether the property to be seized is that of the judgment-debtor or not; nor as a matter of fact does any such enquiry take place. In ordinary cases, there is no adjudication which makes the seizure of the particular goods the act of the Court. For instance, the warrant would not authorize the taking of particular cattle identifying them by sex, age, and particular marks, without reference to the question of ownership, but would empower the officer to seize the cattle of the debtor, in this case, the cattle of Khezar Buksh.

It would paralyse the action of the Courts if Judges were to feel that in issuing warrants of attachment they might be authorizing the commission of wrongs for which there would be no remedy. If that is the law, I can only say that I believe few Judges would be willing to issue orders for attachment without such a full enquiry as might often defeat the diligence of a decree-holder desirous of executing his decree. Of course, if after having all the facts as to the right of a defendant to particular moveables brought before it, the Court after adjudicating on the materials before it, were to order the attachment of specified property or decide as to the right of such attachment, the order would be the act of the Court, and if the decree-holder had acted *bond fide* in bringing the facts fully before the Court, he would not be liable.

The case of Joy Kalee Debee *versus* Chand Malla, 9 Weekly Reporter 133, falls

within this rule. There the defendant was attempting to execute a decree barred by limitation. The Judge by an order, dated the 21st September, directed that the property should remain under attachment pending appeal after a decision by the Principal Sudder Ameen that the right to execute the decree was barred. The defendant had resorted to the Court to seek the enforcement of a supposed right. The order made on his application was no doubt improper, and its consequences were most mischievous. But it was a judicial act of the Court. Under such circumstances it was held that no action would lie against the defendant for obtaining the order without proof that he had acted fraudulently or misrepresented or suppressed the facts in making application to the Judge.

In the case of Lock *versus* Ashton, 12 Q. B., 871, the defendant gave the plaintiff into custody on a charge of felony, and had him taken to a police office. The Magistrate remanded the plaintiff. On a subsequent examination, the plaintiff was discharged, it having been discovered that the charge was made under a mistake. It was held that the defendant was not liable for damages for the detention of the plaintiff under the remand, such detention being the independent judicial act of the Magistrate.

The case is a good illustration of the distinction between the liability of a man for his own acts and his responsibility for those of a Court which he sets in motion. Coleridge, J., said: "Suppose the defendant took the plaintiff to a police office on a day when he knew there would be a remand?" It was answered that would be evidence in an action for malicious prosecution.

In the present case, there was no issue whether the defendant directed or authorized the seizure of the plaintiffs' cattle. But the plaint alleges that the defendant in execution of this decree against Khezar Buksh distrained the plaintiffs' cattle, and brought them into Court, and in fact there was some evidence to that effect.

The defendant by his written statement did not deny the allegation that he had distrained the plaintiffs' cattle in any way. He did not say, "I had nothing to do with the seizure; the officer of the Court in the course of his duty in execution of the attachment seized them. I gave no particular direction on the subject, and am therefore not responsible." The point that no direct issue on the point was raised was not taken by appeal or cross-appeal either in the Court below or before us, and I therefore think we must take it on this record as admitted or not denied, that the defendant by himself or his agents either directed or authorized the seizure of the cattle of the plaintiffs.

Then comes the question what damages are the plaintiffs entitled to recover? There is no doubt that the act of the defendant in attaching the plaintiffs' plough-bullocks at the season of rice cultivation must have occasioned serious loss and inconvenience to the plaintiffs. The Judge has allowed that which would have been the cost of hiring other cattle.

This is probably by no means an adequate compensation to the plaintiffs for the injury actually sustained by them, which seems in effect to have been the entire loss of their main rice crop for the year.

But the plaintiffs have not proved, as they should have done, that this loss was the necessary and unavoidable consequences of the wrongful acts of the defendant, and therefore, we think, that the defendants could not properly be made responsible for a loss which for all that appears may, to a great extent, have been occasioned by the plaintiffs' own want of prudence or energy.

There is no doubt that it must be a very serious thing to ryots to have their cattle seized at the time of cultivation. The Moonsiff finds that the plaintiffs were not under any necessity to keep the land uncultivated, and that they unnecessarily allowed the land to remain waste. On the evidence, he seems to me to have been a little hasty in drawing that conclusion without sufficient enquiry.

It seems to us that damages for the detention of the cattle until they are released from attachment by the Court, were properly allowable. The Moonsiff in admitting a claim under Section 246 does not make any order authorizing the detention of the goods claimed. The continued detention is simply and solely the consequences of the seizure under the warrant of attachment. The case is analogous to that of Edgell *versus* Francis, 1 M. and G., 226, where the defendant improperly gave the plaintiffs in custody on a charge of felony. Tindal, *C. J.*, said he was responsible for all that was done by the officer in the ordinary discharge of his duty.

Then as to the bullocks which died while under attachment, there is nothing to

show that their death was in any way directly attributable to the act of the defendant in causing them to be seized and detained. It is not suggested that they had been overdriven, kept in an improper place, or reduced to an unhealthy condition by bad management or neglect. If we look at the defendant as a mere trespasser who wrongfully took the plaintiffs' cattle, the plaintiffs would be entitled to a decree for a return of the cattle, or their value; and if for any reason whatever he could not return the cattle, he would be obliged to pay their value.

There is nothing to show when the three bullocks died. But we think that on the Judge's statement, we must infer that they died after the plaintiffs' claim had been admitted under Section 246. At that time the bullocks were in the custody of an officer of the Court. The plaintiffs might have obtained an order under Section 92 providing for their safe custody pending the decision of the claim. Perhaps, on giving security, they might have themselves been appointed managers, and allowed to use the cattle. As no such application seems to have been made, the custody of the bailiffs of the Court must be taken to have been that of persons to whom the cattle were entrusted for safe keeping pending the decision of the claim, either by consent of the parties or the act of the Court. I think that the defendant could not be made responsible for any damage to the cattle not shown to have been occasioned by negligence or improper conduct on the part of the bailiffs, while the cattle remained in their custody after the claim had been admitted. Indeed, I am not sure that the defendant would have been liable for the acts of the bailiffs after such an order, even if the bailiffs had been guilty of negligence. See the case of Walker *versus* Olding, 32 Law Journal, N. S., Exchequer, 142, as to the liability of the execution-creditor for loss occasioned by a sale of goods seized under an interpleader order.

On these grounds I think that the appeal must be dismissed.

I may observe that there is no real conflict between our decision and that of Rajbullub Gope *versus* Issur Chunder Hazrah, VII. Weekly Reporter. In that case, the judgment-debtor owned a moiety of the bullocks, and therefore in causing them to be attached as the property of the debtor, the judgment-creditor did not commit any trespass. He had a clear right to attach and sell the interest of the debtor in the bullocks. The only question was whether the attachment should have been under Section 233 or 234.

Jackson, J.—I concur generally in the judgment which my learned colleague has passed. The Lower Appellate Court seems to have taken a very proper view of the case. The damages which the plaintiff has demanded are such as could hardly be given even if the attachment of the plaintiffs' cattle had been brought about maliciously. But there is no allegation of malice in the plaint. The attachment was a wrongful act although it may have been made *bonâ-fide*. The defendant has not attempted in any way to justify it. He has produced no evidence whatever to show the circumstances under which he made the attachment. His cross-appeal cannot, therefore, be entertained.

The plaintiff has not shown in any way the circumstances which led to the death of three of his bullocks, and, without some evidence upon that point, I am not prepared to say that he is entitled to any decree for the value of them.

The Courts below have found as a question of fact that the plaintiff was not prevented from cultivating his lands by the seizure of his bullocks, but that he has of his own accord and without any necessity allowed his land to lie fallow. The Courts have, accordingly, dismissed the plaintiff's suit for the value of the crops which he alleged he might have obtained. But the Court has decreed a sum sufficient to cover what would have been plaintiff's expenses for hiring bullocks to cultivate his lands. I think this was a very proper decree. I would dismiss the appeal and cross-appeal. Each party to bear his own costs in this Court.

The 24th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart.*, *Judges*.

Claims to attached property—Section 246, Act VIII., 1859.

In the matter of J. B. Rainey, *Petitioner*,

versus

Ishur Chunder Bhuttacharjee and others, *Opposite Party*.

Mr. C. Gregory for Petitioner.

Baboo Ashootosh Chatterjee for Opposite Party.

Where, in execution of a decree, property is seized as belonging to *A* as representative of *B*, deceased, and *A* claims the property as his own, and denies that it ever belonged to *B* or to *B's* estate, *A's* claim must be dealt with under Section 246, Act VIII., 1859, and an order under that Section is not appealable, but can only be disturbed by recourse to a regular suit.

Bayley, J.—In this case, we think that the rule ought to be made absolute with costs.

We are moved, under Section 15 of the Charter Act, to set aside the order of the Judge of Jessore, dated the 29th May 1869, passed on an appeal from the decision in review of the Moonsiff of that district, dated the 8th March last.

The facts are these. A certain decree-holder executed his decree as against the property of his judgment-debtor, Mrs. Barbara Rainey.

On this, the petitioner, Mr. Rainey, intervened and claimed the property as his own, stating that the property did not, in fact, belong to the judgment-debtor, who happened to be his mother, but that he had held possession of the property in his own right, and did not inherit it as any part of his mother's assets.

The Moonsiff first overruled the intervention of the petitioner, but on review he admitted the petitioner's claim on the ground that the property was not that of the judgment-debtor. It was against this order that the Judge admitted an appeal, and reversed the order.

Mr. Gregory for the applicant contends that the final order of the Moonsiff being under Section 246, Act VIII. of 1859, no appeal lay to the Judge, and in support of this contention he cites two cases to be found at page 2, Civil Rulings, Volume XI., and page 61, Miscellaneous Rulings, Volume VI., Weekly Reporter.

Baboo Ashootosh Chatterjee, on the other hand, contends that the order of the Moonsiff was not under Section 246, but under Sections 203 and 211, Act VIII. of 1859.

I am of opinion that the Moonsiff's order was clearly under Section 246 and the ruling of this Court, holding that Section 246 provides for what has been done in the present case, *viz.*, that, "where property is seized as "belonging to *A*, as representative of *B*, de-"ceased, and *A* claims the property as his "own, and denies that it ever belonged to *B* "or *B's* estate, *A's* claim is properly dealt "with under this Section."

There is no other Section in the Code with similar provisions. Sections 203 and 211 only provide, in respect to legal representatives of deceased persons, how decrees may be executed against such persons to the extent of the property inherited by them.

I think, therefore, that the Judge was wrong in receiving the appeal in this case, and that, therefore, his order should be set aside, and this rule made absolute with costs, leaving the opposite party to take such steps as he may be best advised.

Hobhouse, J.—I am of the same opinion. It seems to me that whether Mr. Rainey was or was not in this case the legal representative of Mrs. Rainey, within the meaning of Sections 203, 210, and 211 of the Code of Civil Procedure, is immaterial. It may even be that in this case he admitted himself to be, generally speaking, such legal representative (I do not say that it was so, but that it may be so), still what he in effect said as regards this property was that he claimed it as his own. Then the question was, when in execution of decree a person claimed as his own property which was said to belong to the judgment-debtor, how was the Court to proceed; and I agree with Mr. Justice Bayley that he could only proceed under the provisions of Section 246 of the Code. That

Section treats "of claims to attached property," and says that, in the event of any such claim being preferred, the Court shall proceed to investigate the same as if the claimant were a defendant; so that in this case the Court was bound to proceed in the matter of Rainey's claim as if he were a defendant. Then in the terms of the Section there is a provision showing what the point is that the Court has to determine between this claimant so made defendant and the decree-holder; and the point is this, whether the property in question was in the possession of the party against whom execution is sought, and if it finds that it was not in such possession, the Court is to pass an order releasing the property from attachment.

The question, therefore, was whether in this case Mr. Rainey or Mrs. Rainey had been in possession of the property in question; and when the Court found in favor of Mr. Rainey, this was clearly a final order under the provisions of Section 246, which could only be disturbed, under the special provisions of that Section, by having recourse to the Civil Court in a regular suit, and not by having recourse to an Appellate Court. The case reported at page 61, Volume VI., Weekly Reporter, seems to me to be directly in favor of the view that I have taken.

I agree in making the rule absolute with costs.

The 24th August 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Intervenors—Section 73, Code of Civil Procedure.

Case No. 1140 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Gya, dated the 24th February 1869, affirming a decision of the Moonsiff of that District, dated the 28th July 1868.

Kewul Sahoo (Plaintiff), *Appellant,*

versus

Issur Dyal Roy and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

Plaintiff sued to recover possession of a share, an estate which he alleged he purchased from the principal defendant who denied plaintiff's title on the ground that the purchase-money had not been paid. Subsequently, certain persons prayed to be made defendants, as they held a dur-mokurruree, and were not liable to be turned out. They were accordingly added as defendants under Section 73, Civil Procedure Code. It then appeared that the possession sought by plaintiff was *khas* possession

HELD that, although it was *primâ facie* unnecessary for these intervenors to be made defendants, yet, after the intention of the plaintiff became apparent, nothing would be gained by removing them from the record, even if the Court had the power to do so in special appeal.

Macpherson, J.—IN this case the plaintiff, who is the appellant before us, sued the defendant Sheo Dyal to recover possession of a share of a certain mouzah which he alleged that he had purchased from Sheo Dyal on the 23rd June 1866 for the sum of 310 rupees.

Sheo Dyal, in his written statement, stated that, although the sale had been completed and the deed registered, the purchase-money had never been paid, and therefore the plaintiff was not entitled to get possession.

Subsequently, certain persons, who are now before us as respondents, intervened in the suit, and presented a petition praying to be made defendants, on the ground that they were interested in the matter, inasmuch as they held a *dur-mokurruree* under Sheo Dyal, and therefore were not liable to be turned out of possession, whether Sheo Dyal had or had not sold to the plaintiff as alleged. No objection was made by the plaintiff to the proposed intervention of these parties, and they were accordingly added as defendants under Section 73 of Act VIII. of 1859.

The case went to trial; and in the first Court, the two principal issues were, whether these intervenors held the position of *dur-mokurrureedars* as stated by them, and whether the plaintiff was entitled to *khas* possession as against them. There is no express issue recorded as regards the plaintiff's right to *khas* possession, but it is evident from the judgment of the Moonsiff, as well as from the grounds of appeal filed by the plaintiff in the Lower Appellate Court, that the right to *khas* possession was the main issue tried in the first Court as against the intervenors. The Moonsiff says in his judgment, "under the circumstances, "the plaintiff cannot obtain possession by "displacing the *sub-mokurrureedars* and "their representatives;" and again he says—

"but the vendor-defendant admits having "sold his whole mokurruree right. Under "the circumstances, the plaintiff cannot be "deprived of the right of mâlgoozaree reali-"zable annually from the *sub-mokurrureedars*. The plaintiff cannot but be treated "as representative of the vendor. But in "this case that is not the point at issue. "The claim is simply one for possession. "Therefore, under the above-mentioned cir-"cumstances, this suit is dismissed," &c.

The Moonsiff having dismissed the suit as against all the defendants, the plaintiff appealed to the Subordinate Judge. In his ground of appeal, he complained that the intervenors had unnecessarily and improperly been added as defendants; but he also again repeated his claim for khas possession, and insisted upon his right to it. The Lower Appellate Court, like the Moonsiff, has evidently treated the question of khas possession as the one on which the plaintiff's suit depended. This is clear: for both the Lower Courts considered that the plaintiff had succeeded in proving his purchase from Sheo Dyal, and therefore were of opinion that the plaintiff was entitled to such rights as Sheo Dyal had possessed at the time of the sale. That the Subordinate Judge considered that khas possession was the main point is evident from his judgment, where he says: "The Court cannot believe, as has "been contended, that the vendor Sheo "Dyal held khas possession of the property "covered by the kobalah. True, the wit-"nesses for the plaintiff depose that the pro-"perty in suit is in the possession of the "vendor Sheo Dyal," &c. Then further on, he says, "when the *malikana* right had "been leased out before the execution of "the bill of sale by Sheo Dyal, how then "could he retain khas possession as has "been deposed by the plaintiff's witnesses?"

The Lower Appellate Court, concurring with the Court of first instance, dismissed the appeal.

The plaintiff appeals to us, and complains of the intervenors having been added as defendants, and says that, inasmuch as he originally sought relief against Sheo Dyal alone, those parties were improperly made defendants, and the issue as to their rights as dur-mokurrureedars ought not to have been tried. The contention now is that these parties should be struck out of the record, and that the suit should be treated as one solely between the plaintiff and Sheo Dyal. Various cases have been referred to, and more especially the case of Ahmed Hossein *versus* Mussamut Khodeja (10 Weekly Reporter 369), which is said to be a case on all fours with the present, and to support the contention that this Court ought now to strike out the names of these parties from the record.

The circumstances of that case, however, are by no means parallel with the circumstances of the present case; and there is nothing whatever to indicate that the Court was of opinion that intervenors can be removed from the record by an Appellate Court. The Court said that, inasmuch as the plaintiff in that suit did not seek for any decree which necessarily would affect the intervenors, the Lower Court ought not to have made them parties. But the Court, having disposed of certain questions of law between the original defendant and the plaintiff in the suit, came to the conclusion that the plaintiff's case as against the principal defendant was bad, and dismissed the suit altogether as against him. Having so dismissed the suit, the Court went on to say that it was unnecessary to enter into the question raised between the plaintiff and the intervenors (that question being whether certain property which the plaintiff alleged to belong to the estate of a deceased person did belong to that estate), adding that, as regards the intervening defendants, they were volunteers, and should pay their own costs of suit, and that their rights as regards the property, the subject of the suit, would be unaffected by the issue of the litigation. The intervenors' names were not, as a matter of fact, removed from the record; and from the beginning to the end of the judgment of the Chief Justice and Mr. Justice Mitter there is no indication of any opinion that the names ought to be or could be so struck out.

In the present case, I am of opinion that, inasmuch as the plaintiff sued only his own vendor, and asked for no relief against any one else, it was *primâ facie* unnecessary for these intervenors to appear in the suit at all; and probably the Court of first instance would have done better if it had not made them defendants. But the course which the case has taken since these intervenors were added as defendants has shown that the plaintiff really did intend that they should be affected by the decree which he asked for nominally against his vendor only. The plaint claims "possession" of the property without indicating what sort of possession. As soon, however, as the inter-

The Court of first instance found on the evidence that Ramlochun survived his father, and that, according to the Hindoo Law, the plaintiff is the heir of Ramlochun. The suit of the plaintiff was decreed.

In appeal, the Subordinate Judge of East Burdwan, Baboo Rassick Lall Bose, reversed the decision of the Moonsiff. He observes that the Moonsiff has not stated on what principle he holds the plaintiff to be the heir of Ramlochun.

The Subordinate Judge was of opinion that, according to the contention of the pleaders for the defendants, it appeared that the inheritance passes down to the maternal grandfather, and that no other offspring of the maternal grandfather can succeed to the property as heir; for these reasons, being of opinion that the plaintiff was not the true heir of the deceased Ramlochun, the Subordinate Judge reversed the decision of the first Court.

The grounds of special appeal are that the plaintiff, as the great-grandson of Ramlochun's maternal great-grandfather, is entitled to succeed to the estate left by Ramlochun, and that the Subordinate Judge's decision is wrong in law.

I am of opinion that the decision of the Moonsiff is correct.

The plaintiff takes the estate of Ramlochun as a *Sapinda*, and not as a *Sakoolya* or a *Samandoca*. He, the plaintiff, is entitled to offer undivided oblations to his great-grandfather, Kishtonath, to whom the deceased Ramlochun was also bound to offer such oblations. The plaintiffs, Ramlochun and Kistonath, are therefore all *Sapindas* of each other.—*Vide* page 283, *Vyavashta Durpana*, Volume I., first edition.

The defendants are not the heirs of Ramlochun, they being the father's brother's daughter's sons of the said Ramlochun.—*Vide* Case No. 2130 of 1863, published in the Special Number of the Weekly Reporter, pages 176, 177.

I would reverse the decision of the Subordinate Judge, and restore that of the Moonsiff.

The special appeal is decreed with costs payable by the special respondent.

Markby, J.—In this case, it appears to me sufficient to say that the plaintiff is an heir of the deceased. This being so, and it being admitted that there is no nearer heir than the plaintiff, he is entitled to recover.

The 20th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Compensation—Land taken for public purposes —Act VI. of 1857.

Case No. 212 of 1868.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 7th August 1868.

The Bengal Coal Company, Limited (Plaintiffs), *Appellants,*

versus

Maharajah Dheraj Mahtab Chund Bahadoor and others (Defendants), *Respondents.*

Mr. G. C. Paul for Appellants.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Respondents.

A portion of the area of two villages having been taken under Act VI. of 1857, and compensation deposited in the Collectorate, the dur-putneedar sued for the same, contending that the zemindar was entitled to twenty times the rental payable by the dur-putneedar less expenses of collection. The zemindar claimed twenty times the profits he derived from the putneedar less revenue paid to Government.

HELD that, as the plaintiff's calculation secured to the zemindar a more favorable result than that for which the latter himself contended, it was sufficient to decree the suit without determining the proper principle on which compensation should be allowed.

Kemp, J.—THE Bengal Coal Company, Limited, are the plaintiffs in this case. The suit is to recover Rupees 7,494-12-6 for land taken up for railway purposes under Act VI. of 1857. The plaintiff states that two lots, namely, Mouzah Dandadihee and Mouzah Mungulpore in the zemindary of the Rajah of Burdwan, are held by the plaintiff in dur-putnee, the total area of the mouzahs being 6,143 beegahs 4 cottahs, and the jumma payable being Rupees 1,172-3-6. Of this area of 6,143 beegahs 4 cottahs, 83 beegahs 15 cottahs 15 chittacks were taken up for railway purposes on the 24th of November 1862, and the amount of compensation paid for the land so taken is Rupees 5,286-4, which sum, we are informed, is now in deposit in the Collectorate invested in Government securities under the provisions of Section 29 of Act VI. of 1857. The plaintiff, in the Schedule appended to his plaint, states that the jumma or rent

receivable on the whole of the 83 beegahs 15 cottahs 15 chittacks is Rupees 293-10; that the collection-charges are Rupees 29-5 leaving a balance of net collections of Rupees 264-5, and twenty times that amount is Rupees 5,286-4, the total compensation awarded by the Railway; that the amount payable to the plaintiff out of this sum is Rupees 4,996-15 and the interest on the above sum from May 1863 to July 1867, Rupees 2,497-13-6, making a total of Rupees 7,494-12-6 claimed by the plaintiff.

The Rajah claimed under the "established custom" to obtain a two-third share of the compensation-money, and stated that the dur-putneedar and putneedar were entitled to one-third only.

The putneedar stated that "she was not "unwilling to receive the value of her "interest in the land taken away by the "Railway, in conformity with the prece-"dents laid down by this Court, but that "she could not do so on account of objec-"tions having been raised by the zemindar."

The Judge of Beerbhoom has given a decree to the dur-putneedar, the plaintiff, for Rupees 1,639-14-4 or a third share of the entire compensation-money minus Rupees 122-3 due to the putneedar.

The plaintiff appeals against this decision. There is no appeal on the part of the putneedar, and she has not appeared in this Court. The area, as stated by the plaintiff for the villages of Mungulpore and Dandadihee, is not disputed by the other side. It is also admitted that the real name of the village is Dandadihee, and that the plaintiff's calling it Daudabâgh instead of Dandadihee is a mere clerical error. It is also not disputed that the dur-putneedar pays to the putneedar Rupees 1,172-3-6 as jumma for the area of the two villages Mungulpore and Dandadihee. The rental of the 83 beegahs 15 cottahs 15 chittacks taken by the Railway would be Rupees 15-15-6, or about 3 annas 1 pie per beegah, and deducting expenses, Rupees 1-8, the balance or net rental payable by the dur-putneedar is Rupees 14-7-6, twenty times that amount is equal to Rupees 289-5; this is the compensation which the plaintiff contends the Rajah, the zemindar, is entitled to.

The pleader for the Rajah contends that the profits he would receive from the putneedar after paying the Government revenue must be taken into consideration. We have done so. It is admitted by the Baboo, the pleader for the Rajah, that the putneedar pays to the Rajah Rupees 752, and therefore, assuming that the Rajah pays nothing at all to Government for sudder jumma, the rental he would receive from the putneedar in proportion to the whole area of the two mouzahs would be less than 2 annas a beegah. Now, the calculation assumed by the plaintiff gives the Rajah 3 annas and a fraction a beegah. It is, therefore, clear to me that any further enquiry into the matter would only result in the Rajah receiving less than what the plaintiff is willing to allow him. Taking, therefore, the whole amount in deposit, and deducting therefrom Rupees 122-3 awarded to the putneedar, and from which award she has not appealed, and Rupees 289-5 payable to the Rajah, the zemindar, being twenty times the rental of Rupees 14-7-6, which he would derive from the dur-putneedar, the balance of Rupees 4,874-12 is due to the plaintiff, and this sum I would award with the accruing interest in proportion, assuming that the compensation-money has been invested in Government securities as provided for by Section 29 of Act VI. of 1857. The plaintiff to recover costs in proportion to the amount decreed in both Courts from the Rajah.

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The defendants are not the heirs of Ramlochun, they being the father's brother's daughter's sons of the said Ramlochun.—*Vide* Case No. 2130 of 1863, published in the Special Number of the Weekly Reporter, pages 176, 177.

I would reverse the decision of the Subordinate Judge, and restore that of the Moonsiff.

The special appeal is decreed with costs payable by the special respondent.

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The Rajah claimed under the "established custom" to obtain a two-third share of the compensation-money, and stated that the dur-putneedar and putneedar were entitled to one-third only.

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a final order upon the case; and if any disputes arose as to the division of that money, I think a very proper course would be to draw certain issues, and to follow for the disposal of those issues the procedure adopted in civil suits as laid down in Act VIII. of 1859.

In this case, the parties seem to have treated the matter, and proceeded in every way as in a regular suit; and although this procedure appears to me erroneous, it does not seem necessary to do more than observe upon it as no objection was taken on that point by any of the parties at any stage of the case, and the effect of what has been done is for all purposes the same as if a proper procedure had been followed.

Now, with regard to the main question, that is, the question of the principle to be followed in apportioning the compensation-money, I do not think it necessary in this case to give any opinion whatever. Mr. Paul has laid down as a proper principle this. He says, I, the dur-putneedar, pay a rent of 1,172 rupees 3 annas 6 pie annually for 6,143 beegahs 4 cottahs of land. I will assume that the whole of that goes into the pocket of the zemindar, and that will give him a sum of 3 annas 1 pie per beegah; 83 beegahs 15 cottahs 15 chittacks have been taken by the Railway Company, and therefore at the above rate the rent of those 83 beegahs 15 cottahs 15 chittacks would be 15 rupees 15 annas, which, multiplied by twenty as representing the value of the zemindar's interest at a twenty years' purchase, would make 289 rupees 5 annas, and that is what he is entitled to. On the other hand, the zemindar says that the true way of arriving at my annual profits is to see what I receive from the putneedar per beegah, what I pay as revenue to the Government per beegah, and then having ascertained that, the difference between these two sums would represent my annual profits upon which the sum to be awarded to me as compensation would have to be calculated at the rate of twenty times the annual profits as representing the value of the interest held by me. Both parties here make several assumptions. Both assume 20 years' profits as representing the value of the land. Both assume further that the rent paid in the one case, and the Government revenue in the other, are paid equally upon all and every portion of the land, that is to say, that all differences in the greater or lesser value of any portion of that land is to be disregarded. Both assume, further, that the interests of the zemindar are fully exhausted by the rent which he receives from the person next inferior to him in point of tenure. Whether these principles are right or wrong, it is unnecessary for us, under the present circumstances, to express any opinion. It is quite clear that the principle laid down by Mr. Paul is more favorable to the zemindar than that for which the zemindar himself contends, and therefore it is sufficient for us, without deciding which of these principles is the correct one, if we give the zemindar his quota upon the more favorable terms proposed by Mr. Paul.

The only other question is as regards the putneedar, and it might perhaps have been necessary, before passing any order upon the plaintiff's application, to take care that she had due notice that that final order was about to be passed, but all necessity for our doing so is obviated in this case as the putneedar has not objected to the sum of Rupees 122-3 awarded her in the Court below as her share of the compensation-money; and the only point which would remain to be decided would be whether that sum should be deducted from the amount receivable by the zemindar or from that receivable by the dur-putneedar, and that would necessitate a further enquiry. Mr. Paul has, however, and I think with very great wisdom, consented to that amount of Rupees 122-3 due to the putneedar being deducted from his quota, instead of having all the trouble and expense which a further enquiry would entail, and which would necessarily be much greater than the amount involved. The result is that we are now enabled to make a final order under which the zemindar will draw from the amount in deposit in the Collectorate the sum of Rupees 289-5 admitted to be due to him by the plaintiff; the sum of Rupees 122-3 will be paid to the putneedar, and the remaining balance of Rupees 4,874-12 to the Bengal Coal Company with interest on each of these sums in proportion, as laid down in Mr. Justice Kemp's judgment.

The 24th August 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

High Court's decrees—Limitation—Section 19, Act XIV., 1859.

Case No. 279 of 1869.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 3rd April 1869, reversing an order of the Sudder Moonsiff of that District, dated the 5th December 1868.

Huro Pershad Roy Chowdhry (Decree-holder), *Appellant,*

versus

Manick Lushkur (Judgment-debtor), *Respondent.*

Baboos Nil Madhub Sein and *Bhowanee Churn Dutt* for Appellant.

Baboo Khetturnath Bose for Respondent.

Where the High Court rejected an application for review of a judgment passed by the late Sudder Court, it was held that, while the decree of the Sudder Court was governed, in the matter of limitation, by the rule laid down in Sections 20 and 21, Act XIV. of 1859, the only law applicable to the decree of the High Court was Section 19 of that Act.

Loch, J.—In this case, it appears that the special appellant wishes to execute two decrees both for costs, the first decree passed by the late Sudder Court in 1861, and the second passed by the High Court in 1864, which was an order rejecting an application for review of the judgment passed in the former case by the Sudder Court. The application for execution in these cases was made in 1868; and it is urged, in order to meet the plea of limitation, that these decrees being the decrees of the High Court are not governed by the rule laid down by Sections 20 and 21, Act XIV. of 1859, but by the rule laid down in Section 19 of that Act, which allows 12 years as the period within which the decrees of Courts established by Royal Charter can be executed.

We think that there can be no doubt that the decree of the late Sudder Court of 1861 cannot now be executed, as it is not the decree of a Court established by Royal Charter. But the decree of the High Court for costs passed in 1864 cannot be governed by the provisions of Sections 20 and 21 of Act XIV. of 1859, for the High Court is a Court established by Royal Charter, and the only law which is in force by which the execution of decrees of Courts established by Royal Charter is governed is that laid down by Section 19, Act XIV. of 1859.

We reverse so much of the Judge's order which prohibits execution of the decree of the High Court of 1864.

Under the circumstances of the case, we think that the parties should bear their own costs.

The 24th August 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Notice under Section 17, Act X., 1859.

Case No. 840 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 31st December 1867, affirming a decision of the Deputy Collector of that District, dated the 29th September 1866.

Chunder Nath Ghose (one of the Defendants), *Appellant,*

versus

Shotooram Mojoomdar and others (Plaintiffs), *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Ashootosh Dhur for Respondents.

By serving a notice on defendant under the terms of Section 17, Act X., 1859, plaintiff was held to have treated defendant as a ryot having a right of occupancy, and to be debarred from suing him for enhancement of rent as an under-tenant or middle-man.

Loch, J.—The plaintiff's case must, in my opinion, fail if upon no other ground, yet upon this one ground. He seeks to enhance the rent of the defendant upon the ground that the productive power of the land has increased without the agency of the defendant, and also the value of the produce has increased. He served a notice upon the defendant under the provisions of Section 17, Act X. of 1859; he has thereby treated the defendant as a ryot having a right of occupancy. He comes into Court, and tells

us that the defendant is not a ryot having a right of occupancy, and that he is not a ryot at all, but that he is an under-tenant, and ultimately he admits that defendant is a middle-man.

Looking at the terms of the notice which was served upon the defendant, it appears to me that it was not a notice which was consistent with the position which the defendant holds. On this ground alone the plaintiff's suit must be dismissed.

We therefore decree this appeal, and dismiss the plaintiff's suit with costs in all the Courts.

Mitter, J.—I entirely concur in this order. The grounds of enhancement specified in the notice are altogether inconsistent with the grounds stated in the plaint, and these last again are altogether inconsistent with the case which the plaintiff attempted to make out by the evidence. I do not think that any plaintiff ought to be permitted to change his case in this manner, and that it would be countenancing gross injustice, if we are now to permit the plaintiff to amend his notice of enhancement, his evidence, and the plaint with reference to which that evidence was given.

The 25th August 1869.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Mahomedan Law—Endowments—Mortgaged property—Money.

Case No. 60 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 8th March 1869.

Khajah Hossein Ali (Defendant), *Appellant,*

versus

Shahzadee Hazara Begum (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboo Unnoda Pershad Banerjee* for Appellant.

The Advocate-General and *Mr. R. T. Allan* and *Baboos Chunder Madhub Ghose* and *Romesh Chunder Mitter* for Respondent.

HELD (by Kemp, J., whose opinion prevailed) that the mere fact of a mortgage subsisting at the time when an endowment of property is made does not render such endowment invalid under the Mahomedan Law; and that the appropriation of money is not the appropriation of a thing "consumed in using" in these days when Mahomedans openly disregard the prohibition to take interest, inasmuch as money can be invested in Government securities, and the interest appropriated to the purposes of the endowment.

HELD (by Markby, J.) that there can be no complete endowment of mortgaged property until the property is released, and that the appropriation creates a valid obligation on the appropriator and his heirs to release the property. If the release is effected by sale, the surplus proceeds will have to be invested in the purchase of immoveable property for the purpose of the appropriation.

Kemp, J.—THIS is a suit to recover in right of inheritance the sum of Rupees 13,243-1-4, being a moiety of the surplus sale-proceeds of a certain estate, the said moneys being in deposit in the Collectorate.

The plaintiff alleges, and this fact is not disputed, that under the Mahomedan Law she is entitled to one-half the estate of her father who died on the 8th of Chyet 1268 B. S.

The plaint proceeds to state that the father of the plaintiff, on the 12th December 1855, pledged to the plaintiff the putnee talook Belsar as security for the payment of a debt under a kistbundee; that the plaintiff brought a suit for the recovery of the money due under the kistbundee, and obtained a decree; that on taking steps to satisfy her decree by sale of the property pledged, the defendant claimed the property as endowed property; the claim was, however, rejected and a sale ordered. In the meantime, the rent of the aforesaid putnee falling due, the putnee was sold by the Collector on the 1st Jyet 1275, for Rupees 42,500. After payment of the rent due to the zemindar, the surplus sale-proceeds were held in deposit. Out of the sum in deposit, the plaintiff has recovered the sum due to her under the mortgage, Rupees 12,780-1-3; the balance still in deposit is Rupees 26,486-2-9.

The plaintiff states that, as her father had previously mortgaged the property to her, he had no power to make an endowment of the property before the mortgage was redeemed, and that any endowment, if made, would be invalid. As, therefore, the surplus sale-proceeds, after paying the rent and satisfying the plaintiff's lien, amount to Rupees 26,486-2-9, the plaintiff, in right of inheritance, is entitled to one-half of that sum, for which she brings her suit.

The defendant states that the property in dispute was made an endowment of by

Khajah Ali Hossein; that the mere fact of a mortgage subsisting when the endowment was made was no obstacle to a valid endowment. The sale-proceeds belong to the endowment, and must be appropriated to the purposes for which the land was originally given in endowment, and the plaintiff is not entitled to any portion of the sum in deposit in right of inheritance.

The Subordinate Judge of East Burdwan has decreed the plaintiff's suit.

The Subordinate Judge holds "that, as "before the endowment was made the pro-"perty was under mortgage, the endowment "(literally gift) of such a property not "freed from encumbrances is by no means "valid under the Mahomedan Law." The Subordinate Judge quotes page 458, *Futwa Alumgeeree*. Further, the Subordinate Judge found on perusal of the towliutnamah, or deed of endowment filed by the defendant, that the gift of the property was uncertain, indistinct, and conditional, and therefore invalid under the Mahomedan Law.

The Subordinate Judge, on the third issue raised in his Court, namely, whether the property sold at auction was actually used for the purposes of the endowment, found, after placing the *onus* of proving this on the defendant, that it is not satisfactorily proved that the profits of the property sold were applied to the purposes of the endowment.

The defendant appeals. The existence of the mortgage at the time of the endowment, though disputed in the Court below, is admitted before us by the Counsel for the appellant. The contention on both sides is with reference to one point, and this too was the main point upon which the decision of the Lower Court turned, namely, whether the subsistence of a mortgage at the time the endowment was made renders such endowment wholly invalid under the Mahomedan Law or not.

It appears that Khajah Ali Hossein, the father of the plaintiff, executed a kisteebundee, or instalment-bond, in favor of his daughter Hazara Begum to secure the payment to her of Rupees 10,250, the debt being due to her in respect of the dower of her mother. By way of further security, and in order to insure the payment of the said amount, the landed property, the surplus sale-proceeds of which form the subject of this suit, was charged with the payment of the debt by way of simple mortgage.

Hazara Begum, plaintiff in the suit before us, instituted a suit for the recovery of the instalments which fell due in the years 1859, 1860, and 1861, and she obtained a decree on the 8th April 1863, which was affirmed on appeal by the High Court on the 4th of March 1864. On the 28th July 1863, Hazara Begum got a decree in another suit for the instalment which fell due in 1862. Both these decrees were simply decrees for the payment of a certain sum of money out of the estate of Khajah Ali Hossein, deceased. Neither of the decrees contained any declaration that the land was subject to a charge for the payment of the instalments, or that the land was to be sold in satisfaction of the decree.

The estate pledged by way of simple mortgage was never in the possession of the mortgagee. The plaintiff's father who made this endowment remained in possession as trustee for the mutawallee appointed under the towliutnamah, or deed of endowment, the said mutawallee being the grandson of the endower and at the time a minor.

On the question of the validity of the endowment, the authority upon which the Subordinate Judge has based his judgment is to be found at page 458 of the *Futwah Alumgeeree*. The passage has been translated for us, and runs thus: "If a man mortgages "land, and then makes an endowment of it "previous to redemption of the mortgage, "the endowment shall be binding, and this "shall not cancel the mortgage. If the land "after remaining some years" (not two years as translated by Baillie, page 555 of his Digest) "in the hands of the mortgagee, the "mortgage be redeemed, it shall revert to the "purpose to which it was appropriated; "should he, previous to the redemption, die "and leave sufficient assets with which to re-"deem the land, redemption shall be effected, "and the endowment *shall be rendered* "*effectual;* but should he not leave sufficient "assets, the land will be sold, and the en-"dowment shall be rendered void."

Now, from this it appears to me clear that the mere fact of the subsistence of a mortgage at the time the endowment is made does not render such endowment invalid. It has been objected to the validity of the appropriation that, inasmuch as the property appropriated was encumbered when the endowment was made, it is not possible to say over what portion of the endowed property the title of the party making the endow-

ment and that of the mortgagee extended, and therefore the appropriation being of an undefined part or portion of a thing, it is invalid. According to Aboo Yusoof, such an appropriation is not unlawful, though, according to Iman Mahomed, the other great disciple of Huneefa, it is unlawful. I can find no authoritative opinion of Huneefa on the subject, and "when the two disciples, "Aboo Yusoof and Iman Mahomed, differ "from their master Huneefa, the Maho-"medan Judge is at liberty to adopt either "of the two decisions which may seem to "him the more consonant to reason. Fut-"wahs, or law decisions, are given pri-"marily according to Aboo Yusoof, next "according to Iman Mahomed."—Harrington's Analysis, Volume I., page 229.

We have not been shown that the endower left no property or assets from which the charge on the property endowed might not have been paid off. The mortgage, a simple mortgage, was not redeemed by the sale of the property endowed. That property was sold for arrears of rent, and the plaintiff obtained satisfaction of her lien from the proceeds of that sale. There is a surplus which can be appropriated to the purposes, and to carry out the intention, for which the endowment was made.

But it was said in the course of the argument that the endowment being now represented by the balance of the surplus sale-proceeds or by money, which is consumed in using, and that the appropriation being of a thing which does not admit of its use without a destruction of the subject, it is invalid under the Mahomedan Law. There might, perhaps, have been some force in this argument at a time when to receive interest was, if not unknown, strictly prohibited to Mahomedans. But in these days such a prohibition is openly disregarded by Mahomedans in their every-day transactions. The sum remaining in deposit may be invested in Government securities, and the interest appropriated to the purposes of the endowment; the principal will remain intact, and so far from being "consumed in using," will, by being used, produce an income for the purposes for which it was the intention of the endower that his charity should be bestowed. There is, moreover, no reason why in a suit properly framed by any party really interested in keeping up the endowment, the Court should not direct the investment of the money in the aforesaid manner. The present suit of the plaintiff is not brought with the object of carrying out, through the intervention of the Court, the original intention of her father who made the endowment, but solely with the object of recovering as his heiress her share of the surplus sale-proceeds of the property appropriated.

As to the endowment being uncertain and conditional, I do not find, on perusal of the towliutnamah, that such is the case.

The performance of certain ceremonies at the great Mahomedan festivals is provided for, the festivals are distinctly enumerated, the poor who are always with us are to be relieved, and travellers looked after. The Government revenue, or in this case the rent, is to be paid, and the residue is to be expended in the maintenance of the relatives (who are also specified) of the endower, that is, of his mother and grandmother. The sister of the endower is also to be maintained and a small marriage portion given to her. It will be seen that the poor are provided for, which is the primary object of every wuqf. Settlements in favor of relations who are specifically named are made. Such an endowment is in every respect a lawful one under the Mahomedan Law—(pages 585 and 586, Baillie's Digest of the Mahomedan Law). Moreover, the plaintiff does not question the validity of the endowment on the ground of its uncertainty, but on the sole ground that it is invalid, inasmuch as, at the time it was made, a mortgage subsisted.

With reference to the question whether the proceeds of the endowed property were appropriated to the purposes of the endowment by the father of the plaintiff, this point was not argued by the Advocate-General, nor does it arise in this case in which the plaintiff, as before observed, sues, not as a party interested in the endowment being kept up, but to recover a fixed sum as her share in right of inheritance.

I would reverse the decision of the Subordinate Judge, and dismiss the plaintiff's suit with costs.

Markby, J.—In this case, it appears that one Khajah Syud Hossein being possessed of a certain putnee talook called Lot Belsar, on the 19th December 1855 executed a deed whereby, after reciting that there was due to his daughter Hazara Begum the sum of Rupees 10,250 in respect of her mother's marriage-portion which remained unpaid, he

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mortgaged to his daughter the said talook and its appurtenances as a security for the said sum, covenanting not to transfer the property by sale, gift, or mortgage, until the said sum should be paid, and declaring that, if he did so, the same should be held null and void.

The same Khajah Syud Hossein, on the 27th December 1859, executed a document whereby he professed to appropriate the property which he had previously mortgaged to his daughter for religious purposes. In this document, after referring to the duty which he felt it incumbent on him to perform of making provision for the assistance of travellers, and the maintenance of the heirs of his late son, he states as follows: "Consequently, for the sake of the maintenance of Khajah Hossein Ali, I do hereby "appoint him (who is my grandson) as a "mutwallee of the aforesaid Astana or Sepulchre under the following conditions: "that the said Hossein Ali shall neither be "competent to transfer the aforesaid property under a sale, gift, or mortgage, nor "to transfer the wuqf property in any other "way. He is hereby authorized to take "care and to assist the travellers and the "poor. He is to attend to Fatihas of Shabebarat, the Mohurrum, and the Eeds, and to "allow such expenses as are for solemnizing "the above festivals. He is to appropriate "such amounts as would remain in hand, "after the payment of the sudder jumma, "from the nett proceeds of Talooka Lot "Billissur and from the produce of the "gardens, for his personal expenses as well "as for his family, *i. e*, his grandfather "and mother."

When the latter deed was executed, all, or nearly all, the debt of Khajah Syud Hossein to his daughter was still due, and in the year 1863 she obtained a decree for the balance then due, amounting, with interest, to Rupees 12,780-1-3. This decree she sold, and while the person who bought the decree was about to execute it, the zemindar sold the putnee talook for arrears of rent for Rupees 42,500, After the rent was paid, the decree-holder applied for and obtained the amount of his decree, and the daughter then brought this suit claiming half the balance which remained in the Collectorate as her own by right of inheritance, alleging the appropriation by her father in 1859 to be invalid.

The appropriation has been held by the Subordinate Judge to be invalid, *first*, because at the date of it the property was not free from encumbrances. For this he refers to a text of Mahomedan Law in the *Futwa Alumgeeree*, page 432. *Secondly*, he holds that the gift was an indistinct one, inasmuch as it recites that the "heirs of the "donor will be supported, also acts of charity performed from the property left by the "donor." From this and what follows, I gather that the Subordinate Judge looks upon a reservation by the donor in favor of his heirs in the same light as a reservation in favor of himself, and considers that the gift is invalid; either because it is uncertain what is given to charity and what is reserved to the heirs of the donor, or because a reservation to the heirs as being equivalent to a reservation to the donor himself is illegal, or for both these reasons combined.

Nothing has turned in the argument of this appeal upon the rest of the judgment of the Lower Appellate Court, which it is, therefore, unnecessary to notice.

The respondents have thought fit to support only the first of the grounds on which the Subordinate Judge held the gift to be invalid. We are, therefore, relieved from the necessity of considering the other ground or grounds taken by the Lower Appellate Court. As I shall have to point out again presently, the means of discovering the Mahomedan Law which this Court possesses are so extremely limited, that I am glad to avail myself of any mode of escaping a decision on any point connected therewith; but I am desirous not to be understood as giving the least countenance to the notion that a disposition of property which really leaves the holder at liberty to enjoy it, according to the ordinary mode of enjoyment by Mahomedans generally, is valid for the purpose of impressing upon that property the character of absolute inalienability, merely because it contains a vague and merely nominal appropriation to charitable purposes. The deed in question only directs that to be done which the donor himself, as proved in this case, as absolute owner had been in the habit of doing, and every Mahomedan owner of property would consider it his duty to do. It would be dangerous to assume a proposition of law which would enable every Mahomedan owner of property to render it inalienable by the merely nominal ceremony of appropriation.

As regards the question whether the appropriation is void as being subject to an

encumbrance, I find no little difficulty in giving an opinion. The book in which the text occurs upon which the Subordinate Judge relies, as showing that the gift is bad, is in Arabic—a language unknown to us as well as to the Counsel engaged in the cause. At any rate, no attempt was made to refer to the original, but the Advocate-General pointed out a passage in Mr. Baillie's Digest of Mahomedan Law, page 585, which he conceived to be a translation of the passage of the *Futwa Alumgeeree* relied upon by the Subordinate Judge. Since the argument, we have caused a translation to be made of the passage quoted by the Subordinate Judge, which differs somewhat from the passage in the book of Mr. Baillie; but I do not thence infer that Mr. Baillie's is necessarily a wrong translation; he may have introduced a modification from some other Futwa in the same or another collection.

It is hardly necessary to point out how exceedingly unsatisfactory the course is which we here have to pursue. Under any circumstances, to extract the law from a single short passage of a single book, and that book merely a compilation, is highly dangerous. However skilful the author may be, it is almost certain that his meaning can only be fully grasped by a consideration of other parts and passages which he tacitly assumes. We can, however, carry our investigations but very little further. The custom of taking evidence on questions of Mahomedan Law, though it has not fallen altogether into disuse, is so much out of repute that neither party has placed any reliance on that given in this case. Mr. Baillie's work, not being a translation, but the author's own view of the law, cannot, according to the established rule, be cited as an independent authority, until its value has been fully tested, which is always considered to require a period at least as long as the life of the author. The only work on Indo-Mahomedan Law accessible to us in anything which approaches the original form is the *Hedaya*. I do not find in the *Hedaya* any passage directly bearing upon this subject. It is clear, however, that it is closely connected with a subject which is there treated of, namely, what is necessary to constitute a valid appropriation. But this is just the subject on which the three great Doctors of Indo-Mahomedan Law are somewhat at variance. Aboo Yusoof's opinions are the most lax on this point. Iman Mahomed's the most strict; whilst their master, Aboo Haneefa, appears to stand between them. *See* Hamilton's Hedaya, Volume III., page 337.

If we carried out the doctrines of Aboo Yusoof, as stated in the Hedaya, to their logical conclusion, I think it is clear that we should arrive at the result that, even if there was not a complete appropriation by Khajah Syud Hossein, there was a binding obligation to make a complete appropriation by clearing off the mortgage. Whereas, if we carry out the doctrines of Iman Mahomed, we should, I think, arrive at an opposite conclusion. It seems to me that an appropriation of a thing under mortgage would be void according to Mahomed, because in that case there can be no absolute transfer to the mutwallee of a thing defined; the thing appropriated being liable to be sold, and an indefinite part abstracted from appropriation—(*See* pages 340, 349). Aboo Haneefa's doctrines are not given with sufficient clearness to enable me to draw any inference as to his opinion on this particular point.

In this difficulty, I have had recourse to the only other work on Mahomedan Law to which I have access—Mr. Perron's Translation of the work of Khalil Ibn Ishak. This author belongs to a sect (Sunis) said not to be known in India (Morley, page 248), and I should not have recourse to such a remote source of information were anything else available; but I think it safer to trust to the opinion of a Mahomedan lawyer of another branch of the same school than to any speculation of my own. I quote from the translation of Khalil Ibn Ishak's work by Mr. Perron printed at Paris in 1852 by the French Government, which is a model, in my opinion, of what a Government ought to do for the laws of a country which it professes to administer. In Volume V., page 25, it is said: "L'immobilisation "(wuqf) d'une chose possédée in propriété "privative est licite et devient obligatoire "pour l'immobilisant en dehors même de "toute intervention de l'autorité judiciaire. "Il est licite d'immobiliser même une chose "sur laquelle un autre individu a un droit "partiel de propriété, même une chose hy-"pothéquée on mise en gage on a lonage; "mais l'immobilisation n'est accomplie qu "apres que la chose lonée on engagée, &c., "est affrouchie des mains et des droits de "celin qui la détient on qui en partage la "propriété. Dans ce dernier cas, l'associé "proprietaire immobilisant est tenu de ven-"dre sa part du bien commun on de la chose

"possédée en commun, et d'en employer le "prix a l'acquisition, pour l'immobiliser d'une "chose semblable à celle qu'il a vendue."

Then at page 33, amongst the various instances given of void appropriations, he says—"lorsque l'individu qui a immobilisé, "par exemple, une mosquée on un pont on "des puits, &c., ne c'est pas, avant de de-"venir insolvable on avant de mourir on "avant d'etre attaint de la maladie à la-"quelle il a succombé, entierement désaisi "de toute action on droit d' action on "d' inspection sur la chose immobilisée et n' "a pas par abandon complet, livré cette "chose a la libre jonissance du public; si, "jusqu' au moment de l'étal d' immobilité, "on jusqu' au moment du décés on de la "maladie qui a causé la mort, l' immobi-"lisateur a encore en la main sur ce qu' il "avait immobilisé ce kabons est frappé de "nullité', par la raison qu'il est resté incom-"plet et dés lors, dans le prèmier cas, c'est "a dire dans le cas d' insolvabilité de l' "immobilisateur, les creancièrs ont tous leur "droits sur la chose immobilisée, dans les "deux autres cas, les successibles ont droit á "heriter de cette chose."

This opinion is clear enough; it makes appropriation obligatory on the appropriator even when the property is under pledge, but the appropriation is evidently incomplete, and the obligation is upon the appropriator to complete it. If he does not do so during his lifetime, the appropriation is null, as the obligation does not pass to his heirs.

It is also clear that this author has adopted the view of appropriation taken by Aboo Yusoof rather than that of Iman Mahomed. But Aboo Yusoof would hardly have treated the appropriation of mortgaged or undivided property as complete. I think he would have accepted Khalil Ibn Ishak's view as much more consonant to the general principles of Mahomedan Law that an obligation to appropriate was thereby created.

This view is also that which, as I gather, is adopted by the *Futwa Alumgeeree*, but it is said to be there carried a step further than Khalil Ibn Ishak will admit. The latter, as has been seen, distinctly says that this obligation is not binding on the heirs. The author of the *Futwa* in question seems to think that it is, and that they are bound to render it effectual. So far as the *Futwa Alumgeeree* agrees with the opinion of Aboo Yusoof and that given in the work of Khalil Ibn Ishak, I think we are pretty safe in adopting it, namely, that the appropriation of mortgaged property created a valid obligation on the appropriator to clear the property. We ought perhaps also to follow the *Futwa* as an Indian authority, and hold that this obligation passes to the heirs, thus discarding altogether the adverse opinion of Mahomed. But I think all the authorities would lead to the conclusion that there is no complete endowment of mortgaged property until the property is released, and that it is the duty of the heirs to release it. If they cannot release it, the appropriation is null; if the release is effected by a sale of the thing mortgaged, the surplus proceeds will have to be invested by the heirs in the purchase of immoveable property for the purpose of appropriation. Until the appropriation is complete, I think it is clear that the title of the heirs is not diverted.

Now, in the case before us, Khajah Syud Hossein, the original owner of the property, died without having fulfilled the obligation he was under of clearing this property from the mortgaged debt. On his death, which took place eight or nine years ago, this property, therefore, vested in his heirs with (as I will now assume) the obligation to appropriate. During this period no attempt has been made by any one to fulfil the obligation, but the mortgage has been paid off and the property sold by an act over which none of the parties now before us had any control. The question then is, has there been any valid appropriation of the surplus sum which remains in the hands of the Collector, which gives the defendant an exclusive title to that surplus? I think there has not. Although I agree that Mahomedans no longer observe the prohibitions of their law in respect of taking interest for money, it was, I think, admitted on the argument of this case that an appropriation of money is never made, and if the appropriation in this case is carried out at all, in my opinion the only mode of doing so would be by vesting the surplus proceeds of the sale in the purchase of other immoveable property.

By some means or other the defendant has already got possession of Rs. 11,400-2-0. Why the defendant applied for that proportion of the surplus as he now contends he was entitled to the whole, is not very explicable; but the defendant states that it is his intention to purchase therewith some immoveable property, as I suppose, for the purposes of appropriation. There now remains, therefore, in the Collector's hands

a sum of about Rupees 15,000 out of the surplus, and whatever may be the obligation on the parties as to the manner in which the money is to be ultimately disposed of, I do not see why the plaintiff has not a good right to the intermediate custody of her share of the money. It may be that the obligation to appropriate will be held upon further investigation not to be complete; it may be that the law provides no means for enforcing such an obligation; it may be, as the Advocate-General contended, that the mere fact that the property now exists in the shape of money prevents a valid appropriation. Upon all these questions I give no opinion. Even taking the law most strongly against the plaintiff, I think it is clear that her interest in the property has not been divested, and I am by no means sure she may not ultimately turn out to be beneficially entitled. I think, therefore, that she has, as part-owner of the property, a right to a share in the custody of it. The rights of the defendant as mutwallee have not, in my opinion, yet arisen. The person who appointed him did not choose to complete his title; and he has not yet chosen to take steps to complete that title himself, though 10 years have elapsed since the imperfect appropriation was made. I think, therefore, that the plaintiff is entitled, not to a decree for the money, for the Collector is not a party to this suit, but to a declaration that she is entitled, as heiress of the late Khajah Syud Hossein, to the custody of half the surplus sum of Rupees 26,486-2-9 in the hands of the Collector of Burdwan, with such interest as may have accrued on the said half, down to the date of payment.

It is hardly necessary for me to add that I give my opinion in this case with every possible reserve, and subject to any modification which a more satisfactory investigation of the subject may produce.

Had Mr. Justice Kemp concurred in my opinion as to the law, I should have proposed to offer the defendant to retain the money in Court, provided that he paid into Court the share which he has taken out, and that the same should be retained for six months, during which period any person interested, and by law entitled so to do, might take steps to establish the validity of the deed of appropriation, and to carry out the intention of the appropriator under the control of this Court. But as my opinion on the law does not prevail, that proposition falls to the ground.

Upon the other point argued, that, if the appropriation is valid, the plaintiff is entitled to the benefit of the claim which gives the surplus proceeds of the income of the talook to the defendant and his family, I think the plaintiff is not included in that provision. I have had some doubts upon the point, and was at first inclined to think that the mention of the grandfather and mother was a merely false enumeration of the members of the family. But I think the clause which provides specifically for the maintenance and marriage-expenses of Omdah Begum, shows that the appropriator had only in his mind the particular persons whom he mentioned.

The 25th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Enhancement of rent—Excess land—Sections 15 and 16, Act X., 1859—Dakhilahs—Admission.

Case No. 1312 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 17th March 1869, reversing a decision of the Deputy Collector of Magoorah, dated the 19th June 1868.

Indro Bhoosun Deb Roy (Plaintiff), *Appellant,*

versus

Goluck Chunder Chuckerbutty and another (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

No one for Respondents.

In a suit for arrears of rent at enhanced rates where defendant pleads the provisions of Sections 15 and 16, Act X., 1859, if it is found that the tenure has been held at a uniform rent from the time of the Permanent Settlement, the plaintiff has no right to enhance the rent even though the land in possession of defendant may be in excess of that covered by the original tenure. If, on the other hand, the excess land was not included in the original tenure, but obtained subsequently without the consent of the plaintiff, the possession of the defendant must be considered adverse, and the suit must fail for want of privity.

A Civil Court has every right to accept dakhilahs tendered by a party, as undisputed documents, where the opposite party says that he is not prepared to deny their genuineness.

Mitter, J.—THIS was a suit for arrears of rent at enhanced rates. Both the Lower Courts found on a former occasion that the

tenure held by the defendants was protected from enhancement under the provisions of Sections 15 and 16, Act X. of 1859. Against those decisions, a special appeal was preferred to this Court by the plaintiff, and the case was remanded to the Court of first instance with directions to determine whether the defendant was in possession of any lands in excess of those which were originally included within his tenure, and, if so, whether the plaintiff was entitled in the present suit to ask for enhancement of rent in respect of those lands.

After the remand, the Deputy Collector gave a decree to the plaintiff in respect of 97 beegahs of land which were alleged to have been found by measurement to be in excess of the quantity covered by the original tenure.

On appeal, the Judge has held that, inasmuch as the tenure held by the defendants is a talook which has been in existence from the time of the Decennial Settlement, and inasmuch as the grounds of enhancement specified in the notice are not those which are required by Section 51, Regulation VIII. of 1793, the plaintiff could not obtain a decree for enhancement of rent on account of the so-called excess lands.

In special appeal, the first objection taken is, that the Lower Appellate Court has gone beyond the order of remand in throwing out the plaintiff's claim upon the ground that the grounds of enhancement stated in the notice are not in conformity with the provisions of Section 51, Regulation VIII. of 1793.

We are of opinion that this objection is not valid. Nothing was finally determined by the order of remand; and the question as to whether the plaintiff, special appellant, was entitled to any enhancement in respect of the so-called excess lands was left an open one. The words of the remand-order are as follow: "We think that the plaintiff's contention is valid, and that he is entitled to have a finding as to whether the defendant holds the difference between 323 beegahs covered by his holding, and 680 beegahs, the quantity alleged by the plaintiff to be in defendants' possession, and also whether the defendants' liability to pay rent for that quantity can be determined in this suit for enhancement of rent, or not, and, if it can, what is the amount of rent for which they should be liable?" There can be no doubt whatever that, with these instructions before him, the Judge had every right to determine whether the plaintiff was entitled to claim any enhancement of rent on account of the so-called excess lands.

With regard to the plaintiff's right to obtain such enhancement, we are of opinion that the finding of the Lower Appellate Court is quite sufficient to negative it. If the so-called excess lands were included within the original tenure that was created in favor of the defendants, there can be no doubt whatever that the defendants are entitled to hold all the lands in their possession without being subject to any claim for enhancement of rent under the provisions of Section 16, Act X. of 1859. It was found on the former occasion (and that finding was not interfered with by this Court in special appeal) that the defendants' tenure has been held at an uniform rate from the time of the Permanent Settlement, and it would follow as a matter of course that, if the so-called excess lands, together with the other lands in the possession of the defendants, have been held by them at an uniform rate from the time of the Permanent Settlement, the plaintiff would have no right to enhance their rent, even though the quantity of land in their possession might be found to be in excess of that which was alleged to have been covered by the original tenure. If, on the other hand, the so-called excess lands were not included within the original tenure, but were taken possession of by the defendants by subsequent encroachments, there cannot be any doubt whatever that the defendants got possession of them without the consent of the plaintiff, and it is admitted that the defendants have never paid any rent on account of those lands. Under such circumstances, the possession of the defendants in respect of those lands must be considered as adverse to the plaintiff, and the present suit for enhancement must fail for want of privity. But even if this possession is not considered as adverse, the present suit as brought in the Revenue Court for enhancement of rent must necessarily fall to the ground.

There appears to us to be another objection which is fatal to the plaintiff's claim. What the plaintiff sought by this suit was to enhance the rent payable on account of the original tenure, and not to obtain any assessment of rent on account of the so-called excess lands, treating these so-called excess lands as constituting a separate tenure by themselves. This being so, when it has been found that the original tenure itself is not liable to enhancement, the plaintiff's case as brought must fail, and the plaintiff must

seek his remedy elsewhere for the purpose of assessing the so-called excess lands if that remedy is not already barred by limitation, and if he is in a position to establish that those lands were not included within the original tenure which was created in favor of the defendants.

The second objection taken is, that the Judge has found that the tenure held by the defendants is a talook, existing from the time of the Permanent Settlement, on the strength of certain dakhilahs which have not been duly proved. We find, however, that this was a conclusion at which the Judge as well as the Deputy Collector had arrived on the former occasion, and there was no objection taken against that conclusion at the time when the plaintiff preferred his first special appeal. But be this as it may, it is perfectly clear that the facts stated by the Judge were quite sufficient to justify him in accepting these dakhilahs as undisputed. The Judge says that he asked the pleader for the appellant to state whether he intended to deny the genuineness of those dakhilahs, to which the pleader replied that he was not prepared to say that they were not genuine. Upon this state of facts, the Judge was fully justified in accepting those dakhilahs as genuine without asking the defendants to prove them formally.

Reference has been made to a Full Bench decision of this Court, in which it was held that the absence of a denial on the part of an individual who is a party to a suit is not sufficient to show that the documents produced by his adversary have been admitted as genuine. But that case has no bearing whatever upon the circumstances with which we have to deal in the present case. If the pleader for the appellant had stated to the Judge that he intended to dispute the genuineness of the dakhilahs produced by the defendants, the Judge might have, in the exercise of the discretion vested in him by the Code of Civil Procedure, allowed the defendants to prove those documents by legal evidence. The pleader for the appellant, however, as we have already observed, stated that he was not prepared to deny their genuineness, and, under these circumstances, the Judge had every right to accept them as undisputed documents. We see no reason, therefore, to interfere with the judgment of the Lower Appellate Court, and we must, therefore, dismiss this special appeal, but without costs, as the respondents have not appeared.

The 26th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Surplus sale-proceeds.

In the matter of Puddabutty Dossia, *Petitioner.*

Baboo Bama Churn Banerjee for the Petitioner.

Where surplus proceeds of property sold in execution are in deposit in a Court, the Judge is perfectly justified in refusing to pay out the money to any one but to the party in whose name it stands or to that party's agent.

Kemp, J.—THIS is an application on the part of Puddabutty Dossia and another lady, applying for an order to the Judge of Beerbhoom to pay to the petitioner the sum of Rupees 939, being the surplus sale-proceeds of an estate sold in execution of decree in which Rajah Mahomed Jahur Jama Khan was the judgment-debtor. The petitioners applied to the Judge, stating that the Rajah had, for a sum of Rupees 799, sold his claim to receive the aforesaid sum of Rupees 939 to the petitioners on the 9th of Chyet 1275. The Judge passed the following order: "The applicant's pleader "states that the application is not made un-"der Act VIII. of 1859. The Court will "not comply with the request. The money "is standing in the name of Rajah Mahomed "Jahur Jama Khan, and he can take it out "if he likes, or request the Court to pay it "to any agent of his." It has not been shown that the Rajah made any application in Court either to take the money out himself, or requesting the Court to pay it to the petitioners. I think, therefore, that the Judge was perfectly justified in passing the above order refusing to pay the money to the petitioners.

Markby, J.—I am entirely of the same opinion. A Judge who pays out money which has been deposited in Court, or which comes into his hands and remains there deposited on behalf of any one, incurs a most serious responsibility when paying the money to any one but the person in whose name it stands, as if the money was paid to the wrong party, the Judge might possibly have to make it good himself. I think, therefore, that a Judge is perfectly justified in taking any precaution he thinks proper when applied to to pay out that money to any one but to the person in whose name it stands.

The 26th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Mortgage—Foreclosure.

Case No. 1508 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 5th April 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 5th March 1868.

Raj Chunder Poddar (one of the Plaintiffs), *Appellant,*

versus

Sreemutty Monoruma and others (Defendants), *Respondents.*

Baboos Nuleet Chunder Sein and *Sreenath Banerjee* for Appellant.

No one for Respondents.

A certain property was mortgaged to *S*, who disposed of a portion to *R*. Both parties sued to recover possession after foreclosure. The Lower Appellate Court dismissed the claim as regards *R's* portion, because *R* had not been a party to the foreclosure-proceeding.

HELD, that as the foreclosure was duly carried out by "the receiver" of the deed of mortgage (Section 8, Regulation XVII. of 1806), that is, the original mortgagee, it was good as regards the whole property.

Bayley, J.—IN this case 8 annas of certain property was mortgaged to one Soorjo Monee, who disposed of 3 annas 10 gundahs of that 8 annas share to one Raj Chunder, the special appellant before us. These two parties sue in this suit to recover possession of the lands after foreclosure of the mortgage.

The defendants pleaded non-service of notice, limitation, and payment of the mortgage-debt.

The first Court gave the plaintiffs a decree.

The Lower Appellate Court has reversed that decision. The Lower Appellate Court has found that the notice was duly served on the mortgagor, but it has held that, inasmuch as the purchaser of the 3 annas 10 gundahs share was not a party in the foreclosure-proceeding, so that foreclosure was not completed so far as regarded this share. The Lower Appellate Court has accordingly dismissed that part of the plaintiffs' suit which had regard to the 3 annas 10 gundahs belonging to the purchaser Raj Chunder.

The plaintiff Raj Chunder appeals to this Court, and urges that the Lower Appellate Court was wrong in dismissing his suit to the 3 annas 10 gundahs, inasmuch as the foreclosure of the mortgage by the original mortgagee was valid in law to confer an absolute title in the whole property mortgaged upon herself and any body holding from or under her.

We think this contention good. The law on this point is to be found in Section 8, Regulation XVII. of 1806. That Section says: "Whenever the *receiver* or *holder of* "*a deed of mortgage* and conditional sale "may be desirous of foreclosing the mort-"gage, and rendering the sale conclusive on "the expiration of the stipulated period, or "at any time subsequent before the sum "lent is re-paid, he shall apply by a written "petition," &c., &c. The whole question, therefore, in the foreclosure-proceeding is confined between the mortgagor on the one side, and "the *receiver* or *holder*" of the *deed* of mortgage on the other. It is found in this case by the Lower Appellate Court that the foreclosure was duly carried out by at least the "receiver" of the deed of mortgage, that is, the original mortgagee, and so far, therefore, as the proceedings were concerned, the foreclosure was good as regards the whole property covered by the mortgage-deed.

We think, therefore, that the Lower Appellate Court was wrong in dismissing the plaintiff's (Raj Chunder's) suit as regards the 3 annas 10 gundahs, on the ground that he was not a party in the foreclosure-proceedings, and in this view we reverse the judgment of the Lower Appellate Court, and restore and affirm that of the first Court with costs of this Court and of the Lower Appellate Court.

The 26th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Appeal—Section 246, Civil Procedure Code.

In the Matter of Ajoodhya Doss and others, *Petitioners.*

Moonshee Mahomed Yusuff for Petitioners.

Where property attached in execution is released at the instance of an intervenor under Section 246, Civil Procedure Code, and retained in his possession, the decree-holder has no right of appeal.

Note by the Deputy Registrar.—THIS is a case in which property having been attached in execution of a decree, a third party appeared and objected, urging his right by purchase, and declaring that he was in possession.

The Lower Court allowed the claim, and released the property.

This appeal is from that order, and the judgment-debtor and intervenor are named as respondents.

According to Section 246, Act VIII. of 1859, the order of the Lower Court is final.

I beg to refer the appeal to the Court for orders as to its entertainment or otherwise.

Glover, J.—The petitioner appears to us to have no right of appeal in this case. The property was released by the Judge at the instance of an intervenor under Section 246, and it has been retained in that intervenor's possession. Whether this decision is a right or a wrong decision is not our concern. The fact remains that there has been a decision under that Section. The only way in which the petitioner can get rid of the effect of that decision as against this third party in possession is to bring a regular suit within one year from the date of the order.

The 26th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Mesne-profits—Joint liability.

Case No. 1308 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 17th March 1869, affirming a decision of the Moonsiff of Culna, dated the 27th August 1868.

Shama Sunkur Chowdhry (one of the Defendants), *Appellant,*

versus

Sreenath Banerjee (Plaintiff), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellant.

Baboos Bama Churn Banerjee and *Pilambur Chatterjee* for Respondent.

Plaintiff purchased a house with land attached, and sublet the property to his vendor, defendant No. 1. The defendants, however, having, in collusion with each other, prevented his enjoying rent, he sued for rent; but on their intervention the suit was dismissed. He then brought a regular suit, and obtained a decree from the Civil Court, for khas possession. His present suit is to recover wassilat.

HELD that, although the defendants were not all in possession, yet, as they all combined to oppose the plaintiff's possession, they were all jointly liable for the wassilat.

Kemp, J.—THIS was a suit to recover wassilat for the period stated in the plaint, amounting to 617 rupees 10 annas, after deducting the amount barred under the Statute of Limitation. The plaint, although it winds up with a prayer for wassilat, is somewhat curiously worded. It states that the plaintiff purchased a brick-built house with some land attached to it from the defendant No. 1, Bashmuttee Dossee, in 1268; that he then sublet the property to his vendor at the rate of 8 rupees 8 annas per month; that the defendants, in collusion with each other, prevented him from enjoying the rent; that he sued for rent, and on their intervention the suit was dismissed; that he thereupon brought a regular suit in the Sudder Ameen's Court for khas possession, and obtained a decree. He now asks for wassilat from the date on which he was dispossessed, or from 1269 up to date of suit, namely, the 16th Bhadro 1272.

Both Courts have given him a decree.

In special appeal it is contended that the Lower Courts, before declaring the special appellant liable for wassilat, should have found whether the special appellant was or was not in possession of any of the properties in dispute, and if in possession to declare him separately liable only for the amount due on account of the same, and that interest should not have been allowed except from the date of ascertainment of wassilat.

I think this special appeal must be dismissed. The decree is a joint decree, and the Lower Appellate Court in the first instance remanded the case to the Court of first instance for the purpose of trying whether all the defendants were jointly liable for the mesne-profits, and whether the defendant No. 3, the special appellant before us, was in possession of the property at all. The first Court, on remand, found that, although the defendant No. 3 was not in possession, yet he took steps along with all the other defendants against the plaintiff's possession over the whole of the property, and that, therefore, they were all jointly liable for the wassilat. It cannot be said that the Subordinate Judge did not pay attention to this point, for it was on this very point that he remanded the case, and he evidently came to the same conclusion as the first Court, namely, that the special appellant before us opposed the plaintiff in his endeavours to get possession of the property. I, therefore, think that the decision of the Lower Appellate Court is a correct one on this point, and that the plaintiff is entitled to wassilat jointly against all the defendants.

As regards the question of interest, the special appellant has not shown us any grounds upon which we could interfere in special appeal. Both grounds taken therefore fail. The decision of the Lower Appellate Court must be affirmed, and this special appeal dismissed with costs.

Markby, J.—I am of the same opinion. This is not an ordinary suit for wassilat, but it is founded on the special ground that there was a combination between the defendants to keep the plaintiff out of possession. It is, therefore, unnecessary for us to say how the law would be in an ordinary action for wassilat. In this particular case, both Courts have found that a combination between all the defendants existed, and this in itself is a good and sufficient reason for giving the plaintiff his decree for wassilat jointly against all the defendants.

The 26th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Appeal—Intervention.

Case No. 271 of 1869 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 3rd June 1869, affirming an order of the Deputy Collector of that District, dated the 12th November 1868.

Ajmeet Pattuck (Intervenor), *Appellant,*

versus

Ram Lugun Ajha (Plaintiff) and another (Defendant), *Respondents.*

Baboo Boodh Sein Singh for Appellant.

Baboo Rash Beharee Ghose for Respondents.

No appeal lies from an order refusing to make an intervenor under Section 77, Act X., 1859, a defendant in a rent-suit.

Mitter, J.—The respondent in this case brought a suit for arrears of rent against one Beharee Pattuck. The appellant intervened, alleging that he had purchased the right, title, and interest of Beharee Pattuck, and that he ought to be made a party to the suit.

The Collector refused to grant this prayer, and an appeal was preferred by the appellant to the Judge against that order.

The Judge having dismissed the appeal, the present special appeal has been preferred to us upon the ground that the intervention was one under the provisions of Section 77, Act X. of 1859.

It is manifest that this contention is erroneous, and that the appellant has no right of appeal against an order refusing to make him a defendant in a suit brought for arrears of rent, no such appeal being allowed by law. We reject this appeal with costs.

The 26th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Appeal—Section 246, Civil Procedure Code.

In the Matter of Ajoodhya Doss and *Petitioners.*

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An adoption *de facto* must be supposed to be a valid adoption until it is set aside, and a party so adopted is entitled to object to other parties receiving a certificate under Act XXVII. of 1860.

In granting such a certificate, a Judge must look to fitness as well as to propinquity.

Glover, J.—This was an application for a certificate under Act XXVII. of 1860 to collect the debts due to the estate of one Asman Singh, deceased. The applicants were the paternal cousins of Asman Singh, and their claim was objected to by a nephew who claimed the certificate on the ground that he had been adopted by Asman Singh according to the Kritima form.

The Judge after taking into consideration the claims of both parties, considered that the objector, Purm Dhun Singh, even if his adoption were not valid according to Hindoo Law, had always been treated in the family as the adopted son of Asman Singh; that the present petitioners invariably so treated him; and that he had in his position as *de-facto* adopted son paid certain claims which were due by his deceased adopting father. He held, therefore, that his position in the family warranted his objection, and refused the certificate to the petitioners.

It appears to me that the decision of the Judge was a proper one. For even supposing that the petitioners are able to set aside the adoption on account of its being invalid

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acted in the position of an adopted son.
seems to me, therefore, that he was legally entitled to make the objection which he did against the other parties receiving the certificate. Until his adoption is set aside, it must be supposed to be a valid adoption; and if it is a valid adoption, Purm Dhun Singh is undoubtedly the nearest of kin to the deceased, and the proper person to obtain the certificate.

But even if he were not the nearest of kin, I do not see that there is anything in the provisions of Act XXVII. of 1860 that necessitates the Judge's selecting the nearest of kin to whom to grant the certificate. He must look to fitness as well as to propinquity, for it might very frequently happen that the nearest of kin to a deceased person might be either physically or morally unfit for the trust which this Section would impose.

In the present case, the Judge has found that the position of Purm Dhun Singh in the family is sufficient to warrant his objection to the petitioners getting the certificate; and as it is nowhere contended that, setting aside the question of adoption, Purm Dhun Singh is not, either from character or from position, the most proper party to look after Asman Singh's estate, I think that the Judge's order in regard to him was a correct order. I would, therefore, dismiss this appeal with costs. The petitioners have their remedy in a regular suit.

Mitter, J.—I concur in dismissing this appeal. The Judge has found, as a fact, that the respondent was adopted as *Kurta Pootur* by the deceased Asman Singh during his lifetime, and the learned pleader for the appellant has failed to show that this finding is erroneous. It has been said that the adoption is not valid under the Hindoo Law, because the respondent was related to the deceased Asman Singh as a sister's son. It is admitted, however, that the parties to this litigation do not belong to any of the three regenerated castes, and the objection on the ground of consanguinity would not therefore

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, Act XIV., 1859—Presumption of bona fides.

Case No. 248 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 24th April 1869.

Juttadharee Singh (Decree-holder), *Appellant,*

versus

Wuzeer Singh (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Nil Madhub Sein for Respondent.

Where a decree-holder expends money in procuring attachment of his debtor's property and advertising the same for sale, the proceeding must be presumed, nothing to the contrary being shown, to be a *bonâ fide* proceeding within the meaning of Section 20, Act XIV. of 1859.

Glover, J.—THIS was an application by a judgment-creditor to execute his decree. The decree was originally obtained by Ranee Moradun on the 19th July 1853. Various infructuous applications for execution were taken out, and were struck off one after the other. On the 18th of December 1860, the decree-holder sold such portion of his claim as had not been satisfied under the decree to one Chutterdharee Singh who is the present holder of the decree.

Objections were raised by the judgment-debtor on that occasion to the sale, which, however, were finally disposed of by the High Court in favor of the purchaser of the decree on the 17th April 1862.

On the 16th of February 1865, execution was again taken out. This application was struck off on the 29th of July following on account of non-payment of tullubana. Execution was again taken out on the 5th July 1865, when certain property of the judgment-debtor was attached and advertised to be sold on the 11th of April 1866.

Before that date, however, that is, on the 17th March, the judgment-creditor filed a petition in Court to the effect that he had come to an understanding with his debtor who had promised to settle with him, and that, therefore, he no longer wished the sale to take place. In consequence of this petition the execution-proceedings were struck off on the 17th March 1866.

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Before that date, however, that is, on the 17th March, the judgment-creditor filed a petition in Court to the effect that he had come to an understanding with his debtor who had promised to settle with him, and that, therefore, he no longer wished the sale to take place. In consequence of this petition the execution-proceedings were struck off on the 17th March 1866.

The judgment-creditor now comes forward with a further application for execution on 24th December 1868, on the ground that his debtor had failed to keep his promise, and had not paid him the money due.

The judgment-debtor objects that execution of the decree against him is barred by Section 20, Act XIV. of 1859; and the Principal Sudder Ameen has decided that the proceedings of the 5th July 1865 were infructuous in consequence of the decree-holder having released the property which had been advertised for sale, and that, therefore, the application of the 24th December 1868 is more than three years from the date of the last proceeding in execution, and is consequently barred.

It appears to us that the Subordinate Judge's decision in this matter is wrong. On the 5th July 1865, the judgment-debtor's property was attached and advertised for sale. It is argued on behalf of the judgment-debtor that there is no proof on the record that any notice was served on him. We have not been able to find any distinct mention of the fact whether notice was or was not served; but considering that the property was attached and advertised for sale, the fair presumption would be that notice was issued.

But even if we concede so far to the argument of the judgment-debtor's pleader that notice was not served, still that would not bring the judgment-creditor under the Limitation Law. Section 20 of the law says that a decree shall be kept alive by some proceeding taken to enforce such decree within three years next preceding the application. Now, it has been ruled by a decision of the Full Bench in the case reported at page 98, Volume VI., Weekly Reporter, Miscellaneous Rulings, that the word "proceeding" supposes some *bonâ-fide* proceeding taken by the judgment-creditor to recover his dues. Now, what is a *bonâ-fide* proceeding is a question of fact. And it

can scarcely, we think, be said that where a decree-holder expends money in procuring the attachment of the debtor's property and the advertising of the same for sale, he does so without the intention of selling that property; it must be presumed, nothing to the contrary having been shown, that when this attachment was made, and when this advertisement was published, it was the decree-holder's intention to proceed with the sale and to recover his money from the judgment-debtor. There seems to us no possible reason for supposing that the proceeding of the 5th July 1865 was any other than a *bond-fide* proceeding. Under these circumstances it is quite clear that the decree was at the date of the last application for execution fully alive, and that the decree-holder was entitled to proceed with the execution.

The order of the Subordinate Judge is reversed with costs.

The 26th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Satisfaction of a decree—Certificate under Section 206, Code of Civil Procedure.

Case No. 262 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 9th April 1869, affirming an order of the Sudder Ameen of that District, dated the 21st September 1868.

Saadoollah Shaikh (Decree-holder), *Appellant,*

versus

Kalee Churn (Judgment-debtor), *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Kishen Succa Mookerjee and *Grish Chunder Ghose* for Respondent.

A petition signed and filed in Court by a judgment-creditor, certifying payment of the amount due to him by his judgment-debtor, is a sufficient certificate of payment under the decree in the terms of Section 206, Code of Civil Procedure.

Glover, J.—THE only point of law raised has been taken in this special appeal is that the action of the judgment-debtor, if it be taken, was in the nature of a compromise out of Court, and that as the payment has not been certified to the Court, the decree-holder was perfectly justified in taking execution of his decree again.

It has been found as a fact by both the Lower Courts that the two petitions signed respectively by the judgment-creditor and the judgment-debtor were filed in Court as stated; and if they were so filed, it is quite clear that they would be a sufficient certificate to the Court of the payment which had been made under the decree in the terms of Section 206.

The object of that Section was that the payment of money should be authoritatively made known to the Court by the person in whose favor the decree was passed, and it cannot be contended that the petition which has been found, as a fact, to be a true petition made by the judgment-creditor regarding the payment is not a sufficient certificate.

The other objections which have been raised are against the manner in which the Judge has recorded his decision. He is said to have drawn improper inferences from the evidence, and generally not to have decided the appeal upon the questions which were raised before him.

As to whether he has drawn correct inferences or not from the conduct of the judgment-creditor, that does not appear to us to be a question which can be determined in special appeal, it being entirely a matter of fact with which the Judge was quite competent to deal.

As to the rest, it is clear from the Judge's decision that he went through the whole of the evidence, and from that evidence came to the same conclusion as the first Court. That Court had gone thoroughly into all the questions between the parties, and in a very long decision had given reasons for disbelieving the decree-holder's statement with reference to this petition. The judgment of the Lower Appellate Court is an endorsement of the reasoning of the judgment of the Court below, and the Judge's not having re-written those reasons in his judgment is, as has been frequently held by Division Benches of this Court, no ground of special appeal. This special appeal, therefore, appears to be groundless, and is dismissed with costs.

The 26th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Plaintiff's evidence — Section 170, Code of Civil Procedure.

Case No. 1372 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 23rd March 1869, affirming a decision of the Moonsiff of Tajpore, dated the 20th August 1868.

Jhoomuck Singh (Defendant), *Appellant,*

versus

Jeetun Lall (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

In a suit for the right of pre-emption, on the ground that plaintiff was a *shufee-khuleet*, defendant, who alleged that plaintiff was only a *benamee* shareholder, offered to establish his case on the deposition of the plaintiff alone. The latter not appearing on summons, the suit was decreed against him under Section 170, Code of Civil Procedure. On this he appealed, and the Judge ordered the Moonsiff to give further time to appear. This was granted and then extended again and again by the Moonsiff who, on the plaintiff failing to appear, again gave a decree against him under the same law as before. The case was then appealed to the Judge who ordered the case to be tried on its merits, remarking that the presence of the plaintiff was not necessary.

HELD that, as plaintiff's liability to appear and give evidence had been already determined by a competent Court, and never denied by himself, he could not take advantage of a technical objection put into his mouth by the Judge to show that he was not bound to come.

Glover, J.—THIS was a suit for the right of pre-emption, on the ground that the plaintiff was a *shufee-khuleet* or partner in the thing sold. The property claimed was an half-anna share of a certain estate, of which the plaintiff alleged himself already to possess a 4½-annas share.

The case has been pending a long time in the Courts, for we find that the first answer of the defendant was filed so long ago as the 23rd February 1865. In that answer, the defendant denied that the plaintiff was a shareholder in the estate, and alleged that the property merely stood in his name *benamee* for the real owner. He likewise denied that the usual ceremonies (*i. e.*, *tulub-i-mowasibut* and *tulub-i-ishad*) had been performed by the plaintiff.

On the 8th January 1869, the defendant put in a further petition to the effect that it was unnecessary for him to summon any witnesses on his own account as he wished to rely upon the plaintiff's deposition, and stated his readiness to bind himself by the result of that deposition. On this, the plaintiff was summoned to appear—the date of the summons being the 16th of January 1866. On that day, the Moonsiff took up the case, and, finding that the plaintiff had not made his appearance although summoned, decided the case against him under the powers vested in him by Section 170 of the Civil Procedure Code.

The plaintiff appealed against this decision on the 5th of February 1866. His objections were two—*first*, that the case had been decided in the absence of witnesses who were not ordered to come till the 25th January, whereas the case had been decided on the 16th, without waiting for their advent; and, *secondly*, that he had not been allowed time to make his own appearance and give evidence, as desired by the defendant. The Judge, on the 2nd July 1867, remanded the case, desiring the Moonsiff to give the plaintiff further time to appear.

On the 7th August of the same year, the Moonsiff issued the usual proclamation for the attendance of both parties, and then the plaintiff's pleader put in a separate petition asking for three weeks further time to appear in. This was agreed to, and the date of the hearing was fixed for the 27th August. On the 20th August, the plaintiff asked for 15 days more time. This also was agreed to, and the date of the hearing altered to the 10th September. On that date the Moonsiff took up the case, and decided that as time had been given over and over again for the plaintiff to make his appearance, and that, notwithstanding various indulgences which had been allowed him, he had failed to appear, he was entitled to no consideration. The Moonsiff, therefore, again gave a decree against him under the provisions of Section 170.

The plaintiff appealed to the Judge, who remanded the case, this time, in order that the issue between the parties might be tried on its merits, remarking that the presence of the plaintiff as a witness was not necessary, but that the parties should go to trial on the other evidence which they might be able to bring.

On the 6th August 1868, the defendant again applied to the Court of first instance

to have the plaintiff's evidence taken. This application, however, the Moonsiff seems to have felt himself obliged to refuse with reference to the remand-order of the Judge. At last the case came to a hearing; and the Moonsiff, on the merits, decided in favor of the plaintiff, a decision which was afterwards affirmed in appeal by the Judge.

It is contended before us, in special appeal, that the Judge had no authority to issue his second order, declaring the attendance of the plaintiff as a witness unnecessary, in opposition to his previous order by which he had allowed that evidence to be taken, and gave the plaintiff further time to appear in; *secondly*, that, in consequence of the plaintiff's not appearing, the defendant was prejudiced in his defence to the action, inasmuch as having relied on the evidence which could be given by the plaintiff, he abstained from bringing forward his own witnesses although he had them in readiness; and, *thirdly*, that the Judge was wrong in assuming that the plaintiff had no special knowledge of the facts to which he was asked to depose.

It appears to us that all these grounds of appeal are reasonable grounds, and must be allowed. The question of the plaintiff's liability to come and give evidence had been already determined by a Court competent to pass an order on the subject, long before the Judge's order of August 1868; and the plaintiff himself had never denied his liability, and never pleaded any ground for exemption on the score of not being in possession of the special knowledge which the defendant alleged him to be in possession of. He stated himself, throughout, to be willing to come forward and give evidence if further time were allowed him; he cannot now, therefore, take advantage of a highly technical objection—an objection which has been put into his mouth by the Judge—to show that he was not bound to come, because the necessary formalities of the law were not complied with, that he had received no notice, and that the defendant had not shown any special necessity for summoning him as a witness.

Any objection of this description might have been very properly made when the case was first before the Court; but none having been made, and the order having been passed that the plaintiff should come forward and give his evidence, we think that the Judge had no power, at the last stage of the case, after the plaintiff had constantly applied for more time and had constantly eluded all endeavours on the part of the Court to make him give evidence, to throw out the case on that ground, and remand it to be tried irrespective of the plaintiff's evidence.

It appears to us, moreover, to be quite clear, upon the record, that the defendant might have produced other evidence to prove his allegation as to the plaintiff's want of *status* in this case, if he had not relied upon the order of the Court with reference to the plaintiff's attendance. From the very first, he stated that the facts which he could prove by his witnesses being facts within the immediate knowledge of the plaintiff, the plaintiff's evidence was the best evidence procurable; and he agreed that in the event of his evidence being taken, he would produce no witnesses on his own account. We think, that even if the order was correct so far as it declared that the plaintiff need not be summoned, still it would be impossible to decide this case without giving the defendant an opportunity of producing those witnesses which he would have produced in the first instance if he had not relied on the order of the Court commanding plaintiff's attendance.

Then, with regard to the special knowledge which the plaintiff may be supposed to have in this case, the Judge says: "The "defendant must show a *primâ-facie* case "that his opponent has some special know-"ledge of the matter in dispute, and he "must show to the satisfaction of the Court "that he is unable to prove his case in "any other way than by the personal ex-"amination of the opponent." But in this case, it must be borne in mind that the plaintiff was the only person who could be supposed to have had a knowledge of the facts. He was the person who came into Court claiming pre-emption. The defence was that he was not a partner. Surely, if any body could be supposed to know anything in connection with that fact, it must have been the plaintiff himself. It seems, therefore, that this objection of the Judge, that there was no *primâ-facie* case of the special knowledge which the plaintiff must be shown to have before his personal attendance can be enforced, is refuted by the very circumstances of the case, and by the position taken up by the plaintiff himself.

We have been asked to remand this case in order that the plaintiff might now have a further opportunity given him of coming in and deposing. This course appears to us altogether unnecessary, and, under the cir-

cumstances, most unadvisable. The plaintiff has had opportunities over and over again given him of coming in and giving his evidence. In every instance his prayer for further time has been granted, and it is quite clear that he has been intentionally keeping out of the way, and making promises of coming in without the least intention of ever keeping them. It appears to us that the order which ought to be passed in this case is the order which was passed by the Moonsiff on the 10th September 1867, namely, that the plaintiff must lose his case, on the ground that, having been summoned to appear and give evidence by a Court of competent authority, he neglected, without reasonable cause, to comply with that order. We therefore allow this special appeal, and reverse the decision of the Judge, and restore that of the Moonsiff of the 10th September 1867, with all costs.

Mitter, J.—I concur.

The 27th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Rent-free grants by zemindars.

Case No. 1368 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 16th March 1869, affirming a decision of the Subordinate Judge of that District, dated the 26th August 1868.

Dabee Pershad (one of the Defendants), *Appellant,*

versus

Joy Lall Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

After resumption and settlement, a lakheraj estate becomes to all intents and purposes a separate zemindary held from Government in perpetuity, the proprietors of which are, in accordance with the Full Bench ruling of the 14th December 1867 (9 W. R., p. 1), capable of granting portions rent-free; the grantee taking such land with the risk of losing it again in the event of the whole estate being sold for default on the part of the zemindar.

Glover, J.—The plaintiffs, who were the heirs of one Khuruckputty, sued to recover possession of 40 beegahs of land which, they say, was granted to their ancestor as lakheraj in the year 1271.

The entire mouzah in which this land is situate was resumed by Government in the year 1841, and a settlement made with the proprietors. In that settlement, there was special mention made of these 40 beegahs as being in the possession of Khuruckputty's representatives as *shikmee lakherajdars*, and a settlement was directed to be made with them for that land, they paying their rent direct to the lakherajdars.

The present suit is to recover possession of this land as lakheraj from one Debee Dutt, who bought the rights of some of the maliks of the estate in execution, and took a *teeka* lease from others. These proprietors, it is said, gave the plaintiffs two lakheraj chittees, dated respectively in the years 1262 and 1265, in which they absolve them from paying rent for their holding.

The defence was that the plaintiffs were barred by limitation, not having ever been in possession of the land in question, and that the chittees on which they relied to prove their lakheraj title were spurious.

The Court of first instance gave the plaintiffs a modified decree. It found that the chittees were not genuine; but it likewise considered that the plaintiffs were entitled to get possession of the land by paying rent to the defendant as representatives of the proprietors.

The Judge, on appeal, gave the plaintiffs a decree for all that they asked, namely, to recover possession of the land, and to hold the same free of the payment of rent.

There are three objections taken before us in special appeal, *first*, on the issue of limitation; *secondly*, that the plaintiffs, even if the chittees are genuine, are not entitled to hold rent-free under them; and, *thirdly*, that the Judge has credited these chittees without disposing of the reasons for which the Court of first instance thought them spurious.

The last objection may be disposed of at once. The Judge has given his own reasons

from the evidence before him in the case for believing these chittees to be genuine; and that being so, there is no ground of special appeal. He was not bound to dispose seriatim of all the reasons given by the Moonsiff, if he gave special reasons of his own for coming to an opposite conclusion.

With regard to limitation, we find there is on the record the evidence of two putwarees and of a ryot holding land in the estate, and that their evidence of the plaintiff's possession up to the time of alleged dispossession is corroborated, first, by the resumption-proceedings of 1841, and again, by the settlement proceedings in 1856, and again, by the lease which was taken by the special appellants themselves from the proprietors in 1858, in which these very lands were exempted from his holding. The Judge was perfectly justified, if he believed this evidence, in coming to the conclusion which he did, the evidence being legally receivable; and his finding on this point is one of fact with which there is no interference possible in special appeal.

With regard to the second objection, it has been ruled by a judgment of the Full Bench of this Court, dated the 14th of December 1867, in the case of Mahomed Akhil *versus* Assadoonissa Bibee, reported in 9 Weekly Reporter, page 1, that a grant by a zemindar of a piece of land held without payment of rent is valid as against the heir or representative of the proprietor. In this case, after the resumption and settlement proceedings, this mouzah became to all intents and purposes a separate estate held from Government in perpetuity, and was just as much a zemindary as any other zemindary in the country. The proprietors of the estate were, therefore, in accordance with this ruling, capable of granting away portions of their land rent-free, the grantee, of course, taking such land with the risk of losing it again, supposing that the zemindar defaulted, when his whole estate would be sold at auction for the rent due. The special appellant in this case represents the proprietor, inasmuch as he bought his rights and interests, whatever they were, at an execution-sale, and would be bound by rent-free chittees which were granted by him.

All the grounds of special appeal therefore fail, and the appeal must be dismissed with costs.

Mitter, J.—I concur in dismissing this appeal with costs.

The 27th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Mortgage—Stamps.

Case No. 1383 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 31st March 1869, reversing a decision of the Moonsiff of that District, dated the 4th November 1868.

Dooma Sahoo and others (Plaintiffs), *Appellants,*

versus

Joonarain Loll and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Tarucknath Dutt for Respondents.

A mortgagee cannot be bound by a decision relating to the property mortgaged, in a suit instituted long after the date of his mortgage to which he was not a party; nor can he be deprived of his right to enforce his lien by a subsequent sale of the mortgagor's right, title, and interest.

A petition which has been accepted by the Lower Courts as good and valid evidence of a mortgage cannot be objected to in special appeal on the score of its not being engrossed on a proper stamp.

Mitter, J.—THIS was a suit instituted by the plaintiff, now special appellant before us, for the enforcement of a mortgage-lien bearing date the 13th October 1863. The defendant, special respondent, pleaded that the mortgage was a collusive transaction; that he, the defendant, had obtained a mokurruree lease of the property in question from the ancestor of the alleged mortgagor long previous to the date of the mortgage; and that, in execution of a decree obtained by him against the mortgagor, the right, title, and interest of the mortgagor were put up to sale and purchased by him, the defendant, in the year 1867.

The Court of first instance gave a decree to the plaintiff; but on appeal, the decision of that Court has been reversed by the Subordinate Judge.

In special appeal, two objections have been taken before us, namely, *first*, that the decision of the Moonsiff of Chuprah bearing date the 18th July 1866, and that of the Judge of

the same district bearing date the 6th of October of that year, have been improperly admitted in evidence for the purpose of showing that the defendant had obtained a mokurruree lease of the property in question long previous to the mortgage created in favor of the plaintiff; and, *second*, that the Lower Appellate Court is under any circumstances in error in holding that the purchase of the proprietary right of the mortgagor made by the defendant in the year 1867 is a valid purchase so far as the plaintiff's mortgage is concerned.

We are of opinion that both these objections are valid. With reference to the first point, it is admitted that the decisions of the 18th July and 6th October 1866 were passed in a suit which was instituted long after the date of the plaintiff's mortgage; and the plaintiff, who was not a party to that suit, cannot, therefore, be bound by any decision which was passed in that case.

The second objection is also good. The purchase of the right, title, and interest of the mortgagor in the year 1867, which was four years after the date of the plaintiff's mortgage, cannot deprive the plaintiff of his right to enforce his mortgage-lien.

The pleader for the special respondents raised several objections in cross-appeal, but we think it necessary to notice two of them only. The first objection was that the petition of the 13th October 1863 is not legally sufficient to create a mortgage in favor of the plaintiff; and, secondly, that the plaintiff having obtained a money-decree, and that decree containing no provision whatever regarding the hypothecation of the property in dispute, he, the plaintiff, is no longer in a position to institute this action for the enforcement of his mortgage-lien.

Both these objections appear to us to be perfectly groundless. With reference to the petition of the 13th October 1863, we find that it was an instrument executed by the mortgagor with the consent of the mortgagee, and it contains a clause by which the property now in dispute was distinctly hypothecated to the plaintiff as a collateral security for the debt which the mortgagor had contracted. There can be no doubt that this petition is tantamount to a valid agreement between the parties creating a mortgage in favor of the plaintiff.

The only objection which the special respondents could have taken to this agreement was that it ought to have been engrossed on a proper stamp; but inasmuch as both the Lower Courts have accepted the petition as good and valid evidence of the mortgage, no objection on the score of stamp can now be permitted in special appeal.

As to the second objection taken by the respondents, we find that it has been already determined by a Full Bench that, even though a money-decree has been passed in favor of a mortgage, it is still open to him to institute a regular suit for the enforcement of his mortgage-lien. This has been done by the present case, and we do not see any reason whatever why the suit should not have been allowed to proceed.

The case is, therefore, remanded to the Lower Appellate Court for the purpose of re-trying it with reference to the above remarks. The Lower Appellate Court will also take into consideration the plea of collusion which was raised by the special respondents, and any other pleas having a material bearing on the merits of the case. The costs of this appeal will abide the ultimate result.

The 27th August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Examination of defendant's witnesses—Special appeal.

Case No. 1365 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 7th April 1869, reversing a decision of the Moonsiff of Burjorah, dated the 20th January 1869.

Gooroo Doss Akhoolee (Defendant), *Appellant,*

versus

Puran Mundul and others (Plaintiffs), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Petumbur Chatterjee for Respondents.

A Court of first instance, being satisfied that plaintiff's case could not be established, refused to examine defendant's witnesses. The Lower Appellate Court, differing from the Moonsiff, gave plaintiff a decree.

HELD that, although the Moonsiff had committed a great irregularity, still, as that point was not raised in the Lower Appellate Court, it could not be taken in special appeal.

Markby, J.—THERE is no ground whatever for this special appeal. The suit was one brought by the plaintiff to recover possession of certain immoveable property. If what is stated to us is true, about which I have some doubt, because I think very often things are said before us to have occurred in the Lower Courts which have never occurred at all—but if what is now stated is true, there is no doubt that the Moonsiff has committed an irregularity. It is said that, at the conclusion of the evidence for the plaintiff, although the defendant had witnesses there whom he wished to have examined, the Moonsiff refused to do so, saying that he was perfectly satisfied that the plaintiff's case could not be established. That, no doubt, would be a great irregularity, for, there being an appeal upon the facts, the first Court was bound to take the evidence of all the witnesses tendered for examination, but it does not appear that the defendant made any objection on this point when the case was before the Lower Appellate Court.

The Lower Appellate Court, differing from the Moonsiff, thought that the evidence which the plaintiff had given was sufficient to establish his case.

The defendant now comes before us in special appeal, complaining that he has been shut out from giving the evidence which he was prepared to give in the first Court, but he is not able to show us that he brought this matter in any way to the notice of the Subordinate Judge. He makes a statement upon that subject through his vakeel, which I for my part am wholly unable to accept. He says that his client's vakeel had some discussion on the subject with the Subordinate Judge who advised him to apply to the High Court. I do not think we should be justified in believing on a mere statement of this description that the Subordinate Judge did any such thing. If there had been any *bond-fide* attempt to raise that point and a real desire to have those witnesses examined in the Lower Appellate Court, there would have been a petition on the record asking the Lower Appellate Court to examine these witnesses and an order of the Lower Appellate Court recorded at the back of it; so that, even supposing that there had been such an irregularity on the part of the Moonsiff as alleged by the appellant, I still think the special appeal ought to be dismissed with costs.

Kemp, J.— I am of the same opinion.

The 28th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Landlord and tenant—Limitation.

Case No. 1512 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 13th April 1869, reversing a decision of the Moonsiff of Bohur, dated the 29th August 1868.

Ruttun Monee Dabee (Plaintiff), *Appellant,*

versus

Kumolakant Talookdar and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Kant Sein for Respondents.

Where a landlord seeks to obtain *khas* possession, the tenant is at liberty to plead limitation in bar, if he has been in occupation under a title like that of a dur-howladar for a period of more than 12 years.

Hobhouse, J.—IN this case, the plaintiff sued for *khas* possession of land.

The defendants objected to such *khas* possession, on the ground that they had held possession as *bye-howladars* for a period of more than 12 years.

The Lower Appellate Court has found as a fact that the defendants have so held, and has dismissed the plaintiff's suit for *khas* possession.

In special appeal, it is urged, *firstly*, that there is no legal evidence of the possession found; and, *secondly*, that limitation can never apply to such a suit as this, the plaintiff being admittedly the landlord, and the defendants his tenants.

We have had the record read over to us, and on the *first* point we find that there is evidence of the possession on which the defendants relied—evidence on which the Lower Appellate Court might legally come to the conclusion to which it has come.

On the *second* point, we are of opinion that limitation does apply upon the finding of the Lower Appellate Court to such a case as this. We think that, when a landlord seeks to obtain *khas* possession of any land, and when, on the other hand, it is alleged by the tenant that such *khas* possession cannot be given because he, the tenant, has been in occupation under a title like that of a dur-howladar for a period of more than 12 years, limitation might apply in bar of *khas* possession. The question that would have to be determined in such a suit would be whether the landlord had been in *khas* possession of the land at any time within 12 years of suit. If he had not, and if, on the other hand, the tenant had been for more than that period in possession under a right such as that of the *bye-howladaree* before us, which the landlord could not disturb, clearly whatever other rights the landlord might have, the tenant's 12 years' right of occupancy would prevent him, the landlord, from obtaining *khas* possession of the land, that is, from ejecting the tenant.

The special appeal is dismissed with costs.

The 28th August 1869.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Possessory suit—Issues.

Case No. 854 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 7th November 1868, affirming a decision of the Moonsiff of Serampore, dated the 13th December 1867.

Joy Kishto Mookerjee (Plaintiff), *Appellant,*

versus

Hureehur Mookerjee and others (Defendants), *Respondents.*

Baboos Mohendro Lall Shome and *Pearee Mohun Mookerjee* for Appellant.

Baboos Bhyrub Chunder Banerjee and *Umbika Churn Banerjee* for Respondents.

Where certain zemindars sued to recover *khas* possession of certain shares of land, alleging that defendants were wrongfully in possession, it was held that, though bound to prove their right to *khas* possession, yet, whether they proved themselves to have been recently in *khas* possession or not, they had a right to a decision as to the alleged wrongful possession of the defendants.

Macpherson, J.—It appears to us that, even if the plaintiffs have failed to prove that they were in possession as alleged, the Judge ought to have gone on with the case, and tried the question of the defendants' rights.

The plaintiffs are admittedly three of the zemindars, and they sue to recover *khas* possession of shares amounting to a 7 annas 3 cowries 1 krant share in three plots of ground. They allege that the defendants (other than their co-sharers) were wrongfully in possession of those 7-annas shares. It seems to us that they had a right to a decision on this point, whether they proved themselves to have been recently in *khas* possession or not.

Of course, the defendant, who claims the tenure which stood in the names of Manick and Goburdhun, may establish his legal right to that possession on such grounds as may be open to him, including long possession, if he has had such possession as will give him a title.

We quite agree with the Judge that, as the plaintiffs sue exclusively for *khas* possession, they must prove their right to it, and that, if they do not prove their right to it, their suit should be dismissed.

We reverse so much of the decision of the Judge as dismisses the plaintiffs' suit, and we remand the case to the Judge that the case may be further heard upon the question of title, and that the question of title may be decided. The costs of the remand will follow the result.

The 28th August 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Service of notice—Evidence.

Case No. 1479 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 29th March 1869, affirming a decision of the Assistant Collector of that District, dated the 4th August 1866.

Raj Kishore Dutt (one of the Plaintiffs), *Appellant,*

versus

Bydonath Shaha and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Kishen Dyal Roy for Respondents.

A return by the Nazir to the effect that the peon swears that a notice has been served is insufficient in law to prove the service without the deposition, on oath, of the serving peon taken before a competent authority.

Bayley, J.—We think this special appeal should be dismissed with costs.

This was a suit against a farmer and three sureties. The sureties appeared and denied the plaintiff's claim. They stated that it was true that there was a kubooleut given by the farmer-defendant to which they were witnesses, but that their names were interpolated in the deed as sureties, while, in fact, they were but witnesses.

On the day of hearing, the plaintiff did not appear, and the suit was dismissed for default by the Assistant Collector on the 7th June 1866.

On the 19th June, the plaintiff applied for revival of the suit under Section 58, Act X. of 1859, and on the 11th July an order was passed granting the application for revival. The case was then tried by the Assistant Collector *ex parte*, and he again dismissed the plaintiff's suit.

An appeal was preferred from this order to the Judge, who, on the 18th January 1867, reversed the judgment of the Assistant Collector, and gave the plaintiff a decree as against the sureties.

There was then a review sought of this decision, and on the 26th November 1868, the present Judge granted the review, reversed the former judgment of the Judge, and restored the order of the Assistant Collector dismissing the plaintiff's suit.

From this decision, the plaintiff appeals specially, but we think it unnecessary, and in fact, after proceeding to a certain length in the arguments, the pleader himself elects not, to enter into the merits of the contentions raised in special appeal. We find that, after the permission given on the 11th July 1866 for the revival of the suit, and before any hearing had been actually come to, the sureties defendants are not shown to have been legally served with any notice, nor any proof taken by the Collector, before deciding the case, of the due service of notice upon those defendants. There is no deposition of the serving peon on the records of the case, as taken by the Collector or any one competent to do so. There is simply a return by the Nazir to the effect that the peon swears that such a notice had been served on the defendants; but a bare return like this without the deposition on oath of the serving peon taken before a competent authority, which the Nazir is not, is wholly insufficient in law to prove the service.

As, then, the defendants were proved to have been not served with notice, there was no case before the Assistant Collector for adjudication, and the Collector's order of the 7th June 1866 stands affirmed.

The special appeal is dismissed with costs.

The 28th August 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Section 50, Act XX., 1866—Right to juice of trees.

Case No. 2755 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 6th July 1868, affirming a decision of the Moonsiff of that District, dated the 28th February 1868.

Janoo Mundur and others (Defendants), *Appellants,*

versus

Hucha Mundur (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellants.

No one for Respondent.

Section 50, Act XX of 1866, has no application to a lease of a right to take the juice of date trees, which is more a right to, or benefit arising out of, standing trees or timber than a right or benefit to arise out of land coming under the description of immoveable property.

Norman, J.—In this case the appellants, who are the defendants, claim a right under a lease granted by the proprietor to take the juice of 320 date trees in Mouzah Sunhowlee. The plaintiff claims under a similar lease of an earlier date which is unregistered. The appellants contend that their lease, though later in date, is entitled to priority over that of the plaintiff, inasmuch as it is registered. Section 50 of Act XX. of 1866 enacts as fol-

lows: "Every instrument of the kinds "mentioned in Clauses 1, 2, and 3 of Section 18 shall, if duly registered, take effect, "as regards the property comprised therein, "against every unregistered instrument relating to the same property."

Now, the right to take the juice of the date trees will not fall within Section 18, Clause 1, unless it is a right or interest to an immoveable property. Looking to the definition of immoveable property in the 2nd Section of the Act, it excludes "standing timber and growing crops." The definition of moveable property in the same Section includes "growing crops, grass, fruit upon "trees, and property of every other description except immoveable property."

The question is, does the right to cut date trees and take the juice produced by them fall within the description of moveable property, as the term is limited in the 2nd Section?

The definition is as follows: "Immoveable property includes lands, buildings, "right to ways, lights, fisheries, or any other "benefit to arise *out* of *land*, and things attached to the earth, or permanently fastened "to anything which is attached to the earth; "but *not standing timber, growing crops*, "nor grass." The juice of date trees from which sugar is made being produced annually at the season of growth falls nearly within the description of growing crop. The right to take the juice in future years from standing trees, from which it is produced without cultivation, is more nearly described as a right to or benefit arising out of standing trees or timber than a right or benefit to arise out of land, such as is described as immoveable property. On the whole, therefore, though not without some doubt, we think that the 50th Section has no application to a lease of a right to take the juice of date trees. We, therefore, affirm the decision of the Lower Court. The appeal must be dismissed with costs.

The 31st August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Jurisdiction—Small Cause Courts—Hindoo Law—Legal necessity.

Case No. 1353 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 12th April 1869, reversing a decision of the Officiating Subordinate Judge of that District, dated the 14th September 1868.

Doorhyar Roy (one of the Defendants), *Appellant,*

versus

Dulsingar Singh (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondent.

A Small Cause Court has jurisdiction to give a simple money-decree in a suit upon a bond in which landed property is hypothecated.

HELD (by Glover, J.), where the family-property was small, there was no reasonable necessity for contracting a large loan to provide for the minor's investiture according to the Hindoo religion.

Glover, J.—THE plaintiff in this case sues to set aside a sale in execution of a Small Cause Court decree, on the ground that that Court had no jurisdiction to determine the suit, and also to declare null and void a mortgage-lien imposed on the estate by plaintiff's mother and guardian, on the ground that there was no necessity for the alienation such as Hindoo Law allows.

The suit was brought both against the guardian and the decree-holder.

The defence was that the hearing of the suit was barred under Section 2, Act VIII. of 1859; that there was jurisdiction in the Small Cause Court to hear it; and that there was a legal necessity for the sale.

The first Court held that the suit was not barred by Section 2; that the Small Cause Court had jurisdiction to give the decree it did; and that a sufficient legal necessity for the loan was proved.

The Additional Judge, on appeal, considered that the Small Cause Court had no jurisdiction to entertain the suit as brought by the plaintiff, and could not give a decree for what was not asked. He also found that there was no necessity for the plaintiff's mother and guardian to mortgage the property.

Against this decision the defendant No. 1 appeals specially.

It appears to me that, on the question of jurisdiction, the Additional Judge is wrong. No doubt, the original bond hypothecated landed property, and no doubt the creditor, when he went to the Small Cause Court, asked to have his money out of the pledged property, but the mere fact of his asking too much would not prevent the Court to which he applied from giving him such relief as was in its power; and if he was content with that relief, a simple money-decree, which was what the Small Cause Court gave him, I do not see how that decree can be bad for want of jurisdiction, merely because the plaint contained a further prayer which was not within the Court's competence, and which was consequently not granted. The Small Cause Court contented itself with declaring that the money was due under the bond, and so far it appears to have had full jurisdiction. Had it gone further, or declared the hypothecated property liable to be sold, it would have exceeded its powers, but it gave a simple money-decree, and that was, it seems to me, within them. The point has been already ruled in a Small Cause Court reference to this Court, dated the 17th July 1869, in the case of Ram Sewuk Sahoo *versus* Tuttoo Roy.*

The sale in execution of the Small Cause Court decree was duly made by the Civil Court, and it is not contended that it was in any way irregularly conducted. It follows, therefore, that there being no want of jurisdiction in the Court that passed the decree, the sale in execution cannot be set aside.

With regard to the plea of necessity, it appears to me that the Additional Judge was right, and that the mother and guardian was not justified in borrowing so large a sum for the purpose indicated. It may be incumbent on Hindoo mothers to provide for the investiture of their sons, but where the family-property is as small as this is said to be (the respondent's witnesses say that it produces 1 rupee 12 annas a year), a loan of Rupees 70 for the purpose of carrying out one only of the numerous Hindoo ceremonies was preposterous.

It is contended by the special respondent that, with reference to the well-known case of Hunooman Pershad decided by the Privy Council, he was only bound to satisfy himself of the existence of a reasonable necessity. Granted—but according to his own showing, he must have known that the necessity for Rupees 70 was not reasonable in a person of the guardian's position and poverty.

I think, therefore, that the plaintiff is entitled to a declaration that his mother and guardian improperly burthened his property with the loan of Rupees 70, but he cannot in this suit have the sale in execution reversed, for that sale was legally made in satisfaction of a decree passed by a Court having jurisdiction, and the property has passed by the sale into the hands of an innocent third party for value.

The special appeal therefore is allowed, and the Additional Judge's order modified to this extent. Under the circumstances, I would make each party pay their own costs.

Mitter, J.—I concur with my learned colleague in holding that the Court of Small Causes had jurisdiction to pass the decree in question, and the plaintiff is bound by it. The sale in execution of that decree is therefore perfectly valid, and the plaintiff has no right to ask us to set it aside. Holding this view, I think it quite unnecessary to enquire whether the mortgage executed by the plaintiff's mother was a valid transaction or not, inasmuch as any declaration on that point in the plaintiff's favor would be perfectly useless, the property covered by that mortgage having been sold in execution of a decree passed by a Court of competent jurisdiction, and the plaintiff being no longer in a position to question that sale.

* *Ante*, p. 184.

The 1st September 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Damages.

Case No. 1538 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Shahabad, dated the 24th April 1869, reversing a decision of the Moonsiff of that District, dated the 6th November 1868.

Phoolbasee Koer (Plaintiff), *Appellant,*

versus

Parjun Singh (Defendant), *Respondent.*

Baboo Boodh Sein Singh for Appellant.

Moulvie Mahomed Yusuf for Respondent.

Damages cannot be claimed for mere abuse or threatening language.

Macpherson, J.—It appears to me that this special appeal must be dismissed with costs. I do not concur with the Lower Appellate Court in the opinion that the suit will not lie, because of Section 1, Act VIII. of 1859. But I think that the suit was properly dismissed, because plaintiff is not entitled to damages for mere abuse, *i. e.*, abusive language, without proof of any damages. The Court below finds in this case that no damage was proved, and he says that, as a matter of fact, no damage was sustained either from the abuse or the threat of assault. The suit is between a grandmother and her grandson, and, in fact, merely arises out of a family-quarrel.

The appeal is dismissed with costs.

Glover, J.—I concur with Mr. Justice Macpherson, but I also think that the objection taken in cross-appeal is a good objection, namely, that this being a suit for damages coming under Section 6 of the Small Cause Court Act, no special appeal to this Court lies from the decision of the Court below. It appears to me clear that the term "damages" in that Section includes a case of this sort, for the utmost that is said to have been done by the defendant is that he threatened the plaintiff, after abusing her, with a *lattee.* Now, the only exception to Section 3 is in cases for the recovery of damages on account of "personal injury." In this case, the mere threatening with a *lattee* does not, I think, amount to "personal injury," and I am, therefore, of opinion that this case was of a nature cognizable by a Court of Small Causes, and that no special appeal lies to this Court.

The 1st September 1869.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Evidence—Sections 162, 163, and 170, Code of Civil Procedure.

Case No. 844 of 1869.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 19th January 1869, reversing a decision of the Moonsiff of Ghatal, dated the 24th August 1868.

Ishan Chunder Ghose and others (Plaintiffs), *Appellants,*

versus

Hurish Chunder Banerjee and another (Defendants), *Respondents.*

Baboo Tarucknath Dutt for Appellants.

Baboo Bama Churn Banerjee for Respondents.

When a defendant specially summoned to attend and give evidence under Sections 162 and 163, Code of Civil Procedure, failed to attend, and there was evidence to support the plaintiff's case, the Court acted rightly in deciding against the defendant under Section 170.

Macpherson, J.—In this case, the defendant, having been ordered to attend and give evidence, without lawful cause failed to comply with that order; and, in consequence, the Court of first instance passed judgment against him. The first Court decided in favor of the plaintiff upon other grounds also.

In appeal, the Lower Appellate Court reversed this order, not being satisfied with the evidence of the plaintiff, and saying that the Moonsiff ought not to have decided against the defendant, because he failed to appear and give evidence.

It appears to me that the judgment passed by the Court of first instance against the defendant was a judgment which that Court had full power to pass, and which that Court properly passed. And I think that the Lower

Appellate Court was wrong in interfering with that judgment. We have sent for *nuthee B;* and it appears clearly from it that the defendant was summoned specially under Sections 162 and 163 of the Code of Civil Procedure, and that, when he showed cause against being called upon to attend, the Court was not satisfied with the cause shown. Under these circumstances, and there being evidence which supported the plaintiff's case, the Moonsiff was quite right to decide against the defendant under Section 170. The judgment of the Lower Appellate Court ought to be reversed, and the judgment of the Court of first instance restored with costs.

Glover, J.—I am of the same opinion. It is quite clear that the order of the Moonsiff was based substantially on the default of the defendant to come in and give evidence, and it appears, moreover, that the defendant was summoned after enquiry on the part of the Moonsiff that his evidence was necessary for the elucidation of the case.

The 2nd September 1869.

Present :

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Execution—Partial satisfaction—Remanent decree.

Case No. 325 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 1st May 1869, affirming an order of the Subordinate Judge of that District, dated the 8th September 1868.

Tej Narain Chatterjee (Judgment-debtor), *Appellant,*

versus

Ram Tunoo Mojoomdar (Decree-holder), *Respondent.*

Baboos Kishen Succa Mookerjee and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

The rule of law which forbids application for execution of part of a decree does not bar application for all that remains due upon a decree where the rest has been previously satisfied.

Markby, J.—I THINK that really the only question in this special appeal is the first. I think that, if the petition for execution can be considered to be a good one, no question arises on limitation.

The Lower Courts have held that execution is not barred, and they were, I think, perfectly justified in so holding, when they found that proceedings were taken upon this decree in January 1867, and that, subsequent to that date, satisfaction was entered up for one-half of the amount of money due under the decree. It might well be inferred that that payment was made in consequence of the proceedings taken at that date, and that they were, therefore, proceedings in execution sufficient to preserve the decree from limitation.

The principal question which arises in the case is on the other and first objection, as to whether or no the present execution of a part of the decree cannot be executed. Now, it has been frequently held by this Court, and I entirely concur in that view of the law, that no execution can issue for part of a decree, although under certain circumstances part decree-holders can apply for and obtain process of execution; but that means process of execution for the whole of the decree; but on looking to the facts of this case somewhat closely, it would appear that there was no application for execution for a part of the decree. The parties who are now entitled to the benefit of the decree are not the original parties to the suit. The original party to the suit was one Hurish Chunder Roy. His decree was sold, and by some proceedings, into the nature of which it is not necessary to enter at present, certain persons, named Biressur, Modhoo Soodun, and Ram Tunoo, were entered upon the record as joint decree-holders. It seems that, as between themselves, Biressur was entitled to an 8-annas share and Modhoo Soodun and Ram Tunoo to the other 8-annas share, but they were placed upon the record as joint decree-holders. On the 2nd of June 1868, all these persons were before the Court, and Biressur then informed the Court by petition that he had received in full his 8-annas share in the proceeds of the decree, that he had no further claim against the judgment-debtor, and that he left the execution of the remainder of the decree to his co-judgment-creditors Modhoo Soodun and Ram Tunoo. Upon that, the Court made an order, which was not perhaps quite formal, that Biressur had received his half

share of the decree; but that order, I think, amounted substantially to the only order which the Court had the power to make, and which was to enter satisfaction for 8 annas of the whole amount of the decree. Then upon the same day, it appears that Ram Tunoo and Modhoo Soodun asked the Court for execution of what they called their share of the decree; but taking that application together with the position of the parties at the time, I think that was, in fact, an application for execution of all that then remained due upon the decree, and therefore I think it was an application which the Court was at liberty to allow under Section 207, which says, if there be two or more decree-holders, one or more of them may make the application, "if the Court shall see sufficient cause for allowing him or them to make such application." There was clearly sufficient reason in this case for allowing them to make that application, for it was, in fact, part of an arrangement entered into between these parties amongst themselves and in the presence of the Court. Although, therefore, I do not wish to throw any doubt whatever upon the rule of law that there can be no application for execution of part of a decree, it is sufficient in this case to say that there was no application for execution of a part of the decree, but an application for all that then remained due upon the decree, the rest having been previously satisfied.

The result is that the appeal will be dismissed with costs.

Hobhouse, J.—I agree.

The 2nd September 1869.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Revenue Courts—Jurisdiction—Section 10, Act VI. (B. C.), 1862.

Case No. 948 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 2nd February 1869, reversing a decision of the Deputy Collector of that District, dated the 31st August 1868.

Anunt Manjhee (Defendant), *Appellant,*

versus

Joy Chunder Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboos Mohinee Mohun Roy and *Pitambur Chatterjee* for Respondents.

Section 10, Act VI. (B. C.) of 1862, merely empowers Revenue Officers to decide what rate of rent the tenant of a particular parcel of land has been paying, and does not empower them to declare that rent at a certain rate shall be paid, simply because rent at that rate has been paid by the tenants of neighbouring lands.

Macpherson, J.—It appears to me that the judgment of the Lower Appellate Court is wrong.

The plaintiffs sued for a kubooleut at Rupees 35-14-6, at which the jumma has (as the plaintiffs state) been assessed, according to the prevailing rate in the neighbourhood.

The suit is, in fact, a suit for a kubooleut at an enhanced rate; and the plaintiffs, without attempting to prove their right to enhance the rent under any of the provisions of Act X. of 1859, relied exclusively upon a decision of a Deputy Collector passed in a proceeding held by him under Section 10 of Act VI. of 1862 (B. C.).

The Court of first instance did not treat this decision as conclusive; and as the plaintiffs declined to take a decree at the rate admitted by the defendant, the suit was dismissed.

The Lower Appellate Court reversed this decision, holding that the Deputy Collector's proceeding under Act VI. of 1862 (B. C.) conclusively proved that the plaintiffs were entitled to rent as prayed by them.

There can be no doubt that the decision of a Revenue Officer acting under Section 10 of Act VI. of 1862 (B. C.) is final if not reversed on appeal, if the decision be on a matter with which that Section authorizes him to deal. But in the present instance, what the Revenue Officer did was to assess upon the land such rent as he thought proper. This is quite beyond the power of any one acting under Section 10 of Act VI. of 1862 (B. C.). The sole object of that Sec-

tion is to authorize the Revenue Courts to ascertain for the landlord what the existing condition of his estate is, what are the measurements, what the names of the tenants, what the rents that they are paying. But the Section does not empower Revenue Officers to give the go-by to all the provisions of Act X. of 1859 as to the enhancement of rent, and to decide that rent at a certain rate is to be paid for a holding, because the tenants of neighbouring lands pay at the rate. All that can be decided is the rate of rent which the tenant of any particular parcel of land has been paying; and the Revenue Officer, who cannot find out what rent the tenants have, as a matter of fact, been paying, has no power to proceed to assess the rent, or to declare what rent, in his opinion, the tenant ought to have paid, or ought in future to pay.

If the defendant proves that he has never paid more than the 18 rupees which he admits—or if the plaintiffs do not prove, independently of the decision under Section 10 of Act VI. of 1862 (B. C.), that they are entitled to rent at the rate claimed by them in their plaint, then the suit ought to be dismissed.

The judgment of the Lower Appellate Court is reversed, and the case is remanded to be tried again *de novo*. Costs will abide the result.

Mitter, J.—I entirely concur with my learned colleague.

The 2nd September 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Jurisdiction—Joint decree-holders.

Case No. 1485 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 30th March 1869, affirming a decision of the Moonsiff of Mahomedpore, dated the 1st February 1869.

Huro Mohun Roy (one of the Defendants), *Appellant,*

versus

Khettro Monee Dossee (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondent.

A suit against a co-sharer for a share of money recovered by the plaintiff upon a decree which was joint property may be brought in a Small Cause Court.

Markby, J.—In this case what the plaintiff asks for is to recover from his co-sharer his share of the money which has been recovered by him upon a decree which the plaintiff alleges to be joint property. The money was not actually recovered by the decree-holder, but there was a transaction in the nature of a set-off against some other claim, and this, in law, would, no doubt, amount to the same thing as if he had recovered the money. Now, this is just one of those claims which may be looked upon in two or three different ways, but I do not think it is necessary for us in this case to examine the matter minutely, or to decide precisely which is the proper mode of viewing this case, for the suit was one which would come within one, if not more than one, of the descriptions in Section 6 of the Small Cause Court Act. It is clear that it was either a suit for money due on a contract (that is, what would be in this case an implied contract), or for personal property, or for the value of personal property, or for damages. It clearly falls under one of these descriptions, and, if so, the jurisdiction would be in the Small Cause Court, and no special appeal would lie.

I think, therefore, that the special appeal must be dismissed with costs.

Hobhouse, J.—I agree.

The 3rd September 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Defamation—Damages—Jurisdiction.

Case No. 1396 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 12th June 1869, modifying a decision of the Moonsiff of Sulkea, dated the 12th January 1869.

Dhurmo Doss Koondoo (Defendant), *Appellant,*

versus

Koylash Kaminee Dossia (Plaintiff), *Respondent.*

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Baboo Gopeenath Mookerjee for Appellant.

Baboo Rash Baharee Ghose for Respondent.

In a suit for damages for defamation of character, the plaintiff is not required by any absolute rule of law to give affirmative evidence of the falseness of the charge.

Quare.—Before a suit can lie in a case of this kind, is it necessary to presume that actual pecuniary damage has resulted?

Markby, J.—The first question which arises in this case is whether or no any special appeal will lie, the suit being one founded upon defamation, in which the damages claimed are Rupees 500. Precisely this question has arisen in two cases which have come recently before myself sitting with Mr. Justice Kemp, and we held then upon the words of the 3rd Clause, 3rd Exception, of Section 6 of the Mofussil Small Cause Court Act, that cases of this kind were on account of an alleged personal injury, and that it must be presumed that actual pecuniary damages had resulted from the injury, otherwise the suit would not lie at all, and that, therefore, they were within the proviso, and open to that exception, that is to say, within the jurisdiction of the Small Cause Court. No case was cited before us on either of these occasions, but now it has been brought to our notice that a contrary view has been taken in a case reported in Volume X. of the Weekly Reporter, page 114. I am not at this moment prepared to say that I have altered my opinion, because it is not necessary in the view which we take of the merits of this case, and for the purposes of this case, to adopt any final view on that question. I only wish to say that, had I been aware that a different view had been taken of this Section of the Small Cause Court Act by another Division Bench, I should have given the matter more consideration than I did in either of those cases.

In the present case, even assuming that we have jurisdiction, I think it is perfectly clear that this special appeal ought to be dismissed. The only ground which has been taken before us is that the Lower Appellate Court was wrong in giving a decree to the plaintiff, she not having called any witnesses as evidence to establish her character and the falseness of the charge of unchastity which was the defamation alleged. It appears, however, that the only definite shape that that charge had ever taken at the time when she brought forward her evidence in this suit was, that her husband had in his lifetime put her away for her unchastity. She did call two witnesses, chiefly, indeed, to prove the amount of damages she had incurred, but one of these distinctly states that she had lived with her husband until the time of his death; therefore there was evidence, and sufficient evidence, if the Court chose to act upon it (whatever the rule of law may be), to justify the call upon the defendant to prove the unchastity which he alleged. Moreover, as I am reminded by Mr. Justice Hobhouse, there was also evidence in the deposition of the defendant himself, and strong evidence, in my opinion, in favor of the plaintiff's case, because it was shown that, under the directions of a family-arbitration, the person who now makes these aspersions upon her character had handed over to her a portion of the property formerly belonging to her husband. But I would go even one step further, and I am not prepared to say that, even without the evidence that there was in this case, that there is any absolute rule of law which requires the plaintiff in every suit for defamation to give affirmative evidence of the falseness of the charge made. I think that there are cases in which, from the nature of the charge itself, the greater or less particularity with which it is made, and the steps which the party making it has taken to establish that charge, and generally his conduct with respect to it, it may be right to call upon the party who has made the charge to establish the truth of his assertions, without calling upon the plaintiff to establish by affirmative evidence that it is false; but in this case it is not necessary to go to that length, as there was evidence on the part of the plaintiff to show that the charge which was made against her was false. I think, therefore, that, under any circumstances, the special appeal ought to be dismissed with costs.

Hobhouse, J.—I agree.

The 3rd September 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Review—Jurisdiction.

Case No. 1358 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 10th March 1869, affirming a decision of the Moonsiff of that District, dated the 8th September 1868.

Nubo Kristo Mookerjee (Plaintiff), *Appellant,*

versus

Nudiar Chand Hattee (one of the Defendants), *Respondent.*

Baboos Tarucknath Sein and *Pearee Mohun Mookerjee* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

A suit having been decreed *ex parte*, defendant applied for a revival thereof under Section 119, Code of Civil Procedure. The application having been rejected, defendant appealed, and the first Court was directed to inquire whether there was sufficient cause for the non-appearance of the defendant. This was done, and the defendant was allowed to defend the suit. The plaintiff then appealed to the Judge who reversed the last order. Both parties then went back to the Moonsiff who, on 26th April 1867, recorded a proceeding that the original *ex-parte* order was to stand. In the meantime, the defendant appealed to the High Court, which reversed the Judge's order.

HELD that the effect of the High Court's order was to render valid the Moonsiff's order admitting the defendant to defend the suit, and that no application for review was necessary on the part of the defendant.

HELD that the High Court's order, being a final decision by way of appeal on a question which arose in the suit, could not be interfered with except by the Privy Council.

Markby, J.—I THINK this special appeal ought to be dismissed. Looking to the matter closely, and ascertaining the real facts of the case, I think it is quite clear that the ground argued does not arise, and I think I may even go so far as to say that, if the vakeel who argued the case before us for the special appellant had looked into the matter as he undoubtedly ought to have done, he must have himself seen that it does not arise.

It appears that, on the 18th of April 1863, the suit, which was one in the nature of a suit for a resumption of lakheraj land, was decreed *ex parte*. On the 8th of January 1866, the defendant applied for a revival of the suit under Section 119. The Moonsiff rejected that application, and the defendant thereupon appealed to the Judge. On the 9th December 1866, the Judge directed the Moonsiff to enquire whether there was sufficient cause for the non-appearance of the defendant. The Moonsiff made that enquiry, and on the 14th January 1867, finding that there was good cause, admitted the defendant to come in and defend the suit.

The plaintiff then appealed to the Judge against that order, and on the 3rd of April 1867 the Judge reversed the order of the Moonsiff. The effect of that order of the Judge was to restore and give effect to the original *ex-parte* decree of the 18th April 1863. Then, I suppose for the sake of greater security, the parties, notwithstanding that order, went back to the Moonsiff, and on the 26th April 1867 the Moonsiff, distinctly acting upon the order of the Judge, and not upon his own opinion, that he ought to admit the defendant to come in and defend the suit, records a proceeding that the original *ex-parte* order of the 18th April 1863 is to stand. To my mind that proceeding was altogether unnecessary, as the order passed in it was a necessary consequence of the Judge's order, but, at any rate, it is quite clear that the Moonsiff was only carrying out the effect of the latter order. In the meantime, however, the defendant was appealing to this Court, and this Court, on the 1st of January 1868, reversed the order of the Judge. Clearly the effect of that reversal was entirely to do away with the proceeding of the Moonsiff of the 26th April 1867, and to restore the order of the Moonsiff of the 14th of January 1867, by which he had declared his intention to allow the defendant to come in and defend the suit. Then, on the 8th of April 1868, the defendant took a course which is described before us as an application for review of the decree of the 26th April 1867. Possibly the form of that application may in some measure justify that description of it, but to my mind it is quite clear that it was not a proceeding in any way connected with a review, for there was no decree of the 26th April 1867. The only decree which then existed was the *ex-parte* decree of the 18th April 1863, but that decree was subject to the then only existing order, namely, that passed by the Moonsiff on the 14th of January 1867, by which he had determined to set it aside, and to allow the defendant to defend the suit.

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Therefore, the first ground of appeal, which is that the application for review of the 8th of April 1868 was too late, because it was made after 90 days, and that no reasons were given for admitting it after time, seems to me altogether to fail, for when the Moonsiff heard the application of the 8th April 1868, he was not hearing the case in review of his order of the 26th of April 1867, but he was hearing it in consequence of his order of the 14th January 1867, which, by the decision of this Court, had become a valid order.

I may here state, as it is now brought to my mind, and it appears to be so, that it was perhaps the somewhat unnecessary and somewhat informal proceeding of the 26th of April 1867 which misled the defendant into making this application as an application for review on the 8th April 1868. It would fully account for the form of the application, but it does not affect the rights of the parties; and if both the proceedings of the 8th April 1868 and of the 26th April 1867 were struck out, the jurisdiction of the Moonsiff would have been just the same. I think, therefore, as I have already said, that the first ground of appeal before us, that the application for review was too late, altogether fails, because no application for a review was necessary at all.

The next ground is one which I must say has taken me somewhat by surprise. We are asked by the pleader for the special appellant to consider whether or no the order of the High Court of the 1st January 1868, declaring that there was no appeal against the order of the Moonsiff of the 14th January 1867, was wrong. It seems to me that that is a question over which we have no jurisdiction. That order, although not a final decree in the suit, yet was a final decision by way of appeal upon a question which arose in the suit, and it seems to me that the only Court which has any jurisdiction to interfere with that order is the Privy Council, for it was a final order just as much as a final decree in the suit would have been.

Upon the third point, I do not think it necessary to say anything, as I think the vakeel has wholly failed to show that the Judge has in any way misconstrued the evidence.

The special appeal will be dismissed with costs.

Hobhouse, J.—I agree.

The 4th September 1869.

Present :

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Pleaders' precedence—High Court.

Case No. 1433 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 5th May 1869, affirming a decision of the Moonsiff of Bamunarah, dated the 4th November 1868.

Sreeneebash Roy and others (Plaintiffs), *Appellants,*

versus

Umbika Churn Roy and others (Defendants), *Respondents.*

Baboos Ashootosh Chatterjee and *Taruck-nath Dutt* for Appellants.

Baboo Umbika Churn Banerjee for Respondents.

The senior pleader who is present has the entire control of a case in the High Court, and it is not open to the junior pleader to take any ground of appeal which his senior has not thought fit to argue, except only when the senior has obtained the permission of the Court that that course should be taken.

Markby, J.—In this case the point with respect to the Law of Limitation which was suggested in this special appeal is found after further investigation not to arise. Upon that being pointed out to Baboo Ashootosh Chatterjee, who has been the senior pleader in this case, he very properly declined further to argue the case, and he did not take any other point in special appeal. Thereupon, it was proposed by the junior vakeel to argue some point which had not been taken by his senior. I must say, I think, it is a matter of very great importance for the proper transaction of business in this Court that it should be well understood that the senior pleader who is present has the entire control of the case, and that it is not open to the junior pleader to take any ground of appeal which his senior has not thought fit to argue, except only when the senior pleader has asked and obtained the permission of the Court that that course should be taken. The appeal will be dismissed with costs.

Hobhouse, J.—I am entirely of the same opinion.

The 4th September 1869.

Present:

The Hon'ble G. Loch, *Judge.*

Refund of stamp-duty—Appeals.

In the matter of Zeebunnissa Begum, *Petitioner.*

Mr. R. E. Twidale for Petitioner.

The rule allowing refund of stamp-duty (Section 98, Act VIII., 1859, as modified by Section 26, Act X., 1862) is not applicable to appeals which may be compromised.

Loch, J.—I DO not think that the petitioner is entitled to a refund of the value of the stamp of the petition of appeal. Section 358 of Act VIII., 1859, gives the Appellate Court the like powers as those exercised by Courts of original jurisdiction, but confers no privileges on the parties to a suit. The provisions of Section 98, Act VIII. of 1859, modified by Section 26, Act X. of 1862, are applicable only to cases where no judgment has been pronounced, and it allows the refund of the full amount of the stamp if the agreement or compromise be announced to the Court before a certain stage of the proceeding has been arrived at, and half the amount at a further stage of the proceedings. But the law nowhere says that this rule is applicable to appeals which may be compromised. It is true that, under the practice of the late Sudder Court, refunds were allowed, but I have always doubted the correctness of the practice, for it appears to be very unlikely that the Legislature, had it intended such refunds to be made, would have neglected to have made distinct provision for them in one or other of the various laws which have been passed. I reject this application.

The 6th September 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Special appeals—Absent defendants—Sections 116 and 337, Civil Procedure Code.

Case No. 1426 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 15th June 1868, modifying a decision of the Second Subordinate Judge of that District, dated the 15th September 1868.

Doorga Churn Sett and others (Plaintiffs), *Appellants,*

versus

Shamanund Gossain and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellants.

Baboo Pearee Mohun Mookerjee for Respondents.

No special appeal will lie on a ground relating merely to the weight of the reasons given by the Lower Appellate Court for the conclusion arrived at.

Where parties who have been made co-defendants do not appear, and the Court deals with the case under Section 116, Civil Procedure Code, the decree given is not in the nature of an *ex-parte* decree even as against the absent defendants; and proceeding as it does on a ground common to all the defendants, the decision may, under Section 337, be modified in appeal even in favor of defendants not before the Appellate Court.

Markby, J.—I THINK this special appeal must be dismissed. The first part of the argument has consisted entirely in a cri-

ticism of the reasons which the Lower Appellate Court has given for coming to its conclusions of fact. Now, I do not go so far as to say that under no circumstances can an objection be taken in special appeal to the reasons which the Lower Appellate Court has given. If it can be shown that the judgment is based wholly or mainly upon the misconstruction of a document or a misconception of the legal position of the parties, it may be that a special appeal of this kind would lie; but in this case we have nothing of that sort. The observations made before us by the pleader for the special appellant relate merely to the weight of the reasons given by the Lower Appellate Court for the conclusion arrived at, and it is clear that on such a ground no special appeal will lie.

Then the other objection is that the judgment of the first Court was at any rate good as regards two of the defendants. The facts appear to be that the only person who was at first made defendant before the first Court alleged that he was a co-sharer with two other persons, that they ought to be made co-defendants with him, and that the Subordinate Judge agreeing in that view ordered these two persons to be made parties to the suit, but they did not choose to appear; and therefore it was a case which the Court had to deal with, not as alleged by the special appellant as an *ex-parte* case under Section 111, but under the provisions of the concluding paragraph of Section 116, which provides in a case in which some of the defendants do not appear, that "the Court shall "proceed with the suit to judgment, and "shall, at the time of passing judgment, give "such order with respect to the defendant or "defendants who shall not have appeared as "shall be just and proper in the circum-"stances of the case."

Now, in this case, a decree in the ordinary form was given in favor of all the defendants as regards one plot, and against all the defendants as regards the other, and I think we ought to infer that that was a decree not in any sense in the nature of an *ex-parte* decree, but an ordinary decree. I think that will be the only course consistent with what the Court had itself done in bringing these parties on the record as defendants, and the only thing proper and just under the circumstances, namely, to give them the benefit of all that the defendant who appeared had to say in their behalf. Then the plaintiffs appealed, complaining of so much of the decree as was given in favor of the defendants, and the defendant who appeared in the first Court appealed complaining of so much of the decree as went against himself and his co-defendants. The Lower Appellate Court reversed the decision of the first Court as to so much of it as went against the defendants, and dismissed the suit *in toto*. It is now alleged that the decree of the first Court ought to have stood as against the two defendants who did not appear, that part of the decree being *ex parte*, and therefore not appealable. But I do not consider that this was an *ex-parte* decree coming within the provisions of Section 111. I think the plaintiffs in the Lower Appellate Court stood in the ordinary position of parties holding a decree against several defendants, of whom one or more were present before the Court; and thus I think that, under the provisions of Section 337, the Lower Appellate Court was quite right in treating the decision of the first Court as proceeding on a ground common to all, and therefore that he was justified under the last Clause of that Section in modifying the decree of the first Court in favor of all the defendants notwithstanding that these two defendants were not before him. The cause of action was one against all the defendants; the title of the defendants was one; and the whole enquiry had proceeded upon one matter only, namely, was the plaintiff or were the defendants in possession of those two pieces of property? The first Court thought that the plaintiffs were in possession; the second Court thought that they were not, and was, I think, therefore, perfectly justified under Section 337, when it reversed the decision of the first Court as regards all the defendants upon the one ground, and the only ground, upon which that decision had proceeded.

The special appeal will be dismissed with costs.

Hobhouse, J.—I agree in dismissing the appeal, and I may add that in my view it makes no difference whether the decree of the first Court was against all the defendants as between parties present or against some of the defendants in this shape and some *ex parte*. I think that in either case the decree of the first Court proceeded on a ground common to all the defendants, and that so, under the provisions of Section 337, the Lower Appellate Court was justified in reversing it in favor of all.

The 6th September 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart., Judges.*

Deed by minor—Voidance on coming of age—Rights of suit—Sale thereof.

Case No. 1155 of 1869.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 19th March 1869, reversing a decision of the Assistant Commissioner of Hazareebagh, dated the 15th September 1868.

Huree Ram and another (Plaintiffs), *Appellants,*

versus

Jeetun Ram and another (Defendants), *Respondents.*

Baboos Bhyrub Chunder Banerjee and *Proono Chunder Shome* for Appellants.

Baboo Kalee Mohun Doss for Respondents.

Where a "bond" (usufructuary mortgage) was signed in presence of a Deputy Commissioner by the agent of a minor, in open Court, and duly registered by him, the transaction was held to be the same as if the minor himself had executed the deed.

Until avoided by a distinct act on the part of the minor on his coming of age, it was held that the transaction must be considered as valid for the purpose of vesting in the obligees (mortgagees) the minor's interest in the property during the pendency of the usufructuary lease, leaving in the minor nothing more than a bare right to sue to recover after he came of age.

The minor's right, title, and interest having been subsequently sold in execution of a decree, it was held that the purchaser acquired the reversion of the minor after expiry of the usufructuary lease, but nothing more, as mere rights of suit are incapable of being seized and sold under Act VIII., 1859.

Markby, J.—In my opinion, this special appeal ought to be dismissed. The case was that two persons of the name of Andessur Pattuck and Radessur Pattuck were the joint owners of certain immoveable property in equal shares. In execution of a decree obtained against Radessur on the 10th of April 1863, execution was had, and on the 5th of April 1867 Radessur's right, title, and interest in the property was conveyed to the present plaintiffs, who are the auction-purchasers under the execution. Upon their going to take possession, the defendants set up a title under an usufructuary mortgage granted to themselves for Radessur's share on the 31st of August 1861, which usufructuary mortgage they alleged had still two years to run. It does not appear that they in any way disputed the title of the plaintiff to the reversion of the property after that usufructuary mortgage had expired, but they asserted that they had a right to hold the property for the remaining two years. The plaintiffs accordingly brought this suit to recover immediate possession of Radessur's 8-annas share, and, with respect to the usufructuary mortgage held by the defendants, they allege that it was executed during the minority of Radessur by a person who had no authority in that behalf.

The defendants admit the minority of Radessur at the time of the grant of the usufructuary mortgage, but nevertheless contend that it constitutes a valid answer to the plaintiffs' claim.

In the judgment of the Lower Court, what I call an usufructuary mortgage is described as a bond, and the Court says: "I find that this bond was executed on the "31st August 1861; that it was signed in "presence of the Deputy Commissioner of "the district by Andessur Pattuck and "Audhin Chand Pattuck, agent of Radessur "Pattuck, a minor, in open Court, and was "duly registered by him, and it was admitted "by the plaintiffs that the defendants hold "possession of the mouzah under that bond." He then goes on to say: "The Assistant "Commissioner was therefore in error "when he stated that the bond had not "been duly executed, and that the property "sold was not encumbered by any lease. "His finding on the facts is therefore wrong, "and as the mortgagee in possession cannot "be ousted by the purchaser of the land at "a subsequent sale in execution of a decree "of a Civil Court until the term of his "lease has expired, which it has not in this "case, or the balance due on the bond paid "up, the suit brought for possession ought "to have been dismissed."

Now, the effect of that finding I take to be this, that the Judicial Commissioner considered that the effect of the transaction of the 31st August 1861 was to pass the present interest of the minor, during the period which the usufructuary mortgage had to run, from him to the defendants. I think he adopts as his view of the facts, and I think he was justified in so doing, that this was the same as if the minor himself had executed the deed; and in his view of the law, he

considers that such a transaction by a minor is not absolutely void, but only voidable; and in that view of the law, I think he was right. I think this transaction by a minor was undoubtedly voidable, and I think that in this case we must presume that it was still capable of being avoided by the minor when the sale to the plaintiff took place; but it seems to me that, until it was avoided by some distinct act on the part of the minor after his coming of age, it must be considered a valid transaction, that is to say, valid for the purpose of vesting in the defendants the interest of Radessur in this property during the pendency of the usufructuary lease, leaving in the minor nothing more than a bare right to sue, if he thought proper so to do, to recover this property after he came of age.

Now, although some four years, if not more, have elapsed since the minor came of age, it is not shown that he has taken any steps whatever to avoid this lease. It is found by the first Court that he did not ratify it, but he also did not repudiate it, and therefore it seems to me that this lease is still in that condition in which it may either be affirmed or avoided by the minor. In that condition of things, the plaintiff has become the purchaser of the rights and interests of the minor, and there is no doubt (in fact, the point is not contested) that this purchase vests in him the reversion of the minor after the usufructuary lease has expired; but in my opinion nothing more than that passed to him by his sale-certificate. It has been held in a decision by Justices Phear and Hobhouse, in a case reported in Volume X. of the Weekly Reporter, page 225, that in a suit under Act X. a Collector has no right to sell rights of suit *qua* rights of suit alone. That was held following and adopting a decision of Mr. Justice Norman published in Volume VII. of the Weekly Reporter, page 278, where the question arose upon a right to sue being attached by a judgment-creditor in a civil suit; and in this case I follow and entirely adopt these two decisions. I think there is no power under Act VIII. of 1859 to seize and sell merely rights of suit. I consider this to be a totally different case from that in which the judgment-debtor is entitled to property, but who, when execution is sued out, and the sale takes place, happens to be out of possession. In that case, in contemplation of law, the property still remains the property of the judgment-debtor, and the fact that he happens to be out of possession is disregarded; but the very foundation of my judgment in this case is that all that remained in the minor in contemplation of law at the time of the execution was the mere right to sue to recover the property which for the time being was vested in the usufructuary mortgagees. So far as regards his interest in the property during the currency of the mortgage-lease, the minor had left in him a bare right to sue. Then, applying the decisions to which I have referred, what passed to the auction-purchaser under the sale was clearly only the reversion of the property after the term of the mortgage-lease had expired, because the only other thing which remained to the judgment-debtor, namely, the right to sue, did not, because it could not, pass to the auction-purchaser.

It was also contended that we ought to hold that, inasmuch as Radessur himself, upon coming of age, had the power to avoid this usufructuary mortgage, that the effect of the proceedings in execution against him, transferring as they do all his rights with reference to this property to the auction-purchaser, was *ipso facto* and by their mere force, to avoid this lease; but I think this would be giving a greater effect to proceedings in execution of decrees than was ever intended by the law. I think that, upon this point, one may refer to the case in which property is sold either for arrears of revenue due to Government, or for arrears of rent due to the landlord. It is provided by well-known provisions of the law in such cases that all incumbrances in the shape of inferior tenures that may have been created by the act of the defaulting proprietor can be avoided by the auction-purchaser. It is generally admitted that these provisions give a somewhat greater power to the execution-creditors in these particular cases than that given to execution-creditors in ordinary cases; but even there it has been held by the Privy Council with reference to sales for arrears of Government revenue in a case reported in the 11th Volume, Weekly Reporter, page 11, and by a Division Bench of this Court in a case where the sale is for arrears of rent by the landlord, reported at page 160 of the 11th Volume, Weekly Reporter, that the mere fact of such sales does not of itself render void the incumbrances created by the former owner, but that some act must be done by the purchaser evincing his intention to get rid of these incumbrances; and therefore, I think, I would be giving a greater effect to the execution in this case, than that given even in cases of execution for arrears of rent by the

landlord as for arrears of revenue, if it were declared that, by the mere fact of this execution and sale, the voidable lease granted by the minor has been actually avoided. This would be contrary to the principles laid down in the decisions above quoted, and in that point also the special appellant therefore fails.

I think, therefore, that this special appeal must be dismissed with costs.

Hobhouse, J.—After the very exhaustive judgment given by my learned colleague, I have very little to add upon this question; but it seems to me that the Lower Appellate Court distinctly held that, when the plaintiffs bought the property in question, they bought it encumbered by the lease under which, as the Lower Appellate Court expresses it, by the plaintiff's own admissions, the defendants had, from the very first creation of the lease, that is, from the year 1861, been in possession of the property. Then what was the right, title, and interest that the judgment-debtor, Radessur Pattuck, had in this property so encumbered by this lease? He had, it seems to me, a right of two kinds: first of all, a right to re-enter on the property on the expiry of the lease; and, secondly, a right of suit to set aside that lease. Now, it cannot be doubted that the plaintiffs have bought the right to re-enter on the expiry of the lease, but I do not think either that it can be doubted that, under the decisions to which Mr. Justice Markby has referred, the plaintiffs cannot be held to have bought the right of suit to set aside the lease; and this being so, I think the Lower Appellate Court was perfectly right in dismissing the plaintiffs' suit.

The 7th September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Special appeal—Fraud.

Case No. 1535 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 10th May 1869, reversing a decision of the Moonsiff of Sundeep, dated the 14th August 1868.

Murriam Bibee and another (two of the Defendants), *Appellants,*

versus

Mahomed Jamal and others (Plaintiffs), *Respondents.*

Mr. G. A. Twidale for Appellants.

No one for Respondents.

Plaintiff had executed a *kistbundee* for arrears of rent decreed against him by a Revenue Court. He then sued to set aside the decree and *kistbundee* on the ground that the decree had been based on a fraudulent and fictitious *kubooleut*. The suit, though dismissed in the first Court, was decreed in appeal.

HELD in special appeal, there being no evidence of the fraud in the record of the case, that the plaintiff was not entitled to a decree.

Hobhouse, J.—THIS was a suit, first of all, to establish the plaintiffs' right and possession to lands; and, secondly, to set aside a decree of the Revenue Courts and a *kistbundee* executed by the plaintiffs in satisfaction of that decree. The facts are these: The defendant Ameena Bibee sued the plaintiffs for arrears of rent in the Revenue Court, on the ground that those arrears were due under a kubooleut which the plaintiffs had given to the said Ameena. In that suit, the Revenue Court found that the plaintiff had executed the kubooleut in question, and gave Ameena Bibee a decree for the rents claimed. Thereupon the present plaintiffs, then defendants, executed a *kistbundee* in favor of the defendant Ameena, agreeing to pay her the amount of arrears of rent found to be due from them according to certain kists. The plaintiffs then came to the Civil Court in the present case, and sued to set aside the decree of the Revenue Court and the *kistbundee* which they themselves had executed, on the ground that the kubooleut on which the decree of the Revenue Court was founded was a fraudulent and fictitious document. It was on the ground of this fraud that they sued to set aside the decree and the *kistbundee* which followed it, and they further sued to establish their right to hold on in the lands as proprietors of them.

The Court of first instance dismissed the plaintiffs' suit, holding it proved that they were nothing more than jotedars, and not proprietors of the land.

The Lower Appellate Court has found that the plaintiffs have established their proprietary right to the lands under a deed of sale of the year 1249, and has further held that the kubooleut set up by the defendants is not only not proved, but is a false and fabricated document.

We have very considerable doubts as to whether, under any circumstances, a decision of a Revenue Court on a matter in which it has jurisdiction, and a *kistbundee* executed by the defendants in the Revenue Court in satisfaction of a decree of such Court, can be set aside, in the proper sense of the word, by an appeal to the regular Civil Courts. We think, however, that in a Civil Court in a case like the present the plaintiffs would be entitled to a judgment on the question of their title to the lands; but whether the plaintiffs' title to the lands under the original purchase be good or not, we think that they would not be in a position virtually to set aside the decision of the Revenue Court, without showing that the decision was based upon documents and upon a transaction which, upon their own statements, was fraudulent and fictitious. The Lower Appellate Court has found that the plaintiffs have established their proprietary purchase of the lands and their subsequent possession under such purchase. But it is quite possible that, notwithstanding such purchase, the plaintiffs may, under circumstances of which we have not and need not have any cognizance, have allowed their position in regard to the lands to be altered; and a Court of competent jurisdiction has found that whatever that position may have been originally, it is not what it was, but is simply the position of a *tenant* to his landlord. But the plaintiffs averred that this supposed relationship of landlord and tenant was altogether fraudulent and fictitious. It was, therefore, we think, upon them to show the fraud upon which they alleged this supposed relationship was based. The Lower Appellate Court has found the existence of such fraud; but it is contended by the pleader for the special appellant that there is no evidence of such fraud on the record, and we remark that there is no specific mention of any such evidence in the judgment of the Lower Appellate Court. The plaintiffs, after having been duly served with notice, are not present either personally or by pleader, but Mr. Twidale for the special appellants informs us that he has carefully looked through the record, and that in that record there is no evidence of any fraud except it be a statement made by one of the plaintiffs himself in the case in the Revenue Court to which I have alluded. The plaintiff being himself alive, and for anything we are shown to the contrary, capable of giving evidence in this case, a statement which he made in another case is of no sort of value whatever against the defendants, appellants, and we think, therefore, that there is no evidence of the fraud alleged on the records of this case. This being so, we think that the plaintiffs were not entitled to a decree in this case.

We, therefore, reverse the decision of the Lower Appellate Court, and restore that of the first Court, with costs of this Court and of the Lower Appellate Court.

The 8th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Rent-suit—Jurisdiction.

Case No. 1494 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 28th May 1869, reversing a decision of the Assistant Collector of that District, dated the 10th April 1869.

Ishan Chunder Sein (Plaintiff), *Appellant,*

versus

Kenaram Ghose and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellant.

Baboos Mohinee Mohun Roy and *Nuleet Chunder Sein* for Respondents.

In a suit for rent where the original landlord had, in consideration of a loan from his tenant, made to him an assignment of the rents to some extent, plaintiff alleged that that arrangement had been put an end to, and the assignment had dropped, by reason of the defendants having recovered the money in another way.

HELD that the Deputy Collector had full jurisdiction to inquire into the allegation, because plaintiff's cause of action was the original cause of action of the landlord, and only effect of subsequent events was to deprive defendants of an answer to the claim.

Markby, J.—IT is clear that there must be a remand in this case. I am unable to concur with the view of the Judge that this was a question over which the Revenue Courts had no jurisdiction. The suit was for rent by the assignee of the original landlord. The original landlord had made to his

tenant, in consideration of a loan which he took from him, an assignment of the rents to some extent. The allegation on the part of the plaintiff is that that arrangement had been put an end to, and the assignment had dropped by reason of the defendants, having recovered the money in another way; that the first Court found to be true, and held that it was a point on which it had full jurisdiction to enquire.

I think the Deputy Collector was right, because the cause of action upon which the plaintiff sued in this case is the original cause of action of the landlord, which, it is alleged, and is not disputed, has come to him by assignment from the original landlord, and the only effect of the subsequent events which have taken place is to deprive the defendant of an answer which he otherwise would have to the plaintiff's claim. The nature of the plaintiff's claim has never been changed, and the case to which the Judge refers in Volume VIII. of the Weekly Reporter is wholly different from the present one. There the plaintiff sought to recover moneys which he alleged had been paid under a mistake, and sued for a refund of the collections made, alleging that they had not been appropriated, as they ought to have been, to the payment of certain debts. It is also quite different from the Full Bench case reported at page 528, Volume VIII., Weekly Reporter. There the cause of action was not on any relation of landlord and tenant created by the parties between themselves, but certain circumstances from which it was alleged that the Court, as a Court of equity, ought to imply that such relation existed. These two cases, therefore, are clearly distinguishable from the present one, and the Revenue Court clearly has jurisdiction.

Then, by way of cross-objection, it is said that the suit should not be remanded, because it is impossible, on the facts of the case, that the relation of landlord and tenant can exist between the parties, as shown by the circumstances connected with the nature of the original lease and the interest which the parties took under it. That objection was overruled in the first Court, and no appeal was taken thereon in the Lower Appellate Court. It is quite clear, therefore, that this question does not arise. The case will be remanded for trial on all the issues which have been raised in appeal. Costs to follow the result.

Glover, J.—I concur.

The 8th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Trusts—Right of suit—Sections 14 and 15, Act XX., 1863.

Case No. 1563 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Hooghly, dated the 28th April 1869, reversing a decision of the Second Subordinate Judge of that District, dated the 24th April 1868.

Doyal Chund Mullick (Defendant), *Appellant,*

versus

Keramut Ali (Plaintiff), *Respondent.*

Baboo Boykuntnath Paul for Appellant.

Moonshee Syud Ameer Ali for Respondent.

In a suit by the mutawallee of a large Mahomedan establishment, acting on behalf of all the Mahomedans of the neighbourhood, to secure the performance of trusts of a deed of appropriation by a Mahomedan, the plaintiff was held, with reference to the words of Sections 14 and 15, Act XX. of 1863, to be a person interested in the preservation of the trust and a proper person to bring the suit. He was not required under those Sections to have any interest in the trust, direct or immediate, or any share in the management of the property.

Markby, J.—I THINK that this special appeal must be dismissed. The first point taken is that the leave to institute the suit which is required by Section 18 of Act XX. of 1863 was not granted. It does not appear that that objection was taken in either of the Courts below, nor was it taken here in special appeal. As a matter of fact, the vakeel who argued the case for the special appellant is not even able to say positively that such leave was not granted; he can only say that he cannot find on the record any indication that it was so granted, and under these circumstances, I think, we must decline to allow such an objection to be taken now.

Upon the second point, namely, that the plaintiff is not a person who can institute this suit, not falling within the description of persons who may institute these suits under Sections 14 and 15 of the Act I have just referred to, I think that objection also fails. That objection is one entirely of a

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preliminary nature. The suit was one the general object of which was to secure the performance of the trusts of a deed of appropriation by a Mahomedan. A number of questions have been raised as to whether this suit will lie against all the defendants, and as to whether it does not ask for more than the plaintiff is entitled to ask, and other similar questions, all of which, in my opinion, are premature at present, as the merits of the case have not been in any way gone into.

All that it is necessary for us to say is that the plaintiff, coming as we think he does, and as the Lower Appellate Court evidently thought he did, under the above Sections, is entitled to bring this suit. The plaintiff is a person occupying a very conspicuous position amongst Mahomedans. He is the mutawallee of a very large Mahomedan establishment; he represents himself, and the Judge believes in that representation, as acting in this case on behalf of all the Mahomedans of the neighbourhood; and looking to the very wide words of Sections 14 and 15, Act XX. of 1863, I think he may be said to be a person interested in the preservation of the trust. No pecuniary interest is required or any interest direct or immediate in it. It is not required under these Sections that he should be entitled to any share in the management of the property in trust, and I think that, looking to his position, the plaintiff was rightly held to be a proper person to bring this suit.

Another objection has been made that the plaintiff does not belong to the same sect as the person who created this trust. That objection alone was considered by the Lower Appellate Court as not sufficient to disentitle the plaintiff from suing, and we see no reason at present to differ from its opinion that this was not sufficient to disentitle the plaintiff to sue.

The third objection taken falls under the category I have already mentioned, namely, of questions which do not arise now, but which will arise when the suit will be tried on its merits. This objection was taken under the seventh ground of appeal.

The last objection is that the Judge, instead of remanding the case, ought to have tried it himself. As regards this objection, I think that it must be taken upon his order of remand that the Judge was satisfied that the record was not in such a state as to enable him to give a satisfactory decision in the case, and that, having come to that conclusion, he was justified in remanding the case to the first Court.

I think, therefore, that the special appeal must be dismissed with costs.

Glover, J.—I am of the same opinion.

The 9th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Sales for arrears of rent—Regulation VIII., 1819.

Case No. 1412 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 17th February 1869, affirming a decision of the Deputy Collector of Boodbood, dated the 31st October 1868.

Modhoo Soodun Koondoo (Defendant), *Appellant,*

versus

Ramdhun Gangolee (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondent.

No sales for arrears of rent, not even sales under Regulation VIII. of 1819, have *ipso facto* the effect of cancelling tenures created by defaulting owners; they merely give to a purchaser power to cancel such tenures if he thinks proper.

Markby, J.—I THINK that the special appellant in this case has made out a good ground of special appeal. The case originally came before the Deputy Collector upon a suit by the plaintiff for arrears of rent at an enhanced rate. The plaintiff is a dur-putneedar under a person who purchased the putnee when it was sold for arrears of rent under Regulation VIII. of 1819.

The defendant, in answer to this suit, denied that his tenure was liable to enhancement, alleging that he held under an istmoraree tenure created by the defaulting putneedar, and that he had paid at a uniform rate for 20 years. Upon that, the Deputy Collector raised one issue only, which concerned the right of the plaintiff to enhance the rent, namely, whether the jumma held

by the defendant is istmoraree or not, that is, is the defendant's tenure liable to enhancement of rent or not, clearly putting the liability of the defendant to enhancement upon the question whether the jumma, which I understand it to be admitted in the issue actually did exist, was or was not an istmoraree one. The other issues are entirely upon the question of what the proper amount of rent will be, supposing the tenure liable for enhancement.

Upon the issue whether or not the defendant's tenure was istmoraree, the Deputy Collector relies entirely upon a decision between the defendant and the defaulting putneedar given by the Moonsiff in the year 1841, in which he considers that it was raised in issue, and decided that that tenure was istmoraree. He considers that that finding is conclusive upon the question raised on this issue; and relying entirely upon that decision, he decides that that tenure is not liable to enhancement at the suit of the plaintiff.

The plaintiff then appealed to the Judge, and the Judge reversed the decision of the Deputy Collector upon this point. He considers that the effect of the sale for arrears of rent under Regulation VIII. of 1819 is at once to cancel all engagements made by the defaulting putneedar, and that the decision on which the Deputy Collector relies in no way affects the question as between the present parties. He thereupon remanded the case to the Deputy Collector generally.

A great many decisions and appeals have taken place since that order in remand, but the case now comes before this Court for the first time on special appeal; and the first point which arises in this case is whether or no it is now open to argument that the decision between the defaulting putneedar and defendant that the tenure was an istmoraree one is conclusive.

It seems to me that, according to the decisions of this Court, it was quite competent for the defendant either to have appealed at once to this Court from the first order of remand of the Judge upon this question, or to reserve his appeal to this Court upon that point until all other questions should have been disposed of in the Lower Courts. This principle has hardly been contested, but it is said that this point has been abandoned in the course of the argument before the Lower Court; but after reading its decision, I do not think that that is the case, because that point could not have been raised then, inasmuch as the order passed by the Judge on the occasion of the first remand was conclusive until appealed to this Court; and therefore I do not think, when it is said that only one point was intended to be brought before the Lower Appellate Court, that it could be inferred that there had been a waiver by the defendant of points which were not open to him in the Lower Court. Then, if the point is open, it seems to me that the decision of the Judge to which I have referred above was wrong, and I think it of the last importance in this case to see how the question arose. It was perfectly open for the plaintiff in this suit to allege that, by the sale for arrears of rent, this tenure was liable to be, and had been, cancelled. It was also open to him to allege, as he has now alleged, that, whether or no this tenure was cancelled, the decree passed by the Moonsiff in 1841 was no bar to enhancement as between the present putneedar and the defendant in consequence of certain changes made in the law. But it appears to me quite clear that he raised neither of those questions, and the only one which he raised is—is the tenure which the defendant holds an istmoraree one or not? I think that upon that question the Deputy Collector was perfectly right in treating the decision of 1841 as conclusive. I think the Judge is wrong in saying that, by the sale for arrears of rent, all the previous tenures created by the defaulting putneedar were cancelled. That appears to me contrary to the ruling of the Privy Council in their decision,* reported in Volume X. of Moore's Indian Appeals; to that of the same Court in Volume XI. of the Weekly Reporter, page 11; and also to the decision of Justices Bayley and Dwarkanath Mitter, published at page 160 of the same volume. It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII. of 1819, Section 11, Clause 1, but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in these decisions on the Regulations of 1793 and 1822, and Act VI. of 1862, Bengal Council, which are all in *pari materia*; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect to cancel tenures created by defaulting owners, but merely to give to the

* Ranee Surnomoyee *vs.* Suttees Chunder Roy—2 W. R., *Privy Council*, p. 13.

purchaser the power to do so if he thinks proper, and which has not been done in this case. It is clear, therefore, that the ground upon which the Judge bases his decision is wrong in law, and that the proper view of the law in this case is that taken by the Deputy Collector, namely, that the purchaser not having exercised the power which the law gave him to annul that tenure, if he thought proper when purchasing the rights of the putneedar, he takes his purchase with this tenure as it was left by the defaulting putneedar, and therefore also subject to the decision made between the defaulting putneedar and the defendants by the Moonsiff's Court in 1841. It seems to me upon these grounds that the first decision of the Judge remanding the case was wrong; that the Judge ought not to have remanded the case; and that the original decision of the Deputy Collector is right, and ought now to be restored.

The result is that the plaintiff's suit will be dismissed, and the plaintiff will pay the costs of the special appeal and all costs in the Courts below.

It is suggested now by the vakeel for the special respondent that the decision of the Moonsiff of 1841 does not declare the tenure of the defendant to be an istmoraree one. It is so treated in the Court of the Deputy Collector, and as I understand the judgment now before us it was so treated by the Judge, and the ground of appeal relied on on this point is directed, not to the question whether or no the decision of the Moonsiff was that the tenure was istmoraree, but to the question whether that finding of the Moonsiff was or was not binding. Under these circumstances, it may, I think, be presumed that this point was not raised before the Deputy Collector or before the Judge, and it cannot be taken now. I think, therefore, as I have said before, that the decision of the first Court must be restored, and the plaintiff's suit dismissed with costs in all the Courts, including those of this special appeal.

Glover, J.—I am of the same opinion.

The 9th September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Registration—Jurisdiction of District Court—Section 84, Act XX., 1866.

In the Matter of Sunkur Dobey, *Petitioner,*

versus

Obhoy Churn Mohapattur, *Opposite Party.*

Baboo Romanath Bose for Petitioner.

Baboo Mohendro Lall Mitter for Opposite Party.

HELD (by Kemp, *J.*, whose opinion prevailed), that where the executant of a deed denies execution and the application for registration is refused by the Sub-Registrar or District Registrar, the applicant cannot enforce registration by a regular suit; but the District Court has jurisdiction, under Section 84, Act XX., 1866, to summon and examine witnesses, make an enquiry into the fact of execution, and order the Registrar to register the deed.

HELD by Markby, *J.*—*Contra.*

Kemp, J.—ON the 2nd of June 1869, Sunkur Dobey obtained a rule from this Court, calling upon Obhoy Churn Mohapattur to show cause why the Judge of Cuttack should not be required to hear the applicant's petition and take evidence, and make an order under Section 84, Act XX. of 1866.

Sunkur Dobey alleges that, on the 24th December 1867, Obhoy Churn executed a bill of sale of certain properties for a consideration of Rupees 2,000; that he presented the deed for registration before the Sub-Registrar of Cuttack within four months from the date of the deed. The Sub-Registrar served a notice upon the vendor to appear and register the document. The vendor not

appearing, steps were taken under Section 37 of Act XX. of 1866 through the Revenue authorities to enforce his attendance. The vendor, after being fined 50 rupees and threatened with more stringent measures, appeared and stated that he had neither executed the deed nor received the consideration. The Sub-Registrar, therefore, refused to register the deed. The applicant appealed to the District Registrar, who confirmed the order of the Sub-Registrar. The applicant then applied to the Judge of Cuttack by petition under Section 84 of Act XX. of 1866. The Judge rejected the petition, holding that the Sub-Registrar was clearly right in refusing to register the document. The Judge further held that he had no authority under Section 84 to examine witnesses or to determine whether the deed of sale was executed or not, Section 84 being silent on the subject of taking evidence or coming to any such finding.

It appears to me that the Judge is wrong in declining jurisdiction. The Judge put the matter as a question of authority. He says I have no authority to take evidence. He does not say I do not think it right to examine witnesses. If Section 84 gives the Judge authority to hear witnesses, there has been a clear refusal to exercise jurisdiction. This Court is asked to interfere under Section 15 of the 24th and 25th Vic., Cap. 104, and to direct the Judge to hear the petition and take evidence.

But it has been said, and properly said, that if the applicant has a remedy by a regular suit to enforce registration, this Court ought not to exercise the power of interference vested in it by Section 15. I freely admit this if there be any such remedy open to the petitioner.

But I am of opinion, for reasons given in my decision published at page 483, Volume X. of the Weekly Reporter, that no suit to enforce registration will lie in the Civil Court.

Under Section 36, Act XX. of 1866, if a person executing a document shall (as in this instance) refuse to admit the fact of execution, but the Registrar shall nevertheless be satisfied of the fact of execution, the Registrar shall register the document.

In this case the Sub-Registrar took no steps whatever to satisfy himself of the fact of execution. The Sub-Registrar had power, under Sections 37 and 40 of the Act, to summon witnesses, and in my opinion he ought to have made some enquiry into the fact of the execution on the deed.

Under Section 84 of the Act, the District Court, the Judge, has the power to order the Registrar to register a document; and the petitioner under the Section has a right to be heard in order that he may be able to establish his right to have the document registered. The Judge is authorized to examine witnesses, and the provisions of the Code of Civil Procedure as to the service of summons apply.

I would direct the Judge to proceed under the provisions of Section 84, either by taking evidence himself or remanding the case to the Sub-Registrar to examine witnesses, and reverse his order refusing to accept jurisdiction.

NOTE.—Since writing this decision, my attention has been drawn to a judgment of Mr. Justice Phear on the original side of this Court in the case of Brijonath Pyne *versus* Amala Dossia.* The learned Judge appears to take the same view as I do.

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* The 20th May 1869.

Present

The Hon'ble J. B. Phear, *Judge*.

In the Matter of the Indian Registration Act and Brijonath Pyne and Amala Dossia.

Mr. Branson for Brijonath Pyne.

Mr. Graham for Amala Dossia.

Judgment.—ON the 23rd December 1868, Amala Dossia executed a certain Bengali kobala of sale, which purported to convey land and premises therein specified to Brijonath Pyne. This land is situated within the registration district of Calcutta; and on the 12th April 1869, Brijonath presented the document to the Registrar of that district for registration. Amala Dossia, at the same time, appeared personally before the Registrar, and admitted having executed the document, but said that she had done so on the supposition that she was thereby renewing a former mortgage on the property, and denied that she had intentionally executed a bill of sale. Thereupon, the Registrar refused to register the document, and recorded the reason for his refusal in the following words:—

"Amala Dossia appeared under a summons, and "declined to sign the endorsement on the ground that "she never meant to sell but only to renew the original "mortgage which was for Rupees 400, and Rupees 185 "on account of interest due thereon, making together "the sum of Rupees 585."

Brijonath Pyne now petitions this Court under the provisions of Section 84 of Act XX. of 1866, alleging that this reason is insufficient, and praying for an order directing the Registrar to register the kobala. It is objected on behalf of the Registrar that this petition is premature, because the first step ought to have been an appeal to the Registrar-General pursuant to the proviso

Markby, J.—In this case, one Sunkur Dobey claimed to have purchased certain immoveable property from one Obhoy Churn Mohapattur of the value of upwards of Rupees 100. He desired to have the document of sale registered, and on the 12th of March 1868 applied for a summons to compel the attendance of Obhoy Churn at the Sub-

of Section 83, the words of which are: "Whenever the "Registrar shall himself as Sub-Registrar have passed "the order appealed against, the appeal shall lie to the "Registrar-General." Here then the question arises, whether or not the order complained of was passed by the Registrar as Sub-Registrar.

Now, as far as I understand the Act (and I have no great confidence, I confess, that my endeavours have succeeded in leading me to a right comprehension of this very difficult piece of legislative composition), there are two classes of occasions on which it may fall to a Registrar to determine whether a document should be registered or not; the one is when the document is presented directly to himself in the first instance for registration (see Section 32); the other, when the document having been already presented to a Sub-Registrar, and registration having been refused by that officer, the matter is brought before the Registrar by way of appeal (Section 83). Clearly, an order made by the Registrar on any such appeal cannot be termed an order made by him as Sub-Registrar. Also Section 84 says that, "if a "Registrar shall, under Section 82, make an order of "refusal to register any document, it shall be lawful "for any person claiming thereunder to apply by "petition to the District Court in order to establish his "right to have such document registered;" and Section 82 applies solely to cases where the registering officer is called upon, by an application as of the first instance (*i. e.*, not by way of appeal), to accept a document for registration. Therefore, it follows that all cases in which a Registrar makes an order of refusal on an application of first instance, do not fall within the proviso of Section 83. Now, looking a little closely into these cases, we perceive an element of distinction which serves to separate them again into two sets: first, the application on which the Registrar passes his order may relate to a portion of his district which is included in a sub-district; and, if so, the application is one which might have been made to the Sub-Registrar, instead of to him (the Registrar); second, it may relate to a portion of his district which is not included in any sub-district. If, then, the application for registration on which the Registrar's order is passed be of the latter sort, the Registrar is for that time in some sense doing Sub-Registrar's work for which no Sub-Registrar exists, and it is conceivable that the Legislature should in such a case consider the order made by him as made in the capacity of Sub-Registrar. To a certain limited extent only, the Legislature appears to have carried this supposed conception into effect. The latter part of Section 32 enacts that "the Registrar of a district, including a presidency-"town, shall be deemed to be a Sub-Registrar within "the meaning of this Act for such portion of his dis-"trict (if any) as shall not have been formed into a "sub-district." And there is no other enactment, so far as I know, which expressly gives the Registrar, under any circumstances, the character of a Sub-Registrar. On the whole, then, I arrive at the conclusion that the proviso in Section 83 applies solely to the case where the Registrar for a district, including a presidency-town, passes an order on an application which relates to such a portion of his district as is not included in a sub-district; and I further think that the consequence of this proviso is that the order so passed becomes an order of a Sub-Registrar, and is not within the words of Section 84 which I have already quoted, and which give a right to a person aggrieved by a Registrar's order to apply by petition to the District Court. In this view, which I confess I have not adopted without hesitation, every order of the Calcutta District Registrar made on such application for registration as relate to a portion of his district not within a sub-district, must be carried by appeal to the Registrar-General before a petition will lie to the High Court. This conclusion would be fatal to the present petition in this Court, if it were made to appear to me that the premises which are the subject of this kobala are situated in any part of Calcutta not yet formed into a sub-district. But on this point I have no evidence whatever before me, and I think I must assume that an order of a Registrar is made by him in the higher right of Registrar, and not *qua* Sub-Registrar, until the contrary is shown. Thus, it seems to me that the preliminary objection in this case falls to the ground.

Coming next to the merits of the petition, it further appears to me that Brij nath is not entitled to have his prayer granted on the ground which he himself relies upon. When Amala Dossia refused to sign the endorsement, the Registrar had, I think, no alternative but to decline registering.

There are some words in the judgment of the Chief Justice in the case of *Sheikh Ruhamutulla* versus *Sheikh Sariutulla*, which seem not in accord with this opinion; these are: "The defendant did not deny the execution, "but he merely denied that the deed was intended to "operate as a bill of sale. If the defendant admitted, "as I understand he did, the execution of the deed, "the Registrar ought to have registered the document, "and left the parties to contest their rights in a Civil "Court." If taken without qualification, and applied to the present case, these words would, no doubt, support the petitioner's contention that the Registrar ought to have registered his kobala. But much depends upon the sense in which the words "admitted the execution" are used. The 36th Section says: "If all the persons "executing the document appear personally before the "Registering Officer, and all admit the execution of the "document, the Registering Officer shall register the "document as directed in Section 68." The directions of Section 68 run thus: "After the provisions of Sec-"tions 36, 66, and 67 shall have been complied with, the "Registering Officer shall," &c.; and the first provision of Section 66 is: "On every document admitted to "registration, there shall be endorsed, from time to "time, the following particulars, that is to say, the "signature and addition of every person admitting the "execution of the document," and so on. Thus, it appears that the Registering Officer cannot rightly register under the Act, until all the persons executing the document have not only admitted the execution thereof, but have also written their signatures on the back. In truth, to admit the execution within the meaning of these Sections of the Act is to yield such an acknowledgment of the agreement expressed in the document as carries with it the consent that the document should be registered. In my view of the proper construction to be put upon the Act, the Registrar was entirely correct in his decision. If, therefore, the remedy by petition to the District Court, which is given by Section 84, is only a last step in a process of appeal, the present petition ought clearly to be dismissed. In a former case, the exact facts of which have escaped my memory, I was disposed to think that the Legislature intended the application by petition to be nothing more than an appeal. Indeed, in the last clause of Section 84 itself it is spoken of as an appeal. On more mature consideration, however, and after argument, I am now of opinion that "the right to have the document registered," which is to be established on petition, is not merely the right which is limited by the observance of all the requirements of the Act before the Registrar. The Legislature, for reasons which are patent enough, desired to secure the public registration of all documents bear-

Registrar's office for that purpose. The Sub-Registrar accordingly caused a summons to be served on this person; and as he did not obey the summons, his property was attached, and a fine of Rupees 50 was inflicted upon him. Still he did not appear, and on the 4th of September 1868 the purchaser applied to the Sub-Registrar to be permitted to prove the execution of the kobalah by other evidence; but the Sub-Registrar, considering that he had no power to receive such evidence, rejected the application, and refused to register the deed.

The purchaser thereupon appealed to the Registrar, who agreed with the view taken by the Sub-Registrar as to his power of taking evidence, but expressed an opinion that more stringent measures ought to be taken to procure the presence of the executant (as he is called in the Act), and advised the purchaser to make another application to the Sub-Registrar for that purpose. This decision was given on the 9th October 1868.

The purchaser, accordingly, went back to the Sub-Registrar, who again summoned the vendor, and this time he appeared. He, however, denied that he had executed the deed, and the vendor then again tendered other evidence of the execution, but the Sub-Registrar refused to receive it on the ground that he had no authority to take any other evidence of execution than the admission of the executant. Against this decision, the purchaser appealed to the Registrar, who, on the 23rd November 1868, confirmed the decision of the Sub-Registrar.

The purchaser then applied to the District Court under Section 84. The vendor again appeared and denied the execution, and the purchaser asked the Judge to be allowed to produce other evidence of the execution. The Judge treats the application under Section 84 as an appeal from the decisions of the Sub-Registrar and Registrar. He agrees with their view of the law, and affirms their decisions. He also holds that he too has no authority under Section 84 to examine witnesses or to come to any finding on the subject of execution; and he accordingly, on the 19th March 1869, "dismissed the appeal."

The purchaser then applied to this Court, and on the 2nd June 1869 Mr. Justice L. S. Jackson and myself granted a rule calling upon the plaintiff to show cause why the Judge should not be required to hear the last-mentioned application, to take the evidence tendered, and to give his decision thereon. It was contended by the purchaser that the Judge was wholly wrong in treating this application as an appeal from the prior decisions, and that he ought to have gone into the whole case and inquired whether the alleged vendor really executed the deed.

For the vendor, it is contended, first, that, even supposing the Judge was wrong in treating this as an appeal, and refusing to receive evidence, we have no power to correct this error; our powers under Section 15 of 24 and 25 Vict., Cap. 104, not extending to such a case. It is said that the Judge, acting under Section 84, is not acting as Judge of a Court subject to our appellate jurisdiction; and that, even if he be so, our power does not extend to compelling him to correct an erroneous interpretation of the law. Secondly, it is contended that the purchaser still has a remedy by an ordinary civil suit, and that, therefore, this Court ought not to interfere under its powers contained in Sec-

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ing the character which is described in Section 17. With this purpose in view, it enacted Section 49, which has the effect of making all such documents simply waste paper until they are registered; and the want of the document itself cannot be supplied by secondary evidence. Thus, a right under an agreement of this sort and a right to registration are concurrent. One who has a right to any interest or to take any benefit under any instrument required by Section 17 to be registered must have a right to have it registered, otherwise that primary right becomes a nullity. But the ordinary machinery of Registrars and Sub-Registrars only furnish the means of obtaining registration when all persons executing the document consent thereto. The Registering Officer is throughout concerned only with ascertaining this consent from the executing persons themselves. If this is withheld, an altogether different procedure is rendered necessary. The case becomes one of a person asserting a right hostilely to another who opposes it. Recourse must be had to the Civil Courts, and the ordinary rules which govern the contest of right in those Courts come into play. Accordingly, Section 84 prescribes that the petition to the District Court shall take the form of a plaint, and I apprehend that the proceedings which follow on the filing of it must be those of an ordinary suit, in which such of the persons executing the document as refuse to consent to its registration, together with the Registrar, when necessary, should be defendants. The question to be tried will be whether or not the petitioner has a right as against the persons executing the document to have the document registered. That right will, of course, depend upon the circumstances of each case, and cannot well be made the subject of a general definition.

As against the Registrar, this petition must be dismissed with costs, he undertaking to obey any order for registration which may be eventually passed by the Court.

As against Amala Dossia, the issue remains to be tried whether or not the petitioner has a right to have the kobala in question registered. And I now adjourn the case in order to give the parties time to procure and bring before the Court such evidence bearing on this issue as they may be advised.

tion 15 of the Act referred to, as laid down by Norman, J., in a case reported in 12 Weekly Reporter 103.

I will dispose of this last objection first. I do not think Mr. Justice Norman intended to lay down a broad general rule that, in cases where a cheap and speedy procedure had been specially provided by the Legislature, and the Judge had refused to apply that remedy, that this Court could not interfere, because there was still open the more expensive and tedious remedy of a regular civil suit. However ineffectual we may find in practice that these summary remedies, as they are called, are (and in practice, I believe, most of us think that they are quite ineffectual), I still think we cannot set them altogether aside. It seems to me that, when the Legislature points out two distinct remedies, we ought, if we have the power, to take care that parties have the benefit of both.

With regard to the objection that the Judge does not act under Section 84 as Judge of a Court subject to our appellate jurisdiction, I am of opinion that those words in Section 15 of Act 24 and 25 Vict., Cap. 104, are descriptive only, and that they include the case of a Judge acting under Section 84 of the Registration Act. The jurisdiction is given by that Section, not to the Judge, but to the District Court, and the District Court is subject to our appellate jurisdiction. I also think that this was not simply an erroneous interpretation of the law, but a distinct refusal of jurisdiction, and therefore, though I am very unwilling to give a vague extension to the terms of Section 15 of the Charter Act, I think this is a case in which we ought to direct the Judge to exercise the jurisdiction if he possesses it.

The vendor has, however, further contended that the Judge was right in his view of the powers conferred upon him by Section 84 of the Registration Act, and that he had no power to take the evidence tendered or to decide upon the execution of the deed. He contends that the power of the Judge is expressly confined by the Act to a review of the proceedings before the Sub-Registrar and Registrar, inasmuch as he can only order registration if he finds that "the requirements of the law for the time being in force have been complied with on the part of the petitioner." He supports this view further by pointing out that the Judge, under Section 84, has no power to summon witnesses; that the Act contemplates that all necessary parties may be got together, and the case ready for hearing, in two days, which would be impossible if witnesses were to be summoned; that no appeal is provided for; and that in some cases the High Court has to hear the application, which could never have been intended if witnesses were to be summoned. He also pointed out that the form of application in the schedule showed that the application to the Judge was only by way of appeal against the former proceedings.

The purchaser, on the other hand, contends that the Judge was bound to hear this application in all respects as a regular suit; that this was the mode pointed out for him to establish the right to register; and that it was, in fact, the only mode in which he could do so, as it had been held that a regular suit to enforce registration would not lie—per Kemp and Elphinstone Jackson, JJ., 2 Ben. L. R. 105, Civil Appellate;* and that the power to summon witnesses was given by Section 40. The purchaser further contended that, under the provisions of Section 36, Clause 4, the Sub-Registrar was bound, on the refusal of the alleged executant, to admit the execution, to take evidence, and to register the document on being satisfied of the execution.

To clear this very difficult case as much as possible, I will say at once that I dissent entirely from the last contention. I think it is quite clear that the right view has been taken by the Sub-Registrar, Registrar, and Judge of the duty of the Registering Officer when the alleged executant refuses to acknowledge the execution. I think it was clearly not intended that any enquiry into the fact of execution should take place before the Registering Officer, except in the very rare case where the executant was dead, and no one representing him appeared to admit the execution

I also agree with Kemp and Elphinstone Jackson, J.J., that no regular suit will lie *directly* to enforce registration. That is to say, no suit such as was provided for by Section 15 of Act XVI. of 1864, the result of which would be that the purchaser, if successful, would obtain an order directing the Registering Officer to register. I think

* 10 W. R., Civil, 483.

the omission of that Section in the Act of 1866 shows that that special form of suit does not now lie, and I agree with the Chief Justice* (*See* 1 B. L. R. 77, F. B.) that, unless a special power were given for the purpose, the Civil Court could not direct the Registering Officer to register a document which he had refused to register. I also agree that no suit would lie for specific performance of the contract itself which is contained in the written document. In that suit, the document must be given in evidence, and effect must be given to it, which would be in direct violation of Section 49.

But I do not agree that for that reason the only remedy which the purchaser has in the Civil Court is that provided for in Section 84. Whatever may be the true construction of that Section, I have no doubt whatever that, altogether apart from, and independently of, the Registration Act, the purchaser, where the executant refuses to appear and admit execution, has the same remedy which a party has in all other cases of a refusal by a person with whom he has contracted to do that which he has undertaken to do. In a case reported in 11 Weekly Reporter, page 398. Mr. Justice L. S. Jackson and myself expressed an opinion that, in every contract of sale, there was implied a contract that the seller would do every thing which was necessary on his part to complete the title of the buyer, and therefore that, when the sale was effected by a written instrument which required registration, there was an implied contract that the seller would appear before the Registering Officer, and admit registration. To that opinion I fully adhere, and this is a contract which the Civil Court may, in my opinion, order to be specifically performed. The powers of the Civil Court to compel specific performance are not always perhaps quite as complete as could be wished; but in this particular case I think the powers contained in Section 192 of the Code of Civil Procedure, if vigorously used, might be made sufficient to ensure the attendance of the executant before the Registering Officer, and his admission of the execution. The form of the suit would be for damages, and it would be easy to fix such damages as would, in the majority of cases, compel the admission of execution, or fully compensate the purchaser. This is a suit based on general principles, the right to bring which is not affected by the Registration Act in any way whatever. This is the suit to which I understand Mr. Justice Bayley and Mr. Justice Macpherson to refer in the case already quoted (*see* 1 Bengal Law Reports, pages 85 and 91, F. B.*), and I understand that Mr. Justice Norman has maintained a suit of precisely this kind on the original side. In support of this suit, it would not be necessary to give the document in evidence. All that would be necessary would be to prove that the document was in existence, and that the consideration-money had been paid. It was, indeed, urged that this remedy would be ineffectual, because such a suit could not be brought to a final termination within the period of eight months from the date of execution, after which period the document could not be registered. But Sections 22 and 77, which relate to the time of registration, seem to me (probably because the Legislature foresaw that there might be difficulties thrown in the way of registration) to have carefully avoided laying down any limit as to the period within which documents may be accepted for registration. It is not to be accepted for registration unless presented within the proper period. But I think this distinction between presentation and acceptance was expressly made for the purpose of keeping open the right to registration whilst the contest between the buyer and seller was going on.

This, I think, removes the chief difficulty in the construction of Section 84. Had it been the case that no other remedy was open to the purchaser except the successive applications to the Sub-Registrar, Registrar, and Judge, I should have felt compelled, even at the risk of doing some violence to the language of the Legislature, to hold with Mr. Justice Kemp that under that Section the Judge has power to take evidence of the fact of execution; because it would be impossible to conceive that the Legislature meant to put it into the power of the seller absolutely to prevent the completion of the sale (see Section 49) after he had signed a contract for that purpose. But with the view that I, in common with other Judges, hold of the right of the purchaser to sue the seller in the Civil Court, and of his power to secure either his concurrence in registration or a full compensation in damages, I feel at liberty to put upon that Section its natural construction; and I must say that, so construing it, I

* 10 W. R., Full Bench, 51.

* 10 W. R., Full Bench, p. 58.

cannot come to any other conclusion than that the proceeding which it provides for was intended as a summary mode of reviewing the decision of the Registering Officers. It is by the Act itself called an appeal. The only judgment which the Judge can give is that "the requirements of the law have been complied with by the parties seeking registration;" and if he is satisfied of that, it is still discretionary with the Judge whether or no he will direct registration. If it had been intended that the Judge should enquire into the fact of execution, I think the clause would have run "if the execution shall be proved, and if the requirements of the law," &c., and I do not think any discretion would have been given to the Judge to withhold his order for registration when these facts were established.

Moreover, if the proceeding under Section 84 be only an appeal, I can understand why that simple and cheaper proceeding was substituted for the regular suit provided for in the Section 15 of the Act of 1864; whereas, if it was intended that there should be under Section 84 a judicial determination of the fact of execution, I think that the regular suit would have been retained. To the proper trial of such a suit, I think all the provisions of the Code of Civil Procedure in their fullest application would be necessary, and I do not think the Legislature would have deprived the parties of all right of appeal. What would really be tried by the District Court under Section 84, if that Section is read in its wider sense, would be nothing less than the title to the immoveable property comprised in the instrument.

Since writing the above judgment, I have seen a decision of Mr. Justice Phear from which I find that he has put on Section 84 a construction somewhat different from mine, though I am not sure that he would go to the extent of saying that witnesses can be examined on the fact of execution. I need not say, however, that, upon reading Mr. Justice Phear's decision, I have carefully re-considered the construction of the Act, but without being able to change my opinion. I find that learned Judge did not originally entertain the same opinion as he does now, and from what I know of the opinions of other Judges I think the question must again arise. I regret, therefore, that I am unable to concur with the opinion of Mr. Justice Kemp. In my opinion, this rule ought to be discharged.

The 10th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Priority of decree—Attachment—Execution—Mesne-profits.

Case No. 103 of 1869.

Regular Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 24th July 1868.

Ram Coomar Ghose (one of the Defendants), *Appellant,*

versus

Gobindnath Sandyal and others (Plaintiffs), *Respondents.*

The Advocate-General and *Baboos Romesh Chunder Mitter* and *Nuleet Chunder Sein* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

In 1827, *S* commenced a suit against *B*, and before judgment applied for and obtained under Regulation II. of 1806 an attachment of certain immoveable property belonging to the defendant. In 1828, *S* obtained a decree upon which he did nothing immediately; but in 1844, he sold the attached property in execution, and purchased it himself. Thirteen years after, *B* commenced proceedings to set aside that sale, and in 1860 obtained a final decree reversing the sale, restoring to him possession, and awarding him mesne-profits. The mesne-profits were ascertained, and a third party (*R*) attached the decree in respect of a judgment-debt due to himself from *B*. Upon this *S*, after trying ineffectually to stay *R's* proceeding, brought a suit claiming to set off the amount of the decree of 1828 against the decree of 1860.

HELD that, whatever equitable right S might have in consequence of the situation of the parties, it should have been urged in the suit *before* decree, and not afterwards in execution when right of third parties had accrued; and that what R sought was not the mesne-profits attached by *S* under the decree of 1828, but the amount decreed to be paid by *S* to *B*.

HELD that no objection arising out of proceedings outside the suit, such as that *R's* decree has been satisfied, could be entertained by way of cross-appeal.

There is nothing in Regulation II. of 1806 which expressly or impliedly gives to the judgment-creditor who holds an attachment made prior to judgment, under that Regulation, any priority whatever over any other judgment-creditor who has come in and got a decree, and has attached the same property.

When a party attaches property, he also attaches the profits thereof; but if, when attaching the property, he allows the original owner to remain in possession and enjoy the profits, those profits cease, from the moment they find their way into the pockets of the owner, to be specifically liable for the judgment-debt under the attachment.

Markby, J.—IN this case, we do not think it necessary to call upon the Advocate-

General for a reply, as we consider the judgment of the Lower Court ought to be reversed. In consequence of various orders of remand, the case does not come before us precisely in the same shape in which it came before the Lower Court, but I think that the result is that the suit ought to be dismissed. It appears that, in the year 1827, certain persons who have been called the Sandyals had commenced a suit against certain other persons who have been called the Bhuttacharjees, and the Sandyals, who were plaintiffs in that suit, are now represented by the plaintiffs in this suit. They applied for and obtained, in the year 1827, under Regulation II. of 1806, an attachment of certain immoveable property belonging to the Bhuttacharjees. In 1828, they obtained a decree for a sum said to exceed four lakhs of rupees. They did nothing immediately upon that decree; but in 1844, the property which they had attached in 1827 was sold by them in execution of their decree, and was purchased by themselves. Thirteen years afterwards, proceedings were commenced by the Bhuttacharjees to set aside that sale on the ground of some irregularity, and the Bhuttacharjees obtained a final decree of this Court in 1860 that that sale should be set aside, that possession of the property should be restored to the Bhuttacharjees, and that the mesne-profits which had accrued to the Sandyals during the time that they were in possession should be ascertained and paid to the Bhuttacharjees. That ascertainment has since been made, and this suit proceeds upon the assumption that there exists a decree in favor of the Bhuttacharjees against the Sandyals for this sum of money. A person of the name of Ram Coomar Ghose, who, together with the Bhuttacharjees, is one of the defendants in this suit, has obtained an attachment upon that decree in respect of a judgment-debt due to himself from the Bhuttacharjees. Two orders of this Court of January 1863 and January 1865 were made, the effect of which order was to reverse the decision of a Principal Sudder Ameen who had decided that the Sandyals were entitled to stay the proceedings of Ram Coomar Ghose who was attempting to get satisfaction of the decree which the Bhuttacharjees held against the Sandyals. This suit is brought to set aside these orders, and to be allowed to set off the amount of the decree which the Sandyals obtained against the Bhuttacharjees in 1828 against the decree which the Bhuttacharjees obtained against the Sandyals in 1860.

Now, as I have said before, this case has been already several times before this Court, and it now comes before us with two questions finally settled. It has been a question in the suit whether or not an attachment of the property was also the attachment of the profits of that property. That question has been finally settled in favor of the Sandyals, and the effect of their attachment of 1827 must now be taken to be to attach, not only the property, but the profits also. The other question which has been raised between these parties is whether or no the Sandyals could, as they claimed to do, set off the decree under which they were judgment-debtors to the Bhuttacharjees against the decree of 1828 in which the Bhuttacharjees were judgment-debtors to themselves. I think that has been finally settled that the Sandyals could not set off that decree. I think it has been held, not only upon the terms of Section 209, but also upon any equity which could arise out of the situation of the parties. I think it is quite clear that the Judges before whom that question came for trial (as would very naturally be the case) were most anxious that, if possible, those decrees should be set off against one another. They had, in fact, decided on one occasion that they might be so set off, but in consequence of a subsequent ruling of the Full Bench they felt compelled to reverse their former decision, and held finally that they could not be so set off. It is very clear from the decision on review of Justices Kemp and Glover, dated the 18th May 1867, published in Volume VII. of the Weekly Reporter, page 488, and especially from the last paragraph in the left hand column of page 481, that all possible questions which could be raised in favor of a set-off were raised, and that the Judges felt compelled, although reluctantly, to decide against that right of set-off. But it was nevertheless considered in the last order of remand that there were certain questions still open in this suit, and the order of remand on which the case went back to Mr. Grey, the Officiating Judge of Rajshahye, whose decree is now appealed against, was in these terms: "We pass no "opinion as to whether the applicant has "attached the estate or the decree under "Regulation II. of 1806, beyond intimat-"ing our opinion that, if the estate was "attached under Regulation II. of 1806, "it is difficult to see how the mesne-profits "which flow out of the estate were not "attached also. But the question of attach-"ment and its fruits and preferential title to

"participate in the proceeds is left for decision, and must be determined by the Lower "Court to whom the case is remanded for "the purpose, the Lower Court distinctly "understanding that our decision of the "18th May last in review disposed of the "question of set-off alone."

When the case came again before this Court on the 6th April 1868, this Court substantially repeated that opinion; only it declared more positively that in the attachment by the Sandyals in 1827, the mesne-profits were also attached under Regulation II. of 1806. So, what we have to consider in this case is, did the attachment of this property by the Sandyals exist at the time when Ram Chunder attached this decree of the Bhuttacharjees; and if so, what was the effect of that attachment as between Ram Coomar Ghose, the defendant in this suit, and themselves?

Now, the first point taken by the Advocate-General was that the attachment prior to judgment was not effectual after judgment until some order had been passed upon it, under Regulation II. of 1806, Section 5, Clause 3. Upon that point, however, I do not think it is necessary for us to express any opinion in the case now before us. There can be no doubt that the words of the Regulation are somewhat different from the words used in the Code of Civil Procedure; nevertheless, if we had to decide that question, we should undoubtedly have to consider the effect of a decision given yesterday by the Full Bench, as to the effect of an attachment before judgment. But as I have already said, I think it is not necessary for us to express any opinion on this question, because, on the next point taken by the Advocate-General, we are, I think, enabled to decide the case at once in his favor.

I think it is quite clear that, whatever may be the effect of attachment prior to judgment under Regulation II. of 1866, there is nothing in the Regulation which gives to the judgment-creditor who holds that attachment any priority whatever over any other judgment-creditor who has come in and got a decree, and has attached the same property. That priority is specially given as between the first attaching creditor and the other creditors generally in cases of attachment after judgment by Act VIII. of 1859. Whether or not it would exist under Act VIII. of 1859, as between a judgment-creditor who attached prior to judgment and the other creditors, we need not decide. All we have to say is that that priority is not given by Regulation II. of 1866. It is not expressly given by that Regulation, and there is nothing to my mind which implies it. Therefore, upon that ground alone, we should be entitled to dismiss this suit. Ram Coomar Ghose, as the first attaching creditor, under Act VIII., has the priority.

But it has also been contended by the Advocate-General that what Ram Coomar Ghose is seeking to compel the Sandyals to pay to him is not the mesne-profits which were attached under the decree of 1828, but a mere sum of money not impressed with any particular character, which this Court has found by its decree of 1860 to be due from the Sandyals to the Bhuttacharjees, and in that view I think the Advocate-General is correct.

I fully concur in the opinion expressed on a former occasion by this Court in the present case; and even if I did not concur in it, I should consider that opinion binding upon me, that when a man attaches property, he also attaches the profits of that property; but it is also clear that, when a man attaches property, and allows the original owner to remain in possession of the property and enjoy its profits, that from the moment these profits find their way into that owner's pockets, they cease to be specifically liable for the debt of the judgment-creditor. If that were not so, every judgment-creditor would have the right to come in at any time, and call upon his judgment-debtor to account for all the profits he had received from the date of the attachment, and that is a proceeding I have never even heard suggested; and it appears to me that the moment the profits of this property passed to the person who was for the time being the owner thereof, they ceased to be in any way specially liable for the judgment-debt under the attachment. If there was any equitable right in consequence of the situation of the parties, that the Sandyals in the suit brought by the Bhuttacharjees should say that, in consequence of the reversal of the sale, their position was wholly changed, and if they could argue that it was not equitable that they should be compelled to refund a large sum for mesne-profits to the Bhuttacharjees, while the Bhuttacharjees were liable to them for a large sum of money under the original decree, and when those mesne-profits accrued in respect of an estate which was under attachment in respect of that very

debt, he should have said that in the suit before decree went against him; and though I express no opinion upon the point, I certainly think that that might have been urged with considerable force. But it seems to me essential that it should have been urged in the suit before decree, and not afterwards in execution when rights of third parties have accrued, and it is impossible to investigate fully the conduct of the parties, upon which entirely the equity depends. The decree seems to me to be a conclusive answer to any such contention as this. The Court has ordered the Sandyals to pay a sum of money to the Bhuttacharjees, and it is the sum so decreed which has been attached by Ram Coomar Ghose, and all he now asks is to have that decree obeyed. Therefore, on this ground also, I think that the suit ought to be dismissed.

Then certain questions have been raised in cross-appeal. The first one appears to me not to be a question for cross-appeal at all. It is said that, since this suit has been filed, and during the pendency of the suit, the decree now held by Ram Coomar Ghose has been satisfied; and that, therefore, the attachment has dropped. I do not think we ought to go into that question at all, and our decision must, I think, be given on the points arising in this appeal out of the state of facts as they existed at the time the suit was brought. If any question could arise out of proceedings outside the suit, they could form the basis possibly of some application to stay proceedings in the suit on independent grounds altogether, but I do not think we can in any way entertain that objection as a cross-appeal.

The next point is that the orders which the plaintiffs seek to set aside in this suit were made without jurisdiction, and that, therefore, they ought to be set aside. If it is material at all to consider whether or no these orders were valid in this case, we cannot treat them as made without jurisdiction. We must assume that the Judges who passed those orders held that they had jurisdiction to do so, and we have no powers to set aside that decision.

The next point was that, in fact, no attachment had been issued by Ram Coomar Ghose, but I think it is too late to take that objection now, for it appears to me that the parties have all along proceeded on the supposition that that attachment had been made.

The next ground is that, on some principle of equity, the two decrees ought to be set off against one another. No specific ground has been mentioned why this should be done, and I can only repeat what I have already said before that I consider all questions which could be raised on the right of set-off to have been fully discussed and finally settled in the judgment I have referred to above in Volume VII. of the Weekly Reporter, page 480.

There only remains to consider the question of costs. It is always extremely difficult for a Court in the position in which we now are in the present suit, a very small portion of which only has come before one of us, to settle that question in a satisfactory manner. I think, however, that we have seen sufficient of this case to enable us to come to the conclusion that the plaintiffs in this suit have fared somewhat hardly; and Mr. Justice Glover, who has seen a great deal more of this litigation than I have, is of opinion that we should not give any costs in this case. I entirely concur in that opinion, and the result will be that the decision of the Lower Court will be reversed, and the plaintiff's suit dismissed, but without costs.

Glover, J.—I am of the same opinion, and generally for the same reasons as those given by Mr. Justice Markby; and with regard to costs, I think that this is eminently a case in which the Court's discretion should be exercised in favor of the plaintiffs.

The 13th September 1869.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Dowls and amuldarees—Registration—Section 13, Act XVI., 1864—Oral evidence.

Cases Nos. 1701 and 1705 of 1869 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Mymensingh, dated the 26th April 1869, reversing a decision of the Deputy Collector of that District, dated the 24th August 1868.

Goluck Kishore Acharjee Chowdhry (Plaintiff), *Appellant,*

versus

Nund Mohun Dey Sircar (Defendant), *Respondent.*

b

Baboos Rash Beharee Ghose and *Nurendronath Chatterjee* for Appellant.

Baboo Nil Madhub Sein for Respondent.

The registration of a *dowl* or an *amuldaree* which are mere preliminaries to a lease is not compulsory under Section 13, Act XVI. of 1864.

Oral evidence is admissible to prove the existence of an agreement (*e. g.*, a farming lease), and, if credible and sufficient of itself, will justify a Court in decreeing a claim.

Bayley, J.—THE plaintiff sued for arrears of rent for the years 1271, 1272, and 1273, alleging that the defendant held farms for those three years. The plaintiff stated that he received *dowls* from the defendant, and gave him *amuldarees*, that is, authority to the ryots to pay their rents to the defendant.

The defendant's case was that he never entered into any written contract of any kind, that he never received any *amuldaree*, that the rents were less than those stated by the plaintiff, and that he had paid his full amount of rents due.

As to the written documents, the plaintiff did not file any *dowl* till towards the conclusion of the case in the first Court; and the defendant having denied the *amuldaree*, there was no other document to support the plaintiff's case.

The first Court decreed the plaintiff's case, and the Lower Appellate Court has dismissed it.

The judgment of the Lower Appellate Court is not very clear, but at the same time it sufficiently indicates that the Lower Appellate Court did, in fact, hold that, whereas there was in this case a lease for more than three years, and the transaction as such was not evidenced by a *registration*, the plaintiff could not obtain a verdict upon the documentary evidence. The Lower Appellate Court then goes into the oral evidence, and says: "I therefore consider that "plaintiff has failed to prove by full legal "evidence that he can claim rent at the "amount stated in his petition of plaint, and "that the evidence of witnesses alone is not "sufficient to prove a farming lease for "more than a year."

Against this decision, the plaintiff appeals specially, and the contentions raised in special appeal are really but two: *firstly*, that the document which the plaintiff set up in this case, *viz.*, the *dowl*, was not a document in respect of which registration was compulsory under Section 13, Act XVI. of 1864, the Registration Act in force at the time of the transaction; and, *secondly*, that the Lower Appellate Court should have considered the oral evidence upon which the Deputy Collector in the first Court had come to a finding of fact in plaintiff's favor.

The special appellant has cited two cases in support of this argument, the one to be found at page 537, Volume IX., Weekly Reporter, and the other at page 281, Volume VII. It is clear from the case cited in Volume IX., page 537, that a kubooleut, or a dowl, which is its equivalent, is held by the Division Bench on that occasion not to be a document which, under Section 13, it is compulsory to register, and it is equally clear from the case reported at page 281, Volume VII., that documents preliminary or collateral to a lease are not to be considered documents intended to be covered by the word "lease" in the Section above cited.

It is contended, on the other side, that it is not the lease, but the amuldaree pottah which the Lower Appellate Court referred to in its judgment. The Judge's words, however, are distinct. He says: "The law "then for *leases* above one year is plain, "*viz.*, that, if a lease is given for more than "one year, it must be a registered document, "and it could be only on such registered "document or an authenticated copy there-"of that the plaintiff could bring his suit." He then goes on to show that he had the *leases* themselves in view, for he says: "The plaintiff, I suppose, wished to evade "the expense of a proper *lease*, and trusted "to the defendant to deal fairly with him, "and if he is disappointed with his arrange-"ment, he has only himself to blame. The "law cannot assist him, for he neglected to "take the precautions that the law directed "him to take if he afterwards wanted to "enforce the terms of his *lease* against the "defendant." It is clear to us then that the Lower Appellate Court is wrong in holding that the *dowl* or even the *amuldaree*, which were the alleged documents that passed between the parties in this case, was necessary to be registered before the plaintiff could sue.

On the *second* point, it is contended by the special respondent that what the Lower

Appellate Court has, in fact, done is that, having considered the plaintiff's failure to produce documentary evidence as one objection to the suit, the Court goes into the sufficiency or otherwise of the oral evidence, and finds upon that as upon the merits of the transaction that the plaintiff has no good case at all on the merits upon that very evidence. To our minds, however, if we read the terms that the Lower Appellate Court uses as quoted above, in connection with what immediately precedes as to the invalidity of the *document* and the words "the evidence of witnesses alone is not "sufficient to prove a farming lease for more "than a year," it appears to us that what the Judge means is not that he has gone fully into the evidence of witnesses, and finds it insufficient by reason of its vagueness or want of credibility, but that he lays down as a matter of law that in cases like these, where the plaintiff comes to Court upon a *lease* which is not registered, no amount of oral evidence would be sufficient to justify the Court in giving the plaintiff a verdict in his favor.

I would, therefore, remand both these cases to the Lower Appellate Court to try whether the evidence on the record is or is not sufficient to prove the farming lease in question.

Loch, J.—I wish to say a few words. The contention before us has been whether, in the absence of any documentary evidence in the shape of a lease or other instrument creating a lease, but on the admission of the parties that there was a lease, oral evidence is not sufficient to prove the terms of that lease to the amount of rent payable by the defendants. The Judge below has held that oral evidence is not sufficient to prove a farming lease for more than a year, because that lease was not registered. Now, if the evidence of witnesses is sufficient to prove a farming lease for a period of less than a year, I do not see why, if worthy of credit, it should not also be sufficient to prove a lease for a period longer than a year. It may so happen, as appears to be the case in the present suit, that parties, in order to avoid the expense of drawing up expensive leases may agree to let lands at a certain rate of rent. By failing to have a proper lease drawn up, a party deprives himself of a very strong piece of evidence in case of litigation; but if he chooses to trust to the uncertainty of oral evidence to support his claim, no written lease having been executed, there does not seem to me any reason why that evidence, if credible and sufficient of itself to prove the existence of an agreement between the parties, should not be admitted by the Judge, and enable him to give the plaintiff a decree on his claim. It has been pointed out that there was in this case a dowl, which is equivalent to a kubooleut, and an amulnamah exchanged between the parties. These documents have not been used as evidence, and the defendant denies that any documents were executed, or any amulnamah delivered to him, though the plaintiff filed the dowl, but at so late a stage of the proceedings that the Court refused to admit it; and it has been urged that, as those documents were not registered, the plaintiff's suit should have been dismissed. But even supposing that the action has been brought upon the dowl, which does not appear to be the case looking to the terms of the plaint, there are rulings of this Court quoted by my colleague which clearly show that neither of these documents which are merely preliminaries to a lease requires to be registered. As this, however, is not the main ground of this special appeal, I need not express any opinion on the point, but it appears to me that the Judge was wrong in saying that "the evidence of witnesses "alone is not sufficient to prove a farming "lease for more than a year."

I concur with my colleague in remanding these cases, and directing the Judge to consider whether the oral evidence is or is not sufficient to prove the lease.

The costs of this remand will follow the result of the case.

The 13th September 1869.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Transfer of tenure—Ejectment.

Case No. 1676 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 5th May 1869, reversing a decision of the Moonsiff of Hathazaree, dated the 12th September 1868.

Abdool Kureem (Plaintiff), *Appellant,*

versus

Munsoor Ali and others (Defendants), *Respondents.*

Baboo Okhil Chunder Sein for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

Where a tenure is transferred by a ryot without the sanction of his landlord, and the latter nevertheless receives rent from the transferee, and gives him dakhilahs for the year in which he is in possession, the landlord cannot oust him afterwards under a decree for the rent of previous years.

Loch, J.—THIS is a suit to recover possession on the allegation that the plaintiff purchased the land in question from defendant No. 3, who is a ryot of defendant No. 1, and that he (plaintiff) was dispossessed by Munsoor Ali, defendant No. 1, in 1229 M. E. It is admitted by all parties that the deed of sale held by the plaintiff is of no effect unless it be sanctioned by Munsoor Ali, the defendant No. 1, and the Judge has found that that sanction was not given, and therefore the transfer to the plaintiff was not valid.

In special appeal it is urged by the pleader for the plaintiff, special appellant, that even admitting that the kobalah had not received the sanction of Munsoor Ali, yet that as he (plaintiff) was in possession in the year 1228 and Munsoor Ali took rents from him in that year, and gave him dakhilahs, he thereby recognized him as his tenant, and could not, therefore, under a decree for rent of previous years, oust him from the land; and the pleader points to evidence on the record in proof that rents had been paid, though the oral evidence does not go to prove the dakhilahs that have been filed, and he urges that the Judge ought to have come to a decision on that oral evidence, and determined whether it proved the payment of rent; but this the Judge has failed to do.

We think that this contention is correct, and that the Judge should pronounce upon the evidence which has been given, whether or not it is sufficient to prove the payment of rent; and, if so, whether or not the rent was paid in the character of a tenant thus *recognized* by the defendant, Munsoor Ali, as such.

A cross-appeal has been preferred on the ground that the respondent in this case in his appeal to the Judge urged that that kobalah itself was spurious, and that the Judge has come to no distinct finding with regard to the kobalah. We see that the Judge after stating the character of the evidence has come to the conclusion only that the kobalah was not sanctioned, and as the case must be remanded to the Judge to pronounce on the evidence filed by the plaintiff whether rents were paid or not, the Judge will also come to a finding with regard to the kobalah whether it is genuine or not.

The Judge will not admit any fresh evidence, but he will determine these points upon the evidence on the record.

The costs of this appeal will follow the result.

The 14th September 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Arbitration—Objections—Sections 320 and 325, Act VIII., 1859.

Case No. 107 of 1869.

Regular Appeal from a decision passed by the Judge of Bhaugulpore, dated the 3rd February 1869.

Maharajah Sir Joy Mungul Singh (Defendant), *Appellant,*

versus

Mohun Ram Marwaree and another (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Boodh Sein Singh* for Appellant.

Mr. G. C. Paul and *Baboo Anund Chunder Ghossal* for Respondents.

A case remanded by the High Court was referred by the Zillah Judge to two arbitrators who went fully into the matters in dispute, and wrote and signed, as their award, separate papers bearing different dates, which were filed in Court. The defendant then filed a petition of objections, after which the Judge returned the papers to the arbitrators with an order that they should sign their award *conjointly* in a form which he prescribed. The award having been submitted, the Judge took up and disposed of the objections previously made, making a decree in accordance with the award.

HELD that the two papers originally sent in were not an award, which, under Section 320, Act VII., 1859, should be a single instrument complete in itself; and that the Judge was right in sending back the papers, directing the arbitrators to sign their award conjointly and in the presence of each other.

HELD that the objections made to the two papers were not objections to the award; and that under Section 325 the Judge had no power to pass judgment till all objections to the award had been finally disposed of, or within 10 days after the submission of the award.

HELD that an arbitrator has no right to allow documents entrusted to him by the Court, to be removed from the nuthee by any one; and that when an award is returned to Court after remittal, it should be accompanied by all books, exhibits, and proceedings pertaining to it.

Norman, J.—THIS is a case which was remanded by an order of this Court made by a Division Bench (Mr. Justice Kemp and Mr. Justice E. Jackson), dated the 6th of March 1868, to the Judge of Bhaugulpore, to try whether any thing, and what, was due from the defendant Maharajah Sir Joy Mungul Singh, Bahadoor, to the plaintiff upon two accounts which are described in the judgment of my learned brother Jackson as a "roka account" and a "cloth account."

After the case went back to the Judge of Bhaugulpore, it was referred to two arbitrators; one of whom was Mr. Sandys, the former Judge of Bhaugulpore, and the other was Moulvie Waheedooddeen, the Judge of the Small Cause Court, under an order stating that "with a copy of that order the case be forwarded to each of the arbitrators, and also all papers connected with the suit, and that the arbitrators having decided the case in the presence of the pleaders of all parties shall send back the papers and their award within one month from the date of that order." This order was dated the 22nd May 1868. On the 23rd June, the arbitrators, in the presence of both parties, stated that when the case came back, it was transmitted to them as arbitrators; that from the petition, and the order under which they were appointed, it did not appear in what manner they were to deal with the case: whether in obedience to the order of the High Court or with general powers.

The explanation of that probably is, that the arbitrators, reading the judgments of my brothers Jackson and Kemp, in which those two learned Judges do not exactly agree in their views of the case, may have felt embarrassed as to what question they had to decide.

On the 23rd of June, the arbitrators had stated that they could not act without full powers. On the 30th of June, the plaintiff presented a petition stating that it was intended that the arbitrators should decide with general powers. The petition was presented to the arbitrators, and not to the Judge.

On the 2nd July, the defendant also presented a petition to the arbitrators, consenting that the case should be decided by them with general powers.

The arbitrators held sittings on the 2nd, 9th, and 22nd July, on the 20th, 24th, and 25th August, on the 1st September, and on the 7th and 8th December 1868. It is clear, not only from this, but from the reasons which Mr. Sandys has given for his decision, that the arbitrators went into the matters in dispute very fully.

On the 10th of December Moulvie Waheedooddeen wrote and signed a paper as his award, and on the 28th of December Mr. Sandys wrote and signed a separate paper giving the reasons in full for the conclusion at which he had arrived. These papers appear to have been filed in Court on that same 28th of December.

On the 7th of January 1869, the defendant filed a petition of objections to the two papers which had been put in as the award of the arbitrators, objecting, amongst other things, that a number of *khatta* books which had been filed as exhibits in the case, had been given out by the arbitrators without his consent, and had not been submitted to the Court, as required by the provisions of Section 320, Act VIII. of 1859. He also objected that Moulvie Waheedooddeen, in particular, had decided the case on hearsay and rumour, and not on evidence.

On the 29th January 1869, the Judge made this order—

"The Court is of opinion that the arbitrators should *conjointly* sign their award "with reference to the provisions of Section "320.

"Let the separate awards be sent to the "arbitrators, with a copy of this order, and "with a request that the arbitrators will "conjointly sign the award.

"The Judge considers the recitals in the "awards may be dispensed with, unless the "arbitrators especially desire they should "be filed.

"The Judge annexes a form of award "'made' (meaning perhaps *to be made*) "by the arbitrators which, if correct, they "can sign."

The form which they signed was as follows:—

"We, the undersigned, having been appointed arbitrators under Section 315, Act VIII. of 1859, for final decision of the suit marginally noted, herewith submit our award under Section 320.

Mohun Ram Marwaree, plaintiff, *versus* Maharajah Sir Joy Mungul Singh, Bahadoor, K. C. S. I.

"We award the plaintiff a sum of Rupees 22,828-8, with proportionate costs, and interest on the said sum from the date of institution of the suit till the 10th December 1868, at one per cent. per mensem, and interest on the whole from this day (10th December) to date of realization, at one per cent. per mensem; and plaintiff must pay costs of defendant on the unproved portion of the claim, at one per cent. per mensem, from this 10th December to date of realization.

"Waheedooddeen,
"T. Sandys. } *Arbitrators.*"

The signatures at the foot are in the handwriting of the arbitrators.

There is written in the margin of it, and as part of the form—"The 10th December 1868, date of delivery of award."

Mr. Sandys also signed a minute, and Waheedoodeen likewise signed a minute, dated respectively as appears from the minutes themselves, which are as follows:—

"I sign this award, as formally required to do so, by the Judge's proceedings of today's date, but must respectfully decline its being unaccompanied by the recital of the award given by me on 28th December last. I could not give such an award, without placing my reasons for the same on record. It is also the only record of what actually took place in connection with it.

"The 29th January 1869.

"Sandys,
"*Arbitrator.*"

"I sign this award as required by the Judge's proceeding of the 28th January 1869. I thought it my duty to give the grounds in my award, anticipating that, in case my co-arbitrator, T. Sandys, Esquire, should differ from me, and the appointment of an umpire should have been necessary, that umpire would be able to give his opinion, by the perusal of the grounds set forth by both the arbitrators respectively; but as the said co-arbitrator has come to the same conclusion with me, I have no objection in my recitals being now dispensed with.

"The 31st January 1868.

"Waheedooddeen,
"*Arbitrator.*"

On the 3rd of February 1869, the Judge took up and disposed very shortly of the objections made to the two papers filed at the end of December previous. On the same day, he gave judgment in favor of the plaintiff as follows:—

"In accordance with the award and of the provisions of Section 325, the Court decrees to the plaintiff a sum of Rupees 22,828-8, with proportionate costs, and interest on the said sum from the date of institution of the suit till the 10th of December 1868, at one per cent. per mensem, and interest on the whole from the 10th December to date of realization at one per cent. per mensem; and plaintiff must pay costs of defendant on the unproved portion of the claim at one per cent. per mensem, from the 10th of December to date of realization.

"The 3rd February 1869.

"(Sd.) H. R. Maddocks,
"*Judge.*"

From that decree an appeal has been presented to this Court. The first point that I propose to consider is, whether that decision passed on the 3rd of February 1869 was a judgment passed in pursuance of the provisions of Section 325, Act VIII. of 1859, because, if that is the case, it is final, and no appeal lies.

Section 322 of that Act provides that "the Court may, on the application of either party, modify or correct an award, where it appears that a part of the award is upon matters not referred to the arbitrators, provided such part can be separated from the other part, and does not affect the decision on the matter referred; or where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision."

In certain cases under Section 323, the Court has power "to remit the award, or "any of the matters referred to arbitration, "to the re-consideration of the same arbitra- "tor or arbitrators or umpire, upon such "terms as it may think proper (that is to "say)—if the award has left undetermined "some of the matters referred to arbitration, "or if it determine matters not referred to "arbitration—if the award is so indefinite "as to be incapable of execution—if an "objection to the legality of the award is "apparent upon the face of the award."

Then Section 324 says: "No award shall "be liable to be set aside except on the "ground of corruption or misconduct of the "arbitrators or umpire. Any application to "set aside an award shall be made within ten "days after the same has been submitted to "the Court;" and Section 325 enacts: "If "the Court shall *not see cause to remit the* "*award*, or any of the matters referred to "arbitration for *re-consideration* in manner "aforesaid, and if *no application shall have* "*been made to set aside the award*, or if *the* "*Court shall have refused such applica-* "*tion*, the Court shall proceed to pass judg- "ment according to the award, or according "to its own opinion on the special case, if the "award shall have been submitted to it in the "form of a special case; and upon the judg- "ment which shall have been so given, decree "shall follow and shall be carried into exe- "cution in the same manner as other decrees "of the Court. In *every case* in which "judgment shall be given according to the "award, *the judgment shall be final.*"

The first question is—What was the award in the present case?

Now, I think it plain that the two papers which were sent in to the Judge signed, one on the 10th and the other on the 28th of December 1868, are *not* an award; and that the Judge, in remitting those papers to the arbitrators, did so on the ground that the objection to the legality of those papers as an award was apparent on the face of the award.

Now, the making of the award is a judicial act that must be done by the arbitrators *in the presence of one another and at the same time.* Section 320 appears to show that the award is to be one single instrument, complete in itself.

The decision contained in two papers signed by Mr. Sandys and Moulvie Waheed-ooddeen, if award it can be called, could only have been gathered from a comparison of the two papers above referred to. If arbitrators were allowed to sign different papers expressed in different terms, though intended by them to show that they had arrived at the same conclusion, there would be no means of determining that the arbitrators were both precisely of the same mind as to what they had awarded and decided, except from argument and inference. The award could not be final and complete in itself.

We have no doubt, therefore, that the Judge was quite right in sending back the papers to Mr. Sandys and Moulvie Waheed-ooddeen, and requesting them to sign their award conjointly. The Judge so disposed of the matter on the ground that the illegality of the award was apparent on the face of it.

Roscoe on Evidence, Title *Action on an award*, says: "An award to be made by "two arbitrators must be signed by them in "the presence of each other, and at the same "time and place. *And it is no award un-* "*less so signed.*"

Moulvie Waheedooddeen's decision is not with the papers, and we do not learn what it was, or what it contained. But by the decision of the Judge, we take it to be settled that the papers of the 10th and 28th December were not an award. And, indeed, for reasons already given, we think it clear that an award to be collected from two papers separate and distinct from each other and signed at different times could not be an award. The papers of the 10th and 28th of December not being an award, the only award before the Judge was the paper signed and sent in by the arbitrators on or subsequent to the 29th of January 1869. The judgment on the award which was passed on the 3rd of February following was, therefore, at most, only five days after the date of the award.

The Judge, before passing that judgment, appears to have disposed of certain objections made by the defendant. But these were not objections to the *award*, but to the papers of the 10th and 28th of December which, as we have seen, were not an award.

It appears to us plain, on considering the provisions of Section 325, that the Court has no power to pass judgment according to an award under that Section until after all objections to it have been finally disposed of,

or until the time during which an application may be made to set aside an award has elapsed. It is clear that down to that time the Court is not in a position to say whether the Court can or will see cause to set aside the award, or if no objection has been made whether any application will be made to have the award set aside or not, or whether such application ought to be refused or not.

It appears to me that if a decree which was passed before the disposal of objections to the award, or within ten days after the submission of the award to the Court, could be allowed to stand as a judgment under Section 325, it would deprive the opposite party of the opportunity of objecting to the award reserved to such party by the provision in Section 324. After judgment has passed on the award under Section 325, it is final. There is nothing in this Section which empowers the Court which has pronounced judgment on an award to set aside such judgment by review or otherwise.

Now, in holding that a judgment passed within ten days after the award has been submitted to the Court is not a decision under Section 325, we are following a decision of a Full Bench of the Agra Sudder Court to be found in the Sudder Dewanny Adawlut Reports, N.-W. P., for 1863, page 42, Volume II., decided on the 11th July 1863, Sunt Loll *versus* Bubboojee.

The judgment now appealed against was, in our opinion, not a judgment under the 325th Section, and consequently not one against which no appeal lies. We think that the judgment and the decree of the Court below must be reversed with costs.

It has been pressed on us that the award which was made in pursuance of the suggestion of the Court on the 29th of January 1869 is itself bad, because it was signed by Mr. Sandys and Moulvie Waheedooddeen on different days, namely, the 29th and 31st of January respectively. There is no distinct evidence to show when the original signatures were affixed, and we are not disposed to draw inferences one way or the other on a matter on which if the party intended to rely, he ought to have given distinct and positive evidence. Moreover, this point may be raised before the Judge, where a satisfactory explanation may possibly be given.

We do not desire to more than point out to the Judge the principle of the law on this subject. That principle is stated by the Chief Justice in Volume VI., Weekly Reporter, page 272, and 9 Weekly Reporter, page 29, and the rule applicable to arbitrators is shortly expressed in the passage already cited from Roscoe on Evidence, page 324. The Judge appears to have understood that, because he remitted the award to the arbitrators in order that they ought to sign it conjointly. But this they did not do. The Judge will consider whether it would not be proper again to send back the papers signed in pursuance of his former suggestion, that an award may be duly and regularly signed by the arbitrators in the presence of each other.

We desire to observe that it would have been better that the Judge should not have dictated the form of the award. The parties having consented to submit to the arbitration of the persons chosen, those persons should have been left free to draw up their award in whatever manner it seemed fit and proper to them. If there were any error in their mode of procedure or in their award, the Judge should have pointed it out to them, and have allowed them to correct it. By suggesting a form, the Judge may probably have prevented the arbitrators from deciding on the separate accounts referred to in the judgment of the High Court.

It has been brought to our notice that the conduct of one of the arbitrators was exceedingly irregular in allowing certain papers of accounts and *khatta* books to be removed from the record. He attempts to excuse this conduct, but his explanation only makes matters worse. Section 320 provides that: "When an award in a suit shall be made "either by the arbitrator or arbitrators, or "by the umpire, it shall be submitted to "the Court under the signature of the "person or persons by whom it may be made, "*together with all the proceedings, deposi-* "*tions, and exhibits in the suit.*"

Now, if Moulvie Waheedooddeen had parted with any books and documents which had been put in in the course of the inquiry before the arbitrators, he would have done that which appears to be distinctly forbidden by Section 320. But when he, as an arbitrator, took upon himself to allow books and papers which were entrusted to him by the Court to be removed from the nuthee, he was not only wrong as an arbitrator, but forgot his duty to the Court, as we are surprised to find that a judicial officer of his position and standing should have done. The docu-

ments were entrusted to him by the Court, and it was his plain and simple duty to return them to the Court. As an arbitrator, he had no right whatever to allow them to be removed from the nuthee by any one. Still less was he justified in parting with these documents in a case where their genuineness and *bona fides* was in question. At the same time, we do not say or suppose that in parting with those papers, he did so from any bad or improper motives, but he has undoubtedly laid himself open to observation by his conduct.

We have a further remark to make regarding the paper put in by Moulvie Waheedooddeen, and signed by him on the 10th December 1868. It is clear that that had become a proceeding in the suit, and it ought not, therefore, to have been withdrawn from the record; but as laid down by Section 320, it should have been returned to the Court along with the other papers of the record. More particularly, it ought not to have been withdrawn after the defendant objected to it, charging the Moulvie with having decided the case on rumour and hearsay, and not on evidence. It is difficult to see how the Judge could have decided on that objection satisfactorily after he had allowed that paper to be withdrawn and kept back by Moulvie Waheedooddeen. Our impression is that, for reasons suggested by us above, as it stands at present the award is bad. We leave it to the Judge, on hearing any objections made by the defendant, or on the application of the plaintiff for that purpose, to remit the award to the arbitrators under the provisions of the 323rd Section, if he thinks that the ends of justice will be served thereby. We think that with the award to be returned to the Court after such remittal, all books and exhibits together with the proceedings which have been removed from the nuthee, including the decision of Moulvie Waheedooddeen, should be brought into Court with the award. The money which was paid into Court by the defendant will remain in Court until further orders, which the Judge will pass on the subject.

Jackson, J.—I am not prepared to acquiesce in holding that the last award of the arbitrators is bad, because it was signed by the arbitrators, one on the 29th and one on the 30th. A decision of a Court would not be set aside on a question of form, which I hold this to be; much less an award of arbitrators. It did not in any way affect the decision of this case on the merits. As, however, my learned colleague is of an opposite opinion, I am ready to concur with him in remanding this case to the Judge in order that he may take steps to have the award formally signed by the arbitrators at the same time, and not on different dates. I think also that there must be a remand in order that the appellant may obtain ten days' time after the award is signed within which to prefer any objections he can legally urge against the award. I think that Moulvie Waheedooddeen's decision as originally sent in should be restored to the record, as well as the account-books which that officer allowed the plaintiff to take away.

The 15th September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Damage to reputation—Bona fides—Onus probandi.

Case No. 1769 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 19th May 1869, reversing a decision of the Moonsiff of Bohur, dated the 23rd February 1869.

Roshun Sircar (Plaintiff), *Appellant,*

versus

Nobin Chunder Ghuttuck (Defendant), *Respondent.*

Baboos Sreenath Banerjee and *Okhil Chunder Sein* for Appellant.

No one for Respondent.

In a suit for compensation on account of damages done to plaintiff's reputation by defendant's having, on the occasion of a theft in his house, given information in the police against plaintiff, who was acquitted by the Criminal Court:

HELD that as the accusation was made in good faith, *i. e.*, with good and reasonable cause (defendant having in common with other villagers suspected plaintiff, and having, on being asked by the police, given them formal information), it was not made with any malicious purpose.

HELD that the best evidence of enmity is the evidence of the parties between whom it exists, and that, in the absence of the plaintiff's own testimony in this case, there was no sufficient evidence of malice to make it incumbent on the other side to show reasonable grounds for the charge.

Bayley, J.—WE think that this special appeal must be dismissed.

The plaintiff sued for compensation for damages done to his reputation, inasmuch as the defendant, on the occasion of a theft in his house, gave information against the plaintiff in the police.

The defendant's plea was that he joined with the other villagers in suspecting the plaintiff; that it was only after being called upon by the police to name the person whom he suspected that he gave the name of the plaintiff; and that he did so, not from enmity, but because he, in common with the other villagers, suspected the plaintiff of the act.

The first issue in the first Court was. "Whether the defendant brought the charge "of theft against the plaintiff out of enmity "towards him, or did he bring the charge in "good faith."

The first Court gave the plaintiff a decree for Rupees 10 out of Rupees 80 claimed.

The Lower Appellate Court has reversed that decision, holding, in fact, that, inasmuch as the defendant acted on reasonable ground, he was not liable to damages. There are some other remarks in the judgment of the Lower Appellate Court as to the amount of injury that is done by a charge of this kind to a person of the cultivator class to which the plaintiff belongs, but in respect of which we think it unnecessary to pass any opinion for the purpose of deciding this appeal.

The first ground taken in special appeal is that the Lower Appellate Court has misconstrued the plaint in holding that it did not state that there existed an ill-feeling between the plaintiff and the defendant.

On this point, I observe that the substance of the plaint is that, owing to certain acts of the plaintiff's master, an ill-feeling had come about between the plaintiff and the defendant, so that the only mistake that the Lower Appellate Court has committed on this point is a technical one, and one which does not affect the merits of the case. The plaint itself rather points to the acts of the master as causing the ill-feeling less than to any direct ill-feeling otherwise existing between the plaintiff and the defendant.

The second ground taken is that the Lower Appellate Court is wrong in stating that only one of the plaintiff's witnesses supported his statement to the effect that there was ill-feeling between his employer and the defendant. Now, enmity is a matter in which the best evidence is at the command of the parties themselves between whom that enmity exists, and such best evidence can only be had by those parties giving their own evidence on oath. Motives and feelings can hardly be known to others than those who entertain them, and as the plaintiff in this case did not give his own, the best evidence as to the existence of any enmity and its causes and motives, it is immaterial whether the Lower Appellate Court has made a mistake in stating that only one of plaintiff's witnesses, whose evidence would thus be but secondary evidence in the case, supported the plaintiff's statement as to the existence of any ill-feeling between the parties.

The third ground in special appeal is that, as the plaintiff was acquitted by the Criminal Court, it was for the defendant to prove that he had a probable cause for the accusation; and to support this contention, a case has been cited at page 29, Volume VI., Weekly Reporter, decided by Trevor and Glover, JJ. That judgment, however, is one in which the accused was not only acquitted by the Criminal Court, but the accusation was, after investigation, held by that Court to be unfounded. The words are: "An accusation "which has been held by a Criminal Court "to be *unfounded* is sufficient *primâ-facie* "evidence that that accusation was mali-"ciously brought;" so that this case, even if one in the principle of which I concur, does not apply to the present one. I say nothing as to whether I concur in that judgment or not, and it is unnecessary for the present case to refer to the other grounds stated by the learned Judges in that case.

The next case cited is reported at page 42, Volume XI., Weekly Reporter. I do not differ with the law laid down by that judgment. The words are—"I think the Principal "Sudder Ameen ought to have tried whether "the charge preferred by the defendant "Nuffur was *false*, as alleged. If the charge "were found to be *false*, it would lie upon "the defendant to show that he had "reasonable and sufficient cause for bringing "that charge; and on his failure to show "such probable cause, malice might be in-"ferred, and the plaintiff would be entitled "to damages against him."

Now, the principle of law as laid down in that case will not apply to the present, for here the Lower Appellate Court has found as a fact (and I think properly) that the accusation was not without good and reasonable cause, and was not maliciously made, but that

it was made in good faith—good faith being equivalent to when a person has good and reasonable cause for his belief.

In the present case, the defendant was asked by the police, who came to investigate the matter, as to whom he (defendant) suspected of the theft in his house. Defendant's opinion coincided with that of other villagers that plaintiff committed the theft, and he accordingly informed the police that he suspected the plaintiff. On this, he was asked by the police to give information of this matter formally, and he did so. If this conduct on the part of the defendant justifies a verdict for damages against him, either the Police must abstain from requiring parties robbed to give it any information as to the person on whom their suspicion may fall, or parties robbed must abstain from giving the police any clue to the detection of the offender by intimating their suspicions, and thus frustrate the ends of justice.

Under the facts as stated by the Lower Appellate Court, I agree in thinking that the defendant's giving information to the police in this case was not with any malicious purpose, and I would dismiss this appeal, but without costs, no one appearing for the respondent.

Hobhouse, J.—I think, upon the particular facts of this case, that the plaintiff was bound to start his case by proving the enmity, that is, the malice actuated by which, as he alleged, the defendant brought the charge of theft against him. The Judge has found as a fact that the plaintiff has not established this malice, and I think that, in the absence of the plaintiff's own testimony, which was evidently the best evidence in the case, the Judge was right in coming to this finding. But the contention on the part of the special appellant seems to be that, when a charge of theft had been brought in a Criminal Court, and when the plaintiff had been acquitted of that charge, malice must be inferred; and it was, therefore, for the defendant to show that he had reasonable grounds for making the charge. There are, no doubt, some expressions in the decision reported at page 29, Volume VI., Weekly Reporter, which would favor this view of the case, but, as Mr. Justice Bayley has pointed out, what the Judges apparently had in mind was not simply a charge of which the accused had been acquitted, but, in the very words of the Judges, "a charge which had been held by a Criminal Court to be unfounded," that is to say, a charge which had been found by a Court of competent jurisdiction to be a false charge, having no foundation at all. That also is the meaning of the decision at page 42, Volume XI., Weekly Reporter. "If," the Judges remark in that case, "the charge "were found to be false, then it would be "upon the defendant to show that he had "reasonable and sufficient cause for bringing "the charge;" and indeed there can be no doubt that, if a man brings a charge which is found by a Court of competent jurisdiction to be false, then malice cannot but be presumed; but until malice is upon some evidence or other found, it will not be on the other side to show that he yet had reasonable ground for bringing the charge. Here, however, the fact is that malice is not found, and the fact further is that there was evidently no sufficient evidence, because there was not the best evidence in support of the malice.

I agree in dismissing this appeal.

The 15th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges.*

Rights of occupancy—Act X. of 1859—Plaintiff's allegations.

Case No. 1501 of 1869.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 26th May 1869, reversing a decision of the Moonsiff of Ghallal, dated the 3rd April 1869.

Ramdhun Khan (Plaintiff), *Appellant,*

versus

Haradun Puramanick and others (Defendants), *Respondents.*

Baboos Ashootosh Chatterjee, Nubo Kishen Mookerjee, and *Jadub Chunder Seal* for Appellant.

Baboos Hem Chunder Banerjee and *Umernath Bose* for Respondents.

Section 6, Act X., 1859, does not exclude from the acquisition of the right of occupancy persons holding from ryots; but only persons holding from ryots who themselves have no more than a right of occupancy.

Act X. was not intended to apply to any land except land of which the main object was cultivation.

d

No right of occupancy is acquired by a tenant's simply occupying and paying rent under a grant for no specified period.

A suit does not necessarily fail, because plaintiff fails to prove allegations in his plaint, which are not material to the plaint.

Markby, J.—It seems that in this case the plaintiff brought a suit to recover a piece of land 14 cubits long and 7 cubits wide in possession of the defendants. He says that he bought the land on the 25th Assin 1259 from two persons, named Modhoo and Narain. He says that, as this *jummaye* land paid rent to the zemindar, on the 26th Srabun 1259 he had his name registered, and obtained an amulnamah; that he built a hut upon the land, and sub-let it to his vendors at a monthly rent of two annas from Aughran 1261 to Aughran 1275; that the hut was burnt down; that he was going to build another upon the land, when he was opposed by the defendants who are the heirs of Modhoo and Narain.

The defendants in their written statement admit the purchase of the plaintiff from Modhoo and Narain; and they do not dispute the tenure which the plaintiff holds, but they deny that the plaintiff built the hut. They say they built the hut, having taken the land which they hold for dwelling purposes at an annual rent of 4 annas; and as a proposition of law, they say that the plaintiff's title is barred under the general Law of Limitation, and also that the plaintiff cannot obtain khas possession, because they have been in possession 12 years.

Now, nothing seems to have turned upon the defence of general limitation. It is quite obvious upon this that the defendants have put themselves out of Court, because they admit the tenure between themselves and the plaintiff.

The first Court found that the allegations generally of the plaintiff were true, and gave him a decree. The second Court finds, generally, that the allegations of the defendants are true, that is to say, it finds that the defendants built the hut, that they held upon the terms they allege, and it finds that the allegation of the plaintiff that the land was demised for a specified term is untrue; and then the Court, observing that the defendants are "the ryots" of the plaintiff, dismissed the plaintiff's claim.

Now, in special appeal before us, it has been contended by the plaintiff in the first place that the only right to remain in possession which the defendants can claim is under Section 6, Act X. of 1859, and that Section 6 does not apply, because the tenants are persons to whom the land is sub-let by a ryot. I think that contention is bad in law. Section 6 does not exclude from the acquisition of the right of occupancy those persons who hold from ryots, but only those persons who hold from ryots themselves having no right of occupancy. Now, here, the plaintiffs, assuming them to be properly described as ryots, clearly by their own statement, had more than a right of occupancy, for they claimed to have a transferable tenure.

But, then, it is further objected by the plaintiff (still arguing that the only way in which the defendants can gain a right of occupancy is under Act X.) that Act X. has no application to this case at all, because, by the defendants' own showing, the land was taken for dwelling purposes; and according to the decisions of this Court, Act X. does not apply to land taken under such circumstances.

That contention appears to me to be good. In numerous cases decided by this Court relating to various provisions of Act X., this Court has come to the conclusion upon the general frame of the Act that, though not restricted in express terms to any species of land, it was not intended to apply to any land except land of which the main object was cultivation; and with regard to this very Section, the same conclusion has been come to in the case which was referred to, reported in 8 Weekly Reporter, p. 251. Mr. Justice Phear, in delivering judgment, says: "The occupation intended to be protected by that Section is occupation of land considered as the subject of agricultural and horticultural cultivation and used for purposes incidental thereto, such as for the site of the homestead, the ryot, or mali's dwelling-house, and so on. I do not think that it includes occupation, the main object of which is the dwelling-house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that." I think that decision is in accordance with the general view taken of this Act, and for my part, I may say, I entirely concur with it.

But it has been contended by the pleader for the defendants, special respondents, that the plaintiff's suit ought to have been dismissed, because, whatever his cause of action may have been, if he properly stated it, he did not prove the cause of action laid in his

plaint. Now, I think there is a little confusion as to what the plaintiff's cause of action really is. To my mind, the cause of action in this plaint (and this plaint would have been perfectly good if it had been confined to that statement alone) was that the land belonged to the plaintiff, and that he had a right to the present possession of it, and that, when he went to demand possession from the defendants, they refused to give it to him. It is true that the plaintiff does go on and state circumstances which have now been finally decided to be untrue; and, no doubt, the fact of his having done so may very well be raised against him in dealing with the evidence in the case. I do not think it follows, however, that, because a plaintiff states circumstances in his plaint which are untrue, and which are not material allegations, that is to say, which are allegations which might be struck out of the plaint, and yet the plaint remain a good one, and fails to prove those allegations, that, therefore, the suit must necessarily be decided against him. It stands admitted in this case that this land was the land of the plaintiff. It stands admitted that the only title of the defendants was in consequence of a grant made to them of the land, in order that they might use it for dwelling purposes; and it seems to me that, until the defendants can show that that grant was in its origin intended to be a permanent one, or that, by occupation under it, they had acquired a permanent right of occupancy, they must fail. I have already given my reasons for saying that they have made out the claim to a right of occupancy under Act X., because that Act has no application to this case; and the only other ground upon which it was possible that they could claim a right of occupancy was, to my mind, stated in so vague a manner as to make it almost impossible to deal with it. It was stated that, if a man (altogether independently of Act X. of 1859, and even assuming that that Act would not apply) grants, we will say, a house to another for an indefinite term, the tenant, merely by occupation of it under that grant, acquires on equitable principles (for that is what it comes to) a right of occupancy. I know of no such principle of law. If authority were needed, it, seems to me that such a proposition of law was expressly repudiated by the decision of the Privy Council in a case reported in 11 Moore's Indian Appeals, towards the end of the Volume.* I do not at all say that a grant which was originally wholly indefinite in its terms may not be made perpetual by the subsequent conduct of the parties; but that is a matter of fact, and no facts have been shown in this case of that kind, nor has the Court been asked to infer it. What we have been asked to hold, and what we cannot hold to give the defendants what they ask, is that, simply by occupying under a grant for no specified period, and by paying rent under it, a tenant acquires a right of occupancy. I think that right is entirely confined to the special cases in which the Legislature has granted it. Therefore, I think that the grounds upon which the Lower Appellate Court based its judgment in this case have been shown to be wrong in point of law, nor have the counter-objections in support of that judgment succeeded. The result to my mind is that the decree of the Lower Appellate Court ought to be reversed, and that plaintiff should have a decree for what the first Court gave him, that is to say, a decree for possession of the land. The defendants will have to pay the costs of this Court and of the Lower Appellate Court.

Glover, J.—I am of the same opinion, and have nothing to add to the observations which have been made by Mr. Justice Markby.

*Baboo Dhunput Singh vs. Gooman Singh, 9 W. R., 3.

The 17th September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Ex-parte decree—Sections 24 and 54, Act X., 1859.

In the matter of Gudadhur Chatterjee, *Petitioner,*

versus

Nund Lall Mookerjee, *Opposite Party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Romanath Bose and *Mohendro Lall Shome* for Opposite Party.

N sued his gomashtah (*M*) and *M's* surety (*C*) under Section 24, Act X., 1859, and got a decree *ex parte* as against the surety. Upon *N's* proceeding to execute

the decree, *C* applied for a revival of the suit, which was granted, and a re-hearing was appointed for the 4th May 1869, but subsequently postponed to the 8th, on which date the case was struck off by the Deputy Collector under the provisions of Section 54. Subsequently, *N* applied for a fresh execution of his original decree to the Collector, who sent the record to the Deputy Collector with instructions to carry out the execution. Thereupon *C* obtained a rule from the High Court, calling on *N* to show cause why the Collector's order should not be set aside.

HELD that the Deputy Collector's order striking the case off the file annulled the decree so far as *C* was concerned, and that the Collector's order directing execution was without jurisdiction.

Hobhouse, J.—IN this case, the facts are these.

One Nund Lall Mookerjee sued Madhub Chunder Mundul, his gomashtah, and the applicant before us as surety of that gomashtah for money and accounts under the provisions of Section 24, Act X. of 1859.

On the 24th September 1866, Nund Lall got a decree *ex parte* so far as regards the applicant before us. On the 11th March 1869, Nund Lall proceeded to execute his decree against the petitioner. Thereupon the petitioner applied for a *revival* of the suit in an application, dated the 29th March 1869. On the 19th April 1869, the *revival* was granted, and the re-hearing of the suit was appointed for the 4th May, and subsequently postponed until the 8th May 1869. On that day, the Court of the Deputy Collector struck off the case.

Subsequently, Nund Lall applied, not to the Deputy Collector, but to the Collector, for a fresh execution of the decree of the 24th September 1866, as against the applicant before us; and on the 5th June 1869, the Collector admitted the application, and sent the records to the Deputy Collector with instructions that execution-proceedings might be carried on. Thereupon the applicant before us obtained a rule from this Court, calling upon Nund Lall Mookerjee to show cause why the order of the Collector of the 5th June 1869 should not be set aside as an order passed *without jurisdiction.*

Nund Lall has now appeared before us, and shown cause. He contends, first of all, that the order of the Collector was a good order with jurisdiction, because the decree of the 24th September 1866 was, in reality, *outstanding;* and he contends, secondly, that, whether the order of the Collector be good or not, still it is an order in execution of a decree, and we therefore have no jurisdiction to interfere with it.

In support of this last contention, the pleader relies upon certain rulings of a Full Bench of this Court to be found at 5 Weekly Reporter, page 25, Miscellaneous Appeals, and 7 Weekly Reporter, page 519. These decisions seem to us to go no further than this, *viz.*, that where a Court of civil jurisdiction has exercised a jurisdiction which it possesses—such, for instance, as a jurisdiction to pass an interlocutory order in a suit—and where the Code of Civil Procedure does not give an appeal from such order, the High Court will not interfere with such an order under the extraordinary powers given to it by Section 15 of the Charter. But the case before us is not necessarily of this nature, and, in fact, the question before us is *whether the Collector had jurisdiction to pass the order* directing execution-proceedings to be renewed on the 6th June 1859; and though we are not shown any decision in point, yet we ourselves have often ruled, and we are aware that other Benches of this Court have ruled, that, where Collectors or other officers presiding in a Civil or a Revenue Court subordinate to the High Court have exercised a jurisdiction which they did not in law possess, this Court has power to interfere, and has repeatedly interfered and has quashed the orders of those Courts, and we have decisions directly in point upon which we may, from analogy, determine that we have jurisdiction to quash an order passed without jurisdiction—decisions similar to that to be found at page 520, Volume VII., Weekly Reporter, in which a Full Bench of this Court directed a Deputy Collector to exercise a jurisdiction which it had declined to exercise. This disposes of the second objection taken by the opposite party.

In the matter of the first objection, the question turns upon the fact as to whether the Deputy Collector's decision of the 8th May 1869 was a decision in the suit, or merely a decision dismissing the application of the petitioner before us for a revival of the suit.

The law, Section 58, Act X. of 1859, directs that, when a party, against whom an *ex-parte* judgment has been given, applies for a revival of the suit, he must apply within a certain period, and must show good and sufficient cause for his previous non-appearance, and must satisfy the Collector

that there has been a failure of justice; and then the law goes on to say: "The Collector "may, upon such terms and conditions as to "costs or otherwise as he may think proper, "*revive* the suit, and alter or rescind the "decree according to the justice of the case. "But no decree shall be reversed or altered "without previously summoning the adverse "party to appear and be heard in support of "it."

Now, what we find in this case is that, when, on the 25th March 1869, the applicant before us asked for a revival of the suit, the Deputy Collector served a notice on the opposite party to appear and show cause on a certain date why the application for revival of the suit should not be granted. It is not denied but that this notice was duly served. Then we find the Collector, on the 19th April 1869, that is, on the day fixed in this notice, passing the following order, *viz.*, "Revival granted, and day fixed on the 4th May 1869." So that here we find an order passed in the presence of parties and after notice given, directing, *first*, that the application for revival of the suit be granted; and, *secondly*, that the hearing of the suit, that is, the re-hearing of it, be fixed for the 4th May. Then this hearing fixed for the 4th May was postponed to the 8th May, and on that day we have what the Collector himself calls his judgment on a claim for arrear accounts for Rupees 2,200. The judgment runs as follows: "This was an application for time, but I "find none of the parties present. It was "presented by the Revenue Agent on the "part of the defendant. The plaintiff's "mookhtear, Woomesh Chunder Kur, was "sent for, but he would not, or could not, "come, as he was engaged in the Sessions "cases. I would have granted time had "the parties been present. I would have "examined them, drawn out issue or issues, "and then granted time. As none of the "parties are present, I strike off the case "from the pending file." It is to be observed in the first instance that the decision here given is directly in accordance with the provisions of Section 54 of the Act, omitting only the particular provisions of that Section with which we have no concern in this rule. That Section says: "If, on the day fixed "by the summons or proclamation for the "appearance of the defendant, or on any "subsequent day to which the hearing of "the case may be adjourned prior to the "recording of an issue for trial as hereinafter "provided, neither of the parties appear in "person or by an agent, the case shall be "struck off, with liberty to the plaintiff to "bring a fresh suit." Then follows the additional provision with which we have no concern.

We find the Collector in a separate order passed in the presence of parties and after notice given, directing, first of all, that the suit be "revived." That is clearly one order. Then we find the same Deputy Collector fixing a day for the hearing of the case. Then we find him taking up the case on that day, passing judgment upon it, saying he would have postponed it if the parties had been present, saying further that he would have drawn out issues, and then stating as his ultimate decision, "I strike off the case from the pending file." This seems to us to be clearly a *judgment* passed in the suit, and a judgment which did, in reality, entirely get rid of the decree of September 1866, by striking off the plaintiff's case so far as it concerned the applicant before us; and we are certain that by this judgment, and we are inclined to think that even by the order of revival of the 19th April previous, the decree of September 1866 was set aside entirely and completely so far as the applicant before us was concerned in it. This being so, when the Collector directed that the execution-proceedings should be revived against the applicant before us by virtue of the decree in question, there was virtually no decree before him at all, and nothing, therefore, on which his order could legally be based, and, in fact, such order was altogether without jurisdiction.

We direct that the rule be made absolute with costs.

The 16th September 1869.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Hindoo Law—Grandmother's right of maintenance.

Case No. 1727 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 4th June 1869, reversing a decision of the Second Subordinate Judge of that District, dated the 30th July 1868.

Puddum Mookhee Dossee (Plaintiff), *Appellant,*

versus

Rayee Monee Dossee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Becharam Mookerjee* for Appellant.

No one for Respondent.

On a division of an estate, the Hindoo Law recognizes the right of a grandmother to maintenance, but not her title to any share of the estate.

Bayley, J.—In this case, we think that the judgment of the Lower Appellate Court must be reversed. That Court dismissed the plaintiff's case, relying upon a passage which it quotes from Sir William Macnaghten, namely, "She has a right to participate in all the comforts which are enjoyed by his family in its undivided estate, and a legal as well as a natural claim to that protection which may be derived from a union of her descendants. If, therefore, she is deprived of such advantages, it is but just she should be enabled to take care of herself, and not be obliged to go from door to door for her support."*

That passage is one which merely lays down the principle that the Hindoo Law recognizes the right of the mother to maintenance on the part of one in the position of this grandmother. But the Lower Appellate Court says that the above citation from Sir William Macnaghten's works not only entitles the mother to support, but also, in case of a division of the estate, gives her a right to a share. To my mind there is no law laid down by Macnaghten in the above passage to the effect that in a division of the estate the grandmother is entitled to a share, or to what share; but the principle laid down is that she is not to be left to go from door to door, but has a right of maintenance. No one appears on the other side, nor is any authority quoted, except the one I have just mentioned, in support of the judgment of the Lower Appellate Court. I am of opinion that the Lower Appellate Court's judgment must be reversed, and the first Court's judgment restored, with costs of this Court and of the Lower Appellate Court.

Glover, J.—I am of the same opinion.

* Chapter on Partition.

The 17th September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Special appeal—Review.

Case No. 213 of 1869.

*Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Sir Charles Hobhouse, Bart., on the 27th July 1869, in Special Appeal No. 600 of 1869.**

Juggobundhoo Bose and others (Plaintiffs), *Petitioners,*

versus

Mr. J. P. Wise (Defendant), *Opposite Party.*

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Petitioners.

Mr. G. C. Paul and *Baboo Anund Chunder Ghossal* for Opposite Party.

A case having been remanded for the trial of an issue under the specific provisions of Clause 1, Section 4, Regulation XI. of 1825, an application for review was made on the ground that it was requisite for the ends of justice to remand the case upon an issue under Clause 3, which, it was alleged, was the issue to which the applicant had directed all his evidence.

Held that, as the correctness of this allegation could not be ascertained without going through the record again, the application could not be granted, for to grant it would, in fact, be to grant a second special appeal, which is not the object of a review.

Bayley, J.—This application for review is on the ground that we were wrong in restrict-

* *Ante*, p. 229.

ing our remand-order and the issue in the case to a trial under the specific provisions of Clause 1, Section 4, Regulation XI. of 1825, and that really the case ought to have been tried under Clause 3 of that Section of the Regulation.

Now, in our judgment, the remand-order is as nearly as possible in the very words of Clause 1. The words of Clause 3, Section 4, Regulation XI. of 1825, are these: "When "a *chur* or island may be thrown up in a "large navigable river (the bed of which is "not the property of an individual), or in "the sea, and the channel of the river or "sea between such island and the shore "may not be fordable, it shall, according to "established usage, be at the disposal of "Government. But if the channel between "such island and the shore be fordable at any "season of the year, it shall be considered "an accession to the land, tenure, or tenures "of the person or persons whose estate or "estates may be most contiguous to it, sub-"ject to the several provisions specified in "the first Clause of this Section with respect "to increment of land by gradual acces-"sion."

It appears to me that Clause 3 applies to cases of *churs* being as islands and surrounded by water, the property of Government; and if not so surrounded by water, belonging to the nearest riparian proprietor. Clause 1, on the other hand, refers to cases of alluvion gradually accreting by recess of the river.

The plaint in the present case discloses facts rather contemplated by Clause 1 rather than by Clause 3. The substance of the plaint seems to me to declare that the lands were gradually acquired adjoining the plaintiff's talook Aowal and Kolaparah by the recess of the river, or, to use the exact words (শুষ্ক স্রোত) or drying up of the stream. I do not think, therefore, that there is any such error in our judgment in directing on remand a trial on the issues drawn under Clause 1 as would justify our interference in this review, and directing a re-trial of the case under Clause 3.

I would therefore reject this application with costs.

Hobhouse, J.—I agree in rejecting this application for review. We remanded the case to try this issue, *viz.*, whether the plaintiff's lands were a gradual accretion to his estate within the meaning of Clause 1, Section 4, Regulation XI. of 1825. We are now told that we committed an error in remanding the case to be tried on this issue, and that we ought rather to have remanded it to be tried on another and a very different issue, the issue, *viz.*, whether the lands were an accretion to the plaintiff's estate within the meaning of Clause 3 of the Section that I have quoted.

Now, as I understand the foundation of the procedure in review of judgment, it is necessary that the applicant for review should show good and sufficient reason for his application, and "good and sufficient reason" seems to me to be expressed in the words of Section 378 of the Code, and we are there told that, if we are of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, we are to grant the review.

Now, it is admitted that there is no evident error or omission in our judgment, but it is contended that it is requisite for the ends of justice to remand the case upon the issue for which the present applicant for review contends, because it was to this issue that he directed all his evidence. It is possible this may be so, but it is quite impossible that we should find this out without going through the records once again, and in fact giving the applicant for review what is precisely a second special appeal. My opinion is that the object of granting a review is not to grant a second special appeal, and if complete justice should not, by reason of our refusal to admit this application for review, be accorded to the applicant, it is entirely his own fault or that of the person who represented him in this Court. It is his own fault evidently in one respect, for it is impossible to gather from his plaint whether he intended to claim the lands as an accretion under Clause 1 of the Section, or as an accretion under Clause 3, and a very different Clause of the Section; and evidently there has been some default on the part of his pleaders in this Court, because we went into the case very thoroughly and at length. It was argued for some time by pleaders and by learned Counsel on either side, and we delivered judgment in open Court in the presence of one or other of the pleaders for the present applicant. In that judgment, we, distinctly and after much consideration, laid down the issue upon which we directed that the case should be remanded, and no objection of any kind was taken to any one single statement of fact that we made or to the issue which we very distinctly and

unmistakeably laid down. If, therefore, I say, the applicant in this case has not had full justice done to him, it is his own fault and that of his pleaders.

For these reasons, I agree in refusing this application for review with costs.

Bayley, J.—I would add that I also concur in the separate reasons given by my learned colleague for rejecting the application.

The 17th September 1869.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Right of appeal—Declaratory decree—Wassilat—Execution.

Case No. 302 of 1869.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 30th April 1869.

Gopal Chunder Chuckerbutty (Judgment-debtor), *Appellant,*

versus

Oodoy Lall Dey, guardian of Sham Chund Dey (Decree-holder), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Boykuntnath Paul for Respondent.

Objections having been successfully raised under Section 246, Act VIII. of 1869, against a decree-holder's attachment of a tenure as the property of his judgment-debtor, he brought a regular suit, and obtained a declaratory decree that the property belonged to his debtor. He then took out execution, attached, sold, and himself purchased the property in question. The objector meantime appealed to the Privy Council, and having obtained a decree reversing the declaratory decree, took out execution against the opposite party for costs and wassilat. The opposite party objected, but the Judge allowed the execution to proceed, and deputed an Ameen to ascertain the amount of mesne-profits collected.

HELD that the Judge's order was not an order prior to decree within the meaning of Section 363, Civil Procedure Code, and that the opposite party was entitled to appeal against the *principle* that he was liable, without waiting the result of the Ameen's investigation.

HELD that the decree of the Privy Council could not be held to include restitution of every thing that the decree-holder would have enjoyed had the property not been sold in execution.

Glover, J.—THE appellant in this case, the purchaser of a decree against Doorga Pershad and Russeek Lall Dey, attached a certain tenure as the property of his judgment-debtors. Objections were raised under Section 246, Act VIII. of 1859, by the present respondent which were successful, and the decree-holder brought a regular suit to have it declared that the property in question belonged to his debtors.

The decree-holder gained his case in the Zillah Court and also in the High Court where the case was heard on appeal by the objector (*vide* 1 Hay's Reports, page 456), but the Privy Council reversed both these decisions (7 Weekly Reporter 10), and "dismissed the action of the respondent" (*i. e.*, the decree-holder) "in the Court below with costs." The ground of the Privy Council's judgment was that the *onus probandi* was on the decree-holder to show that the talook was still the property of the judgment-debtor, and not the property of the objector (purchaser), and that he had failed to discharge that *onus.*

We may remark here that, after succeeding in the Zillah and High Courts, Gopal Chunder Chuckerbutty took out execution of the decree, attached the property, and brought it to sale, purchasing it himself.

On the decree of the Privy Council being passed, the objector took out execution for costs and wassilat accruing during the time the opposite party had been in wrongful possession of the property.

Gopal Chunder objected on various grounds, but the Judge allowed execution to proceed. He did not fix the amount of wassilat, but deputed an Ameen to ascertain what had been collected, leaving it upon the debtor to object to such items as he pleased when the report came in.

The debtor appeals against this order.

The decree-holder also appeals under Section 348, his objection being that, as the Judge's order was not a final one, but was held in abeyance pending the Ameen's report, no appeal could be preferred against it.

It will be convenient to dispose of this objection first.

We think that the Judge's decision is in no sense an order prior to decree such as

would come within the meaning of Section 363. It finally decides the *principle* that the party who lost the case in the Privy Council is to pay back the mesne-profits collected by him, and leaves the amount—a matter of detail only—to be decided on the hearing of the Ameen's report. This was, to all intents and purposes, a final decision of the case against the judgment-debtor's objection, that he could not be declared liable to pay wassilat without a fresh suit being brought against him; and we think, therefore, that the debtor was fully entitled to appeal against the *principle* that he was liable, without waiting the result of the details of the Ameen's investigation.

Then as to the debtor's appeal. With regard to costs, we agree with the Judge below. The decree of the Privy Council is, to our mind, perfectly clear in its intention to give the appellant all costs in both Lower Courts. Indeed, the pleader for Gopal Chunder Chuckerbutty does not seriously contest this point.

There remains the question of wassilat. The Judge below has held that there was no necessity to bring a fresh suit, inasmuch as, the decree of the High Court being reversed, the decree-holder was entitled to full and complete restitution of all that he had lost by that decree.

We think that the Judge was wrong. If the decree he executed were one that could in any way be held to include complete restitution to every thing that he would have enjoyed had the property not been sold in execution, there might be some reason for the contention; but in this case there is nothing from which such a legal inference can be drawn. What the decree-holder got was an order that the action of the respondent in the first Court should be dismissed with costs. Now, that action was for a declaration that the property claimed by the objector belonged to the judgment-debtor, and Gopal Chunder has lost that action, and has had to pay costs. The decree-holder gets no further relief than this, and there is not a word in the Privy Council's decree that declares him entitled to any mesne-profits collected during the time of his wrongful dispossession.

We might, we think (following several rulings of this Court), decide the case on this point alone, and say that, in executing the Privy Council's decree, the Judge could not award anything that was not given by that decree, and that wassilat could not, as a matter of fact have been given, for the appellant to England preferred no prayer for wassilat, nor was there any question raised about mesne-profits either in the plaint or the decree from first to last. It would be most dangerous to suppose intentions or to amplify a decree given according to the plaint, declaring the original decree-holder not entitled to a declaration that the property in dispute belonged to his judgment-debtor, into an order giving the winner the right to demand wassilat without further pleadings on the point or judicial enquiry thereon. It so happens in this case that the party in possession was the original decree-holder; but suppose a third party had purchased at the auction-sale, could he have been made liable under the Privy Council's decree for mesne-profits? There can be no doubt, we think, that he could not.

We were much pressed during the argument with a decision of the Full Bench in the case of Huro Chunder Roy Chowdhry (9 Weekly Reporter 405) in which his Lordship the Chief Justice made some remarks with reference to restitution, and held that, when a decree by which a plaintiff had been turned out of possession was reversed, that plaintiff had a right to be restored to possession of what he had lost, not only of the land, but also of the rents and profits which had been received by the defendant whilst in possession.

These remarks, we may observe, were made with reference to an entirely different state of things than that of the case before us, and were moreover only applicable to the particular question which the Full Bench were then deliberating upon, which by the very terms of the reference was a question of limitation. In any case, they cannot apply to the matter before us, where there has been no decree for possession or wassilat, but merely one reversing a judgment declaratory of the judgment-debtor's right in a certain property.

We do not say that the decree-holder is not fully entitled to recover the mesne-profits of his lands from the party who has wrongfully enjoyed them, but we do not see how he can recover them in these execution-proceedings, as now urged. He must bring a fresh suit.

So much, therefore, of the decision of the Court below as awards a liability for wassilat in execution is reversed, with proportionate costs.

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The 18th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Affidavit—Practice—Rule Nisi.

In the Matter of Francis Choisy, Manager of the Calcutta Agency of the Comptoir d'Escompte d'Paris, *Petitioner*,

versus

R. Currie & Co., *Opposite Party*.

Mr. L. P. Broughton and *Baboo Mooraley Dhur Sein* for Petitioner.

An application having been made for a rule calling upon a Recorder to show cause why he should not issue execution, where the affidavit on which the application was based did not state in terms, nor did it appear from the record, that the applicant (plaintiff) had got a decree, or if he had, whether the execution sought was general or particular—the High Court refused to issue the rule, holding that, before granting a rule to show cause, it ought to be satisfied that if no cause be shown, the rule must be made absolute.

Peacock, C. J.—It is quite clear that, upon the materials which we have before us, we cannot order the Recorder to issue execution. The affidavit does not state in terms that the plaintiff has got a decree. It merely says that an application for execution was made in proper form, and that the Recorder has refused the application on the ground that he had reserved a question for the consideration of the High Court. The nature of the question is not stated in the affidavit, but we are referred to the case, which is now here, and we see that the question which the Recorder has referred is whether a judgment can be given upon confession under the Code of Civil Procedure. We, therefore, see that the Recorder has refused to grant execution until he knows whether he can give a decree upon confession. Whether a decree upon confession has been given or not, we cannot say. If a decree upon confession has been entered up, the Recorder may have held as a matter of law that the decree is void, and that no execution can be issued upon it; and if he has so held, any objection to his decision would be a ground of appeal, and not for an application for a rule calling upon him to show cause why he should not issue execution. Further, it does not appear whether the application for execution was general against all the property of the defendant, or specific against particular property specified in the application. If the application was in the latter form, the Recorder might have good reasons for refusing to grant the execution against that property, and the objection to his ruling would form a ground of appeal if the property was of sufficient value. At all events, we cannot, upon the materials before us, say that there is a *primâ-facie* case made out against the Recorder, that he was so far wrong in refusing to issue execution that we, in the exercise of our powers under Section 15 of the Act under which the Letters Patent of this Court were issued, ought to order him to do that which he has refused to do or to show cause. Before we can grant a rule to show cause, we ought to be satisfied that, if no cause be shown, we ought to make the rule absolute. Upon this affidavit, we are quite in the dark as to whether, if no cause be shown, we should be promoting the ends of justice by making the rule absolute, and therefore we cannot issue a rule to show cause.

The application may be renewed upon an affidavit sufficiently detailing the facts.

The 20th September 1869.

Present:

The Hon'ble W. Markby and F. A. Glover, *Judges*.

Putnee tenures—Alienation—Hindoo Law—Widow's powers.

Case No. 111 of 1869.

Regular Appeal from a decision passed by the Judge of Midnapore, dated the 12th March 1869.

Tarinee Churn Gangooly and others (Plaintiffs), *Appellants*,

versus

Watson and Co. (Defendants), *Respondents*.

Mr. W. A. Montriou and *Baboos Unnoda Pershad Banerjee, Sreenath Doss, Rash Beharee Ghose*, and *Prosunno Coomar Roy* for Appellants.

Messrs. G. C. Paul and *R. T. Allan* and *Baboo Ashootosh Dhur* for Respondents.

The term "putnee talook" *primâ facie* imports a hereditary tenure.

A tenure in the nature of a putnee talook is, by its very nature, alienable; the zemindar parting with all control and interest except as regards an annual rent, and his interest only requiring that the talook should be kept whole and entire.

Where a pottah granting a putnee talook contained clauses prohibiting the transfer of its lands by sale or gift, the clauses were construed as intended to prevent alienation, not of the entire talook, but only of portions of the land.

Where a widow, who is under age, is properly represented in a suit, the matter stands precisely as if she were of age and acted on her own behalf; and as representative of the entire estate, involving the interests of her deceased husband and her minor son, she has the same control with respect to compromise as she has with respect to the assertion of rights and appeal against an adverse decision.

Markby, J.—THIS was a suit brought to recover possession of a share of two zemindaries, called Pergunnah Bogree and Turuf Behala, under the following circumstances.

These zemindaries belonged to a family of Mookerjees. At some time prior to the year 1243, that family consisted of three brothers and three sisters, and on a partition the Bogree Pergunnah became vested in two of the brothers, Shumboo Chunder and Ram Narain, jointly, in equal shares, while Turuf Behala became vested in Shumboo Chunder alone. Shumboo Chunder died, leaving a widow and several children, namely, Juggut Chunder, Pran Chunder, Mohesh Chunder, Hurish Chunder, Kalee Chunder, and Sreeman Chunder. Pran Chunder died in 1247, leaving a widow, Brohmo Moyee, and a daughter Dukhina, who married the plaintiff Tarinee Churn Gangoolee, and by him had two sons Chinta Monee and Ooma Monee. Ooma Monee is dead, and is represented by his father Tarinee Churn. Chinta Monee and Tarinee Churn are plaintiffs in this suit; and it is not disputed that by inheritance a 2 annas 13 gundas 1 cowrie 1 krant share in the two zemindaries is vested in these two plaintiffs.

In the year 1243, Ram Narain borrowed a sum of money from his brother Shumboo Chunder and other members of the family, and on that bond Shumboo Chunder and his co-creditors in the same year obtained a decree. On the 8th of Bhadro 1244, Shumboo Chunder being then dead, his sons granted to Messrs. John and Robert Watson a "putnee talook" in 8 annas of Bogree Pergunnah, and in the whole of Turuf Behala by two separate instruments. On the 22nd Assin in the same year, Ram Narain granted a "putnee talook" of his 8-annas share in Pergunnah Bogree to his three sisters and another lady. In Falgoon, Shumboo Chunder attached Ram Narain's share in the zemindary in execution of his decree. In Chyet, the four ladies above mentioned sold their putnee talook to John and Robert Watson, Ram Narain assenting to the transfer, and promising to confirm it. Accordingly, on the 26th of Chyet, Ram Narain granted to the Watsons a pottah, and took a kubooleut in respect of this putnee talook.

In the year 1246, the creditors, under the decree obtained upon the loan to Ram Narain, attached and sold Ram Narain's share of the Bogree Pergunnah zemindary, and the creditors themselves, amongst whom one was Pran Chunder, the father of Dukhina, became the purchasers of the property at the auction-sale.

Immediately after the sale in execution, these purchasers took proceedings in the Supreme Court to eject the Watsons, but those proceedings failed. Matters then appear to have remained quiet till the year 1255, when the purchasers at the execution-sale brought a suit in the Mofussil against the Messrs. Watson and other persons, the object of which was to get rid of the putnee pottah granted by Ram Narain to his sisters and the other lady, as well as that granted to the Watsons, on the ground that they were collusive transactions intended to defraud creditors, and to get possession of the property.

The Principal Sudder Ameen (Mr. Mackay), who heard the suit, gave the plaintiff a decree for possession of 8 annas of Bogree Pergunnah, declaring the pottahs to be invalid.

The Messrs. Watson appealed, and on the 27th Assar 1257 (10th July 1850), a compromise was entered into by Robert Watson for himself and as representing the estate of John Watson, who had died during this litigation. The compromise is contained in two documents in the form of pottah and kubooleut. The pottah is granted by Juggut Chunder, Mohesh Chunder, and Sreeman Chunder on their own behalf; by Juggut Chunder and Mohesh Chunder "as guardians on behalf of Kalee Chunder Mookerjee, deceased, and Sreemutty Dukhina Dabee," she being then a minor; by Mohesh Chunder as agent on behalf of the minor sons of his brother Hurish Chunder; and by Sreemutty Soudamonee Dabee, the mother of Kalee Chunder. It is addressed

to Robert Watson for himself and as administrator on behalf of the late John Watson. It recites the sale by the Sheriff, the ejectment-suit in the Supreme Court, the suit in the Principal Sudder Ameen's Court, and the appeal. It then recites that the parties had determined to settle the matter amicably by Watson paying Rupees 1,500 over and above the putnee jumma fixed by Ram Narain, which putnee the Mookerjees affirmed at that rent, and that the parties had filed a razeenamah and safeenamah to this effect, and had arranged to execute a pottah and kubooleut in due form. The parties above mentioned then proceed to grant and confirm Robert Watson a putnee talook of Ram Narain's share in the Bogree Pergunnah. The corresponding kubooleut is executed by Robert Watson "for self and as administrator of John Watson."

The plaintiffs, Tarinee Churn and Chinta Monee, prior to this suit, granted a putnee talook of all their share in the two zemindaries to Luchmeeput Sing Roy, who joins in this suit as plaintiff.

The ground on which the plaintiffs claim to recover possession of the land now in the possession of the defendants are, first, as to the whole, that the putnee talooks granted on the 8th Bhadro 1244 of Turuf Behala and of Shumboo Chunder's 8-annas share in Bogree Pergunnah, as also that granted on the 27th Assar 1257 of Ram Narain's 8-annas share in Bogree Pergunnah, were all for life only. Secondly, as to Ram Narain's 8-annas share in Bogree Pergunnah, that the compromise of 1257 was a collusive one made by Robert Watson with persons who had no title, and that the exchange of pottah and kubooleut was also collusive and made by persons who were strangers to the property. Thirdly, that the pottahs of 1244 prohibit alienation, and the defendants' title only accrued as purchaser.

Nineteen issues have been raised in the Court below; the 1, 2, 3, 4, 5, 7, 8, 9, 10, and 19 were found in favor of the defendants, establishing that the pottahs of 8th Bhadro 1244, 22nd Assin 1244, 26th Chyet 1244, and the 27th Assin 1257, passed to the grantees in each case a perpetual alienable tenure; that the defendants had a good title by purchase to a putnee talook in the whole of both zemindaries. And further that, even if that were not so upon the construction of the documents themselves, the tenures must now be considered transferable and hereditary by reason of the conduct of the parties.

Against this judgment the plaintiff appealed, and three points have been argued before us on the part of the appellants.

1st.—That the putnee talook granted by the pottahs of 8th Bhadro 1244 and 27th Assin 1257 are for life only.

2nd.—That the tenures created by those pottahs, as well as by the pottah of the 22nd Assin 1244, are not alienable.

3rd.—That the compromise of the 27th Assin 1257 was not binding on the plaintiffs Tarinee Churn and Chinta Monee, or persons claiming through them.

It was admitted by the appellants that the putnee talooks granted by the pottahs of the 22nd Assin 1244 and the 26th Chyet 1244 were hereditary.

With regard to the first point, we intimated to the Advocate-General in the course of his argument that we should not trouble him upon that point. We concur with the Judge that the term "putnee talook" *primâ facie* imports a hereditary tenure. We know of no instance in which the term "putnee talook" has ever been applied to an interest which is to last for the life of the grantee only. We doubt if a single instance could be produced in which the term has been so used. As an instance in which the word is used in a very marked manner as implying *ex vi termini* heritability, we may refer to the case of Dya Ram *versus* Bhobindur Narain, Sudder Dewanny Adawlut, 1806, page 139, where the plaintiff claimed a "talook," but the Court held that he had only a "mowrosee ijarah." There is a note appended to this case by Sir W. Macnaghten, in which he says, "a talook and a mowrosee ijarah, though "*both hereditary*, differ in some important "points."

We also think that this inference, which arises from the use of the word "talook," is strengthened by the addition of the word "putnee." Putnee talooks throughout Bengal owe their validity entirely to Regulation VIII. of 1819, and we think it quite a legitimate inference that, when these parties used the words "putnee talook," and refer to that Regulation, they meant to describe an estate of the same general nature and with the same general qualities as the putnee talooks described in that Regulation, one prominent feature of which is that they are hereditary. We do not hold that anything

in that Regulation prohibits or impedes a zemindar from granting a tenure which is not hereditary, nor do we derive the heritability of the tenures now under consideration from any enactment in that Regulation. We refer only to the preamble as showing what in the common understanding of persons acquainted with such matters and in the ordinary use of language is meant by the expression "putnee talook," and we have no doubt whatever that, when a man grants a putnee talook, he clearly means a heritable tenure. If he intends to grant anything else, the term would be misapplied; and nothing but an express declaration that a heritable tenure was not intended would be sufficient to show that the term was used in so exceptional a sense.

Reference was made by the appellants to Regulation I. of 1815 and Regulation III. of 1828, but we hardly see how those Regulations apply. These are Regulations which relate to the resumption of tenures by the governing power. They merely lay down the extent to which, and the conditions under which, the Government will exercise its right of resumption. If they were to be considered as laying down general rules of construction, the absurd consequence would follow that the words "mowrosee istmoraree" would create a life-tenure only.

A case was also referred to in 3 Sutherland's Weekly Reporter, Act X., page 127, which was said to afford an instance of the application of the term "putnee talook" to a grant for ten years only. But clearly that is not so. In that case a great number of persons were holding dependent talooks, which had been created in a zemindaree subsequent to the Permanent Settlement. The zemindary was sold for arrears of revenue, and purchased by the Government, and the talookee tenures became thereby liable to be cancelled. Every effort was made by Government to come to an amicable arrangement with the talookdars, and the Government (as found by the Court), whilst negotiating this arrangement, made a temporary settlement for ten years with the talookdars. It is obvious that, when the persons with whom this settlement was made are described as talookdars, that the settlement, not in respect of this temporary settlement, but in respect of their previously existing tenures, which never were cancelled, and which the purchasers of the zemindary from Government were in this very case compelled to acknowledge.

As to the second point, there can be no doubt that a tenure in the nature of a putnee talook is by its very nature alienable. Though, of course, we do not mean to deny that it is a tenure, yet the relation between zemindar and talookdar has scarcely any analogy to the ordinary one of landlord and tenant. The zemindar parts with all control over his property, and all interest in it except to an annual rent which has been likened to what in England is called a quit-rent. The interest of the zemindar only requires that the talook should be kept whole and entire, so that his security for the rent may not be diminished. There is nothing in the smallest degree partaking of a personal character in the relation between him and the talookdar. Indeed, it was hardly contested that some special restriction was required to prevent the talookdar from alienating; but certain words have been relied on in these pottahs for that purpose. In the pottah of 8th Bhadro 1244, granting a putnee talook of Shumboo Chunder's 8-annas share of Pergunnah Bogree to the Watsons, we find the words: "You shall not sell or grant in "gift the aforesaid mehals or lands of our "talooka, nor make any application for trans-"fer. It will remain attached to our "zemindary, and the rent will be discharged "by you." In the pottah of the same date, granting a putnee talook of Turuf Behala, the words are: "You shall not of your "own authority convey the said mouzahs "by gift or sale, nor apply for transfer. They "shall remain attached to our zemindary, "and you will discharge the mâlgoozaree." No similar clause is to be found in the pottahs which relate to Ram Narain's share of Pergunnah Bogree, with respect to which, therefore, the question does not arise.

We agree with the District Judge that these clauses were inserted, not to prevent alienation of the entire putnee talook as such which could in no way affect the interests of the zemindar, but to prevent any alienation of portions of the land, whereby, in case of default in payment of the putnee rent, doubts might arise as to what was and what was not liable to be sold for arrears.

We decide this question in the terms in which it has been raised; but we do not thereby intimate our opinion that, even if alienation were prohibited, the tenure would

in this case have been forfeited to the zemindars. That question has not been raised.

The third question affects only the 8-annas share of Pergunnah Bogree, which belonged to Ram Narain. If the putnee talook created by Ram Narain could be got rid of, a 2 annas 13 gundahs 1 cowrie 1 krant share in that zemindary was vested in Dukhina Dabee as widow of her deceased husband Tarinee Churn. When the compromise was effected in 1244, she was a minor and had a son, the plaintiff Chinta Monee. It is contended by Mr. Montriou that the putnee talook created by Ram Narain having been then declared invalid, that share was then well vested in her, and the document of the 27th Assin was, in fact, a conveyance of her interests in that share to the Watsons. It is admitted that by her subsequent acts Dukhina Dabee so far recognized this conveyance as to make it binding on herself, but it is contended that it has no operation whatever upon the interests of Tarinee Churn and Chinta Monee whose interests cannot be alienated by the acts of the widow except under special circumstances of necessity, which here do not exist.

The argument is good if the view of the facts be correct, but we think the view is not correct. A great deal will depend on whether or no Dukhina Dabee was properly represented in the suit before the Principal Sudder Ameen. If, as we think, we ought now to presume, she was properly represented, then we think the matter stands precisely as if Dukhina Dabee had been of age and had acted on her own behalf, and we think it would be a wholly erroneous view of the transaction to look upon it simply as an alienation by her of an interest of which she was in possession. We consider that both before and after the decree in the Principal Sudder Ameen's Court, she, and therefore those who represented her, had full power to compromise the suit.

If she had chosen never to assert her right, her children would have been barred by the Statute of Limitations—(9 Weekly Reporter 505, F. B.). Surely then she could enter into a compromise before suit brought. If the decision of the Principal Sudder Ameen had been adverse, and Dukhina had not appealed, the decision would have been binding on her children (9 Moore's Indian Appeals, page 404).* Surely she could then have compromised. If the decision of the Principal Sudder Ameen had been reversed by the Sudder Court, and she had not then appealed to the Privy Council, her children would have been equally bound, and in that case also she could clearly have compromised. And it seems to us that it would be most unreasonable and inconvenient to hold that her power to compromise litigation should depend simply on the question whether or no she had been hitherto successful. It seems to us much more reasonable to hold that, as representative of the entire estate in the litigation, she has the same control with respect to compromise as she has with respect to the assertion of rights and with respect to appeal against an adverse decision. It is, of course, possible that the trust thus reposed in the widow may be abused without detection, as may the very large discretion which, as the law now stands, she undoubtedly possesses in other matters. But, on the whole, we think it will be found most favorable for the heirs that she should have the power of compromise at every stage of the proceedings.

But even were we to suppose the compromise to be invalid, and that the Principal Sudder Ameen's decree stands, the decision of the Full Bench in 9 Weekly Reporter decides that no new cause of action accrues to the heir after the death of the widow; the only cause of action which ever existed has been asserted by the widow, and she obtained a decree thereon. The plaintiffs Tarinee Churn and Chinta Monee could, therefore, at most, be entitled to execute that decree. This is not what they are now attempting to do; nor could they do so, for the same decision demonstrates that they would be barred here also.

Again, suppose that Dukhina was not properly represented in the litigation in the Court of the Principal Sudder Ameen. Those proceedings must then, so far as the present plaintiffs are concerned, be wiped altogether out of consideration, and how does the matter stand?—Precisely as the matter stood in the case before the Full Bench. The plaintiffs are heirs after a widow who had not asserted her rights. More than 12 years have elapsed since their cause of action accrued, and they are therefore barred.

In any possible view, therefore, of this case, except that which we consider the wholly inadmissible one suggested by Mr. Montriou, and accepting as we are bound to do the Full Bench decision referred to, we

* The Advocate-General *vs.* Ranee Surnomoyee —1 W. R. 14.

think the plaintiffs in this suit ultimately stand in the same position as regards the 8-annas share of Ram Narain as they do in respect of the 8-annas share of Shumboo Chunder in the Bogree Pergunnah, that is to say, that the defendants hold in the whole of both zemindaries a valid putnee talook.

In this view of the case, it is unnecessary to enter into the other questions raised on behalf of the respondent, namely, whether the zemindars could be properly made parties to this suit which was for possession, they having transferred all their rights of possession to Luchmeeput; secondly, whether the suit ought to be dismissed on the ground of champerty or maintenance; thirdly, whether the suit could be maintained in the Civil Court; fourthly, whether, apart from the construction of the documents, the zemindars had so dealt with the putneedars as to show that the putnee talook was, or at any rate had become, an hereditary one. We consider, for the reasons we have stated, that the Court below was right in holding that the interest of a putnee talook in both zemindaries is well vested in the defendants, and that this appeal ought to be dismissed with costs.

The 20th September 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Co-sharers—Rent-suits—Jurisdiction—Right of action.

Case No. 2609 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 30th May 1868, reversing a decision of the Deputy Collector of Monghyr, dated the 23rd May 1867.

Kalee Pershad (Plaintiff), *Appellant,*

versus

Shah Lutafut Hossein and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Rajendronath Bose* for Appellant.

Moonshee Mahomed Yusuff for Respondents.

The legal position of co-sharers in an estate occupying separate portions in it is, that each possesses and holds, in respect of his several right, to enjoy that which is his own. If one holds a portion larger than his share, the inequality may be rectified by a partition, or, if a dispute arises on a division of the annual profits, it may be adjusted in a suit for an account; but such a suit is not cognizable under Act X. of 1859.

Where a co-sharer occupies a larger portion than his own share, or the whole estate, by renting the land he occupies from one or more of his co-sharers, he may be sued for that rent under Act X. of 1859, by the person or persons with whom he engaged.

In such a case the liability of the cultivating shareholder to pay rent must, in the absence of usage, agreement, or evidence, be deemed single and entire. But if there is an agreement, express or implied, that the occupying shareholder shall pay separately to each of his co-proprietors a definite sum, such sum may be recovered by each co-proprietor by a separate rent-suit.

Norman, J.—THIS is a suit under Act X. of 1859 to recover Rupees 131-10-8 as arrears of rent from 1271 to 1273 Fuslee. The plaint describes it as due under a wassilbakee account.

The plaint stated that 3 annas out of 4 annas out of 16 annas of Bishenpore was let in farm to the plaintiff by Mussamut Bibee Nujeeoonissa from 1267 to 1273; that the defendants cultivated 86 beegahs of land in the said mouzah at Rupees 2 per beegah, at an *annual jumma of 173 rupees 9 annas in addition to the usual expenses.* The other defendants have appropriated the produce of the land, without paying the rents of the plaintiffs' share. That, after deducting the

shares of the other shareholders, the sum of Rupees 13-10-8 is due to the petitioner on a wassil-bakee account signed by the putwaree. The account is as follows :—

STATEMENT OF RECEIPT AND BALANCE FOR THE YEAR 1271 FUSLEE.

Names.	Quantity of land.	Rate.	Amount.	Usual expenditure.	Total Jumma.	Deduct share of other shareholders.	Remaining share of 3 annas.	Amount received.	Balance.
15	Big. Bs. D.	Rupees.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.
Plots.	86 15 4	2	173 9 0	19 3 0	182 12 0	156 9 3	36 2 1	... ...	36 2 1
							Interest, &c.	...	12 3 1
							Total	...	48 5 2

FOR THE YEAR 1272 FUSLEE.

15	Big. Bs. D.	Rupees.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.
Plots.	86 15 4	2	173 9 0	19 3 0	182 12 0	156 9 3	36 2 1	... ...	36 2 1
							Interest, &c.	...	7 13 3
							Total	...	44 0 0

FOR THE YEAR 1273 FUSLEE.

15	Big. Bs. D.	Rupees.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.	Rs. As. P.
Plots.	85 16 4	2	173 9 0	19 3 0	182 12 0	156 9 3	36 2 1	... ...	36 2 1
							Interest, &c.	...	3 2 5
							Total	...	39 5 0
							Grand Total	...	131 10 2

The defendants alleged that they held only 55 beegahs, and that the rents had been adjusted in an account between themselves and the plaintiffs as their co-sharers. The Deputy Collector raised two issues; first, what was the amount of land held by the defendants; secondly, whether the whole or any portion of the rents had been paid by the defendants. He finds that the defendants held 86 beegahs 15 cottahs, and that they failed to prove their plea that the rent had been settled in account. He also finds that the plaintiff was sued by the defendants and made to pay his share of rents, and also that another sharer sued the defendants for his portion of the rents due on account of these lands, and obtained a decree. The date of that decree was the 3rd of November 1865.

The Deputy Collector gave the plaintiff a decree for the entire amount claimed.

The Judge, on appeal, reversed the decision of the Deputy Collector, and dismissed the suit on the ground that Bebee Nujeeoonissa and the defendant being co-sharers and the relation of landlord and tenant not subsisting between them, the Collector's Court had no jurisdiction under Section 23 of Act X. of 1859 to entertain the suit.

From this decision the plaintiff appeals.

Now, we may observe that in the first instance the defendants raised no objection to the jurisdiction of the Deputy Collector, though they seem to have done so afterwards in an application to admit a review.

It appears from a decree of the Sudder Ameen of Bhaugulpore which was in evidence before the Deputy Collector, that on the 14th of June 1866, the now plaintiff joined with the heirs of Bibee Nujeeoonissa in bringing a suit against the now defendants for possession of the land for the rent

of which the plaintiff is now suing, with mesne-profits of the same from the beginning of the year 1267 Fuslee, or September 1859. That suit was dismissed with costs on the 25th of September 1866. In answer to a question by the defendants' pleader, the plaintiffs' agent said that the suit was dismissed for want of jurisdiction. That statement was not contradicted or challenged by the defendants on the hearing before the Deputy Collector. But as the ground for the dismissal of the suit could not be ascertained from the decree without reference to the plaint, the written statement of the defendant, and the judgment, we sent for the record of the case from the Sudder Ameen's Court. On an inspection of that record, it appears that the plaintiffs in that suit sued for possession, with mesne-profits, of their 4-annas share of the lands occupied by the defendants; that the defendants alleged that as the plaintiffs' claim to recover rent of the land which *should have been brought in the Revenue Court* had been barred by limitation, the plaintiffs had brought that suit fraudulently. They go on to allege that they held the lands in question at a rent of 2 rupees a beegah payable in cash. The now plaintiff, Kalee Pershad, and the Vakeel of his co-plaintiffs in that suit also stated that the lands had been held by the defendants at a rent of 2 rupees per beegah, and that that suit was brought because they had ceased to pay rent. The Sudder Ameen decided that the defendants were ryots, and if the suit was brought to eject them on account of non-payment of rent, it should have been brought under Clause 5, Section 23 of Act X. of 1859.

The defendants then clearly stated before the Sudder Ameen that they were ryots or tenants of the land, in other words that the relation of landlord and tenant existed between them and their co-sharers.

No doubt, the Judge is right in saying that a suit by one co-sharer against another is not cognizable by the Collector's Court under Section 23 of Act X. of 1859.

The legal position of co-sharers in an estate occupying separate portions of it for their own purposes is, that each possesses and holds in respect of his several right to enjoy that which is his own. If any one holds a portion of land larger than his share either as being greater in extent or greater in value, the inequality may be rectified by a partition; or if a dispute arises on a division of the annual profits, it may be adjusted in a suit for an account in which the rights and equities of all the parties can be fully dealt with. But that is a suit which is not cognizable under Act X. of 1859. That point was expressly decided in Syud Hyder Ali *versus* Omrit Chowdhry, Sutherland's Decisions for 1864, Act X. Rulings, page 42. Mittun Lall Sahoo *versus* Shaikh Nadur, 1 Weekly Reporter, page 53, is exactly the converse. It decides that such a suit is cognizable in the Civil Court. Huro Chunder Roy *versus* Obhoy Churn Sircar, 2 Weekly Reporter, Act X. cases, page 72, is to the same effect. In such a suit, what a co-sharer has a right to ask for is not rent. It is the balance which may appear due to him on an account such as would be made out by a putwaree, showing the amounts for which the co-sharers are respectively chargeable in account as between themselves and other co-sharers in respect of their occupation, after taking into account the allowance to which each is entitled in respect of his share in the entire estate. A co-sharer is only liable to pay over to the other shareholders the amount which, on taking the whole account, may appear due from him.

No doubt a co-sharer occupying a portion of an estate larger than his own share in the estate entitles him to hold, may do so by arrangement with his co-proprietors. Thus, if a co-sharer, having an 8-annas share, cultivate a share equal to 12 annas of the whole estate, he may do so by renting from one or the rest of his co-sharers a 4-annas share, and for the rent of that 4-annas share he might be sued under Act X. by the person or persons with whom he engaged.

Again, it is easy to imagine a case where the property in a village might be divided amongst a very great number of shareholders, and one shareholder or a few shareholders might cultivate the whole at an agreed rent or rents. In such cases, I am inclined to think that the cultivating shareholders might be treated as having a double character, and might be sued under Act X. *for the rent*, agreed by them to be paid to the body of shareholders for the occupation of the land. In such cases, the putwaree, lumbürdar, or the agent or manager of the proprietary body, would divide the profits after deducting expenses between the shareholders, and in the event of any dispute the Civil Court would be the tribunal to adjust the *shares* of the *proprietors* in the profits.

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The Legislature, no doubt, for good reasons, has not thought fit to extend to the Lower Provinces the provision in Section 1, Act XIV. of 1863, giving to Collectors jurisdiction to entertain suits by co-sharers for their share of the profits of an estate.

In the present case, the relation between the parties is not that of co-sharers only. The defendants, by their own admission, occupy as tenants at a certain money-rent. They succeeded in defeating the plaintiffs in the Principal Sudder Ameen's Court on the ground that they were ryots liable to pay rent, and as such should have been sued in the Collector's Court. They cannot now be allowed to turn round and ignore an assertion and a decision of which they have had the benefit. As against them, it stands as a binding and conclusive admission that the sum now sued for is rent, and, if so, the Collector's Court had jurisdiction.

The next question is whether the plaintiffs can sue separately for their proportion of the entire rent at which the defendants hold. The defendants did not object that the plaintiffs cannot sue separately for their proportion of the rent. Apparently, they could not have done so with any chance of success, because it appears that not only have they sued the plaintiffs for their share of the rent of that part of the land which is occupied by them, but they have actually been sued by other shareholders for the proportion due to such shareholders of the rent of this very land. After decrees in such suits, it would, no doubt, have been too late to contend that the plaintiffs could not sue separately for the proportion of the rent payable by defendants to them.

The case thus appears to be distinguishable from the ordinary case of cultivating shareholders holding at a rent which is collected by a putwaree on behalf of the entire body. In such a case, I think that the liability of each cultivating co-sharer to pay rent for his holding must, in the absence of usage, agreement, or evidence to the contrary, be deemed to be single and entire. On principle, it is not easy to see how any undertaking to pay one single and entire sum can, without the consent of the party undertaking, be converted into a liability to pay separately portions of that sum to the several parties who may be interested in the same. Were it so, the inconvenience to tenants might be very great. We had an instance before us lately of a village in the Bhaugulpore District in which there were at least thirty co-sharers. Conceive the position of a ryot sued separately by each of these sharers for the proportion of rent due to him. With what safety could he pay any one particular shareholder? What means could he have of ascertaining the exact rights of each several shareholder, and what would be his position if he resisted, even while making the enquiry which he might think necessary for his own protection?

I may add that the case of Ram Joy Singh *versus* Nagur Gazee, 5 Weekly Reporter, Act X. Rulings, page 68, was decided on the ground that one shareholder cannot sue a lessee for his proportion of an entire rent. The decision accords with the opinion of Sir Barnes Peacock, Chief Justice, in the case of Banee Madhab Ghose *versus* Thakoor Dass Mundul, 6 Weekly Reporter, Act X. Rulings, page 75. But if there be an agreement, either express or which can be implied from the conduct of the parties, that the occupying shareholder shall pay separately to each of his co-proprietors a certain definite sum in respect of the share of such co-proprietor as the rent of the undivided share of such co-proprietor, there is no reason why such sum should not be recovered by such co-proprietor by a separate suit for it as rent in the Collector's Court.

What is called the annual expenditure charged at Rupees 19-3 in each year, I suppose meaning the share of the putwaries and other expenses, cannot be recovered in this suit. The sum of Rupees 57-9 on this head must, therefore, be deducted from the plaintiff's account, and the interest must be re-calculated. Subject to this alteration, I think that the decree of the first Court may be restored, as in my opinion no remand is necessary.

The defendant must bear the costs in all the Courts.

Jackson, J.—This is a suit by the farmer of one of the sharers of a village in the District of Monghyr against a co-sharer in that village, alleging that the defendant holds 86 beegahs of land in the village for which the defendant is liable to pay rent to the plaintiff. The answer of the defendant was that he did not hold 86 beegahs, but 55 beegahs, and that he had paid the rent due on that land in a debit and credit account with the co-sharer from whom the plaintiff had obtained his farm. The Deputy Collector found that the defendant held 86 beegahs of

land, and that the defendant had not attempted to prove his alleged payment of rent. The Judge, on the appeal of the defendant, held that the Revenue Courts had no jurisdiction to try any suit for rent as between one co-sharer and another, unless his status as co-sharer had been altered by attornment, or otherwise, into that of a tenant. It was urged before him that the different co-sharers had brought suits against each other and against the defendant for rent, and that the defendant had brought a suit for rent in exactly similar circumstances against the present plaintiff, and decrees had been passed in such case; but the Judge held that such decrees were no proof that the relationship of landlord and tenant existed in another suit in which such relationship was not established.

In special appeal, the contention is that no objection to jurisdiction was raised by the defendant, and that the conduct of the defendant as regards similar holdings in the villages established, that they were held, and rent paid for them, as between landlord and tenant.

The question as to whether the parties were landlord and tenant or not is a question of fact. I am not prepared to hold that in no case can a co-sharer in an estate be a tenant of another co-sharer. I understand that the Judge also would not go so far as this. Then what are the circumstances which would establish that relationship? The Judge says "attornment or otherwise." It is stated in this suit that the relationship is established by the acts of the parties; by the fact that each co-sharer paid his fellow co-sharer directly the whole amount of rent due to him, and under the law applicable only to landlords and tenants brought suits for rent, and obtained decrees: and that specially the defendant in this suit, when in exactly the same position as the present plaintiff, stated that he was the plaintiff's landlord, and sued him for rent for land held by the plaintiff as farmer of the defendant's co-sharer; and I think that the act of the defendant in bringing his suit was a virtual admission that, as regards such tenures as the plaintiff now sues to recover rent upon, the parties stood in the relationship of landlord and tenant. The Judge was, therefore, wrong in law in holding that it was no evidence of the fact. There is evidence in this case, both oral and documentary, that the different co-sharers do recover their rents directly from each other according to their shares.

I would, therefore, restore the decision of the first Court so far as it decreed the rents claimed by plaintiff. I would dismiss that part of the claim which refers to other expenses. The plaintiff to obtain his costs.

The 21st September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Judgment-debtor's release from prison—Sections 280 and 281, Act VIII., 1859—Applicant's evidence.

Case No. 348 of 1869.

Miscellaneous Regular Appeal from an order passed by the Officiating Judge of Dacca, dated the 24th June 1869.

Gunga Churn Dhur (Judgment-debtor), *Appellant,*

versus

Kulinga Pa Setee (Decree-holder), *Respondent.*

Mr. C. Gregory and *Baboo Rash Behare Ghose* for Appellant.

Baboo Khettur Mohun Mookerjee for Respondent.

Where a judgment-debtor applied for release from imprisonment under the provisions of Section 280, Act VIII. of 1859, and the judgment-creditor adduced *primâ-facie* evidence that the applicant had wilfully concealed property or rights and interests in property, which evidence was not rebutted, the Judge was held to have done right in rejecting the application.

When a party seeks the assistance of a Court in any case in which the best knowledge of the disputed facts is with himself, he is bound to place that knowledge before the Court with the sanction of an oath.

Bayley, J.—THE question before us in this case is whether the Lower Court has passed a proper order on the application of the judgment-debtor Gunga Churn for his release from imprisonment, with reference to the provisions of Section 281, Act VIII. of 1859.

That Section requires that, on an application for the release being made by the defendant under the provisions of Section 280, the plaintiff shall make proof that the defendant, for the purpose of procuring his discharge, without satisfying the decree, has wilfully concealed property or his rights or interests therein, or has fraudulently transferred or removed property, or committed any other act of bad faith.

The Lower Court in this case holds that the debtor has *not* made a full disclosure of his property, and that he is still living in a respectable style of life, and is in possession of property. It is true that the Judge, in his judgment of the 24th June last, states that the evidence brought to show that the house was built by the prisoner is unsatisfactory, and that the attachment should be withdrawn; but that was on the application of the petitioner for the release of the property which had been attached by the decree-holder, and does not necessarily affect the decision of the appeal before us. This regular appeal leaves it open to us to find, as a matter of fact, whether the judgment-debtor is entitled to his release under the provisions of Section 281 of the Code, and I think that the whole evidence adduced by the decree-holder is sufficient to show that the judgment-debtor had a trade in shells, that he lived in a house such as a wealthy and solvent man would be living in, and that he did not make a full disclosure of the property he had; and although, in regard to the house released from attachment, the Judge has held that the evidence as to the building of that house by the judgment-debtor was unsatisfactory, I doubt the correctness of this finding. It is pressed on us that the witness does not give details as to what payments were made, to what workmen, and at what precise times; but it is not likely that a witness should be perfectly capable of seeing from day to day when a man superintends the construction of a house, what workmen received payment, at what times, or should know other details of that nature. There is the distinct evidence of the witness Ram Soondur—an immediate neighbour to the debtor's house—to the effect that he was a witness to the deed of transfer of the house and land, and saw the consideration-money paid. No evidence in rebuttal of this is shown on the part of the judgment-debtor. The only evidence read out to us is that of one Gunesh, who was a gomashtah for 13 years of the judgment-debtor. He says he does not know whether his master had any trade or not, but to my mind his whole evidence seems to be untrustworthy and evasive. Be that, however, as it may, there can be no doubt that the facts whether the judgment-debtor made a full disclosure of all his property or not, whether he had any trade carried on in his own name or benamee, whether he had any interest in the house or land or not, and whether he had means beyond that of a pauper and insolvent judgment-debtor, are facts which would not only be best known to himself, but are facts which, according to the purport and policy of that Section (281), could be best established to the satisfaction of the Court by the pledge of his own oath to those facts, and it would then have been for the Court to direct his release from imprisonment, provided the Court were satisfied with his evidence so tendered and given. This remark is not only pertinent as regards the case of the judgment-debtor now before us and with regard to this particular matter, but in respect to every case where clearly the best knowledge of the disputed facts is with the party himself; and when such a party seeks the assistance of the Court, he is bound to place that knowledge before the Court under the sanction of an oath, so as to give the Court the best means of proper adjudication.

In this view, I would uphold the order of the Lower Court, and reject the judgment-debtor's application for release from imprisonment. I would, therefore, dismiss this appeal with costs.

Hobhouse, J.—I agree in thinking that the Judge below was right in this case in refusing to allow the judgment-debtor to be set at liberty. I understand that, under the provisions of Section 281 of the Code, the judgment-creditor had to make proof that the judgment-debtor, for the purpose of procuring his discharge without satisfying the decree, had wilfully concealed property or his rights or interests therein. Being in this case a Court of regular appeal, we have to decide whether the judgment-creditor did make such proof, and having had the whole of the evidence read over to us, I agree with Mr. Justice Bayley that we cannot but say that the judgment-creditor did give *primâ-facie* proof that the judgment-debtor had a right and interest of some kind in at least three specific properties, *viz.*, in a trade at Dacca, in a three-storied house, and in a plot of land annexed to that house; and not one of these properties was scheduled by the judgment-debtor. On the other hand, as Mr. Justice Bayley has pointed out, it was at all times within the competency of the judgment-debtor to have shown upon the best evidence, that is upon his own evidence, that he had no right or interest in those specific properties; but not only did he himself carefully abstain from pledging his own oath to any such statement, but also the only witness adduced by him, whose

evidence has been read to us, was equally careful not to pledge himself on this point. It follows, therefore, that the *primâ-facie* proof adduced of an interest held by the judgment-debtor in the properties I have alluded to has not been rebutted; and this being so, the Judge was manifestly right in holding, as he does substantially hold, that there has been a wilful concealment of the property, or rather of an interest in property, such as not to entitle the judgment-debtor to his discharge.

The 22nd September 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Jurisdiction—Judicial Commissioners—Assam—Act XI. of 1858—Act X. of 1865.

Case No. 170 of 1868.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Assam, dated the 6th March 1868, affirming an order of the Deputy Commissioner of Luckimpore, dated the 23rd November 1867.

Thakoor Kristo Surma Adhikaree, *Appellant,*

versus

Basoodeb Ghoshamee and another, *Respondents.*

Baboo Gopal Lal Mitter for Appellant.

Baboo Tarrucknath Paulit for Respondents.

The Court of the Judicial Commissioner, not of the Deputy Commissioner, is the principal Court of original civil jurisdiction in Assam, and the Judicial Commissioner is the officer to whom, under Act XI. of 1858, the charge of minors and their property is committed.

Assam does not come within the definition of a province, but of a district for the purposes of Act X. of 1865; and the jurisdiction in granting probates and letters of administration under the 235th Section of that Act is vested, not in the Deputy Commissioner, but in the Judicial Commissioner.

Norman, J.—On the 23rd of November 1867, a certificate of administration under Act XI. of 1858 was granted by Major Stewart, Deputy Commissioner of Luckimpore in Assam, to Basoodeb Surma as guardian of some orphan children. This order was confirmed on appeal by the Judicial Commissioner of Assam, Lieutenant-Colonel Agnew, on the 6th of March 1868.

On appeal, it was objected before us that the Deputy Commissioner had no jurisdiction under Act XI. of 1858 to make the order.

By the 2nd Section of that Act, it is enacted that "all minors not taken under the "protection of the Court of Wards, and not "being European British subjects, and the "charge of their property, shall be subject to "the jurisdiction of the Civil Court."

By Section 3—"Every person who shall "claim a right to have charge of property "in trust for a minor under a will or deed, "or by reason of nearness of kin or otherwise, "may apply to the Civil Court for a certifi-"cate of administration," &c. By Section 29, "the expression civil, as used in this Act, "shall be held to mean the principal Court "of original civil jurisdiction in the dis-"trict."

We find that, by a notification published in the *Calcutta Gazette* of the 1st June 1864, the powers of a Zillah Judge are to be exercised by the Judicial Commissioners. The powers of a Collector and Principal Sudder Ameen are to be exercised by Deputy Commissioners.

It follows that the Court of the Judicial Commissioner, and not the Court of the Deputy Commissioner, is the principal Court of original civil jurisdiction in Assam, and consequently that the Judicial Commissioner is the officer to whom, under Act XI. of 1858, the charge of the minors and their property is committed. We are, therefore, of opinion that the order of the Deputy Commissioner was made without jurisdiction.

The objection was not taken in either of the Lower Courts. Under Section 6, the Judicial Commissioner had power to make an order granting a certificate of administration on an inquiry conducted under his direction by a Court subordinate to him. As he has heard the case, and on appeal on the merits confirmed the order of the Deputy Commissioner, it is little more than an objection in point of form in which the appellant succeeds. We quash the orders of the Lower Courts, but without costs.

We may observe that, in a letter from the Officiating Secretary to the Government of Bengal, No. 6114, addressed to the Registrar of the High Court, dated the 12th of November 1868, a list of the judicial officers employed in Assam was forwarded for the information of the Judges of the High Court showing the civil judicial powers exercised

by such officers respectively. The name of Major Stewart appears as Subordinate Judge in the District of Luckimpore. Now, the term "District Judge" in Act XVI. of 1868 is defined as the Judge of a principal Court of original jurisdiction. It is clear that in this Act the term is used in contra-distinction to the term "Subordinate Judge."

Again, the term "District Judge" is defined in the same terms as in Act XVI. of 1868 in the Indian Succession Act X. of 1865. The term "province" as distinct from "district" is said in the 3rd Section of the last mentioned Act to include any division of British India having a Court of the last resort; so that Assam does not come within the definition of a province, but of a district, for the purposes of that Act. It would follow that the jurisdiction in granting probates and letters of administration under the 235th Section of that Act is apparently vested, not in the Deputy Commissioners, but in the Judicial Commissioner.

The 20th September 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Religious endowments—Komolabari, Odhikaree, and Bhukuts.

Case No. 31 of 1869.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 5th November 1868, reversing a decision of the Deputy Commissioner of Seebsagur, dated the 15th July 1868.

Dooteeram Surmah Dooree and others (Plaintiffs), *Appellants,*

versus

Luckhee Kant Gossamee and another (Defendants), *Respondents.*

The Advocate-General and *Baboos Sreenath Doss, Bhugobutty Churn Ghose,* and *Obhoy Churn Bose* for Appellants.

Baboo Romanath Bose for Respondents.

In a suit by the Bhukuts of the Komolabari Shuster in Assam, for confirmation of their rights in that endowment and restoration of possession thereof, it was held that plaintiffs had failed to make out their title; that by the original grant of Rajah Luckhee Singh inscribed on a copper plate, the management of the debuttur property was entrusted to the Odhikaree, over whom the *Shomooho*, or general body of Bhukuts, have no control either in respect to his duties as the religious head of the Komolabari Shuster, or in the management of its revenues.

HELD that the Odhikaree cannot turn the Bhukuts out of the Shuster without just cause.

Norman, J.—THIS is a suit by the plaintiffs as Bhukuts of the Komolabari Shuster in Upper Assam. The plaint alleges that Rajah Joyadhury Singh was the founder of the Komolabari Shuster, and that he granted to Badoolah Attah for the purpose of the worship of the idols Bykuntnath and others a certain piece of land exempt from the payment of revenue, as well as certain people under the description of Bhukuts for the performance of the worship; that Badoolah Attah with his Bhukuts at the time of his death left to the Shomooho Bhukuts (which is explained to mean the body of Bhukuts excluding the Odhikaree) the care of the idol and of the Bhandar (or treasury) and the performance of religious duties; that since that time the Odhikaree has been elected by the Shomooho Bhukuts who remained in charge of the Bhandar, and that expenditure was made by the common consent of the Shomooho; that the determination of all cases involving religious questions was entrusted to the Shomooho; that the Odhikaree had no power to determine any case, or to expend moneys without the authority of the Shomooho. They complain that defendant, the Gossain or Odhikaree, has taken possession of the Bhandar and expends money from it at his own pleasure; that he decides cases involving religious questions of his own authority; and that on the 20th of October 1867, he turned the plaintiffs out of their houses, and prevented them from doing the duties of Sheba and Poojah. They sue for a confirmation of their rights and restoration to possession.

The Deputy Commissioner of Seebsagur, Captain Clarke, gave the plaintiffs a decree considering that the case was governed by that of Ram Doss, appellant, *versus* Mohessur Deb Mistree, respondent, 7 Weekly Reporter 446, decided by Mr. Justice Kemp and Mr. Justice Glover.

That decision was reversed by the Judicial Commissioner who points out the distinction which exists between the case of the Komolabari Shuster, and the Burpatah Shuster which was under consideration by this Court in 1867. In the case before Mr. Justice Kemp and Mr. Justice Glover, the

grant was a grant to certain Bhukuts and Paiks and *their descendants* for ever. There was no mention of any Shustree or High Priest as partakers of the benefits of the endowment, nor was any one appointed to the office.

In the case now before us, by the grant of Rajah Luckhee Singh inscribed on a copper plate, the land is granted as debuttur. It is exempted from payment of Government revenue, and it is declared that the manager of the Shuster shall apply the produce of the land in conducting the worship and the maintenance of the Sheba of the idols. In the time of the Assam Rajahs, Paiks, or Villains appear to have been transferable. The Rajah accompanied the grant of the land by a gift of Paiks as Bhukuts to perform the worship.

The ground on which the first Court based its judgment in favor of the plaintiffs wholly fails. In the present case, the management and control of the debuttur is clearly vested by the original grant, not in the Bhukuts, but in the Odhikaree. The plaintiffs base their title on a supposed death-bed grant of Badoollah Attah. But, as the Judicial Commissioner rightly observes, there is no evidence whatever of any such grant. The defendant is, in fact, in possession under a decree passed by Mr. Robertson in 1834, declaring him to be the heir of Badoollah Attah.

The Judicial Commissioner shows that the Bhukuts were originally slaves, and that statement was admitted to be correct by the appellant's Counsel in the appeal before us. The Judicial Commissioner says the Bhukuts often resorted to the Courts to ask for their release, and gives an instance which occurred in 1839, where the Deputy Commissioner, Captain Brodie, in making the order, directed that they should not enter the Poojah house without the permission of Krishno Kant, the Odhikaree. The Sudder Court, in 1836, in reversing a decree of Captain Jenkins, successor of Captain Robertson, which had made over the Bhukuts to one Shumboonath, a rival claimant of the office of Odhikaree, treated it as a well-known fact that the Bhukuts were subject to the control of the Odhikaree, and as the Guddee had been decreed to Krishno Kant, held that the Bhukuts passed under the decree, and reversing the orders of the Deputy Commissioner, directed that the Bhukuts were as theretofore to remain in subordination to the Guddee. It should be observed that this decision was before the passing of Act V. of 1843, by the second Section of which it was enacted that "no right arising "out of an alleged property in the person "and services of another as a slave shall be "enforced by any Civil or Criminal Court "within the territories of the East India "Company."

In 1844, an appeal was laid by Krishno Kant Odhikaree against Dooteeram Bhukut which was heard before Major Mattie, the Deputy Commissioner of Assam. It appeared that the respondent, who under the order of the Deputy Commissioner had been turned out of the Shuster on the 1st of August 1842, alleged that about 15 years previously he had purchased a house and land within the boundaries of the Shuster for Rupees 18 from one Kristo Byan, a Bhukut of the same order, and had obtained a decree in the Court of the Assistant Commissioner for possession of the same. Major Mattie determined that these Bhukuts, who perform the duties of Shuster, and the persons who have obtained permission from the Odhikaree *alone* should be allowed to reside on the land, and reversing the decision of the Assistant Commissioner, dismissed the suit.

It seems to us clear that the plaintiffs have wholly failed to make out the title alleged by them; that by the original gift or endowment inscribed on the copper plate, the management of the debuttur property of the Komolabari Shuster is entrusted to the Odhikarees; that there is nothing to lead to the inference that the Shomooho, or general body of the Bhukuts, have any control on the Odhikaree either in respect to his duties as the religious head of the Komolabari Shuster, or in the management of its revenues; and, therefore, as the plaintiffs have wholly failed to support the case made by their plaint, we think that the suit was properly dismissed by the Judicial Commissioner.

The Advocate-General contended that the Odhikaree or Gossain has not the right to turn the Bhukuts out of the Shuster at his own free will and pleasure, but that is not the question raised by the plaintiffs in this suit. We certainly are not prepared to say that the Odhikaree can turn the Bhukuts out of the Shuster without just cause. By becoming Bhukuts and members of this religious fraternity, it appears that they change their condition. They come under an obligation or vow of celibacy. We are very much disposed to think that when that

question comes to be decided, it will turn out that the position of the Bhukuts is that their office is one for life, but that they have, especially since Act V. of 1843, the power to withdraw from the Shuster and resign the office, but that the Odhikaree has not the power to deprive them of their office except for misconduct or insubordination. The plaintiffs do not complain that they have been improperly deprived of their office and the land they occupied as holding such office without just cause. Indeed, if they had done so, we are by no means prepared to say that an attempt by the defendants to assert that the general body of Bhukuts, and not the Odhikaree, have the management of the endowed property, and constitute the religious head of the Komolabari Shuster, to whom the Odhikaree is merely subordinate, is not such an act of insubordination and factious opposition to authority as could have fully justified the Odhikaree in turning them out.

We dismiss the appeal with costs.

The 23rd September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Compromise—Admission.

Case No. 1672 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 18th May 1869, reversing a decision of the Moonsiff of Ghatal, dated the 19th January 1869.

Ram Chunder Adhikaree (Plaintiff), *Appellant,*

versus

Ram Jeebun Adhikaree and another (Defendants), *Respondents.*

Baboo Rash Behary Ghose for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

A suit having been brought against *R J* and others, a compromise was effected, to which *J D* (a *pro-formâ* defendant) was no party, and a decree was passed on the terms of the compromise whereby certain land was awarded to the plaintiff. On attempting to take possession, plaintiff was opposed by *J D*. The case was taken up under Section 230, Code of Civil Procedure, and *J D's* possession was upheld. The plaintiff then brought a suit against *J D*, who, dying, was represented by the defendants in the former suit, who had been parties to the compromise.

HELD that these defendants were bound by the terms of that compromise, in which they had admitted the title of the plaintiff in the lands in dispute, even if their title to the land accrued to them since the compromise.

Kemp, J.—THIS is a suit to recover possession of a plot of land on the allegation that it was in the occupation of the defendant Juggessuree Dabee. I may here mention that Juggessuree Dabee died during the pendency of the suit, and was succeeded in the suit by Ram Jeebun Adhikaree and another, who were admitted to defend the case as her legal representatives. Previous to the present litigation, a suit had been instituted by the plaintiff against Ram Jeebun Adhikaree and others, the special respondents, and against Juggessuree Dabee as a *pro formâ* defendant in the Moonsiff's Court of Gurbetta in Zillah Midnapore. That suit was compromised, and a decree was passed on the terms of the compromise, by which the land in dispute in the present suit was awarded to the plaintiff in this suit, the two defendants in the former suit getting a decree for the other land in suit. On the plaintiff attempting to take possession of the land, he was opposed by Juggessuree, who alleged that she was in possession on her own account. Juggessuree was not a party to the compromise which had been come to between the plaintiff and the other two defendants in this suit, now the special respondents before us. On the objection of Juggessuree, the suit was taken up under Section 230, and it was held that the land in dispute belonged, not to Mouzah Madhubpore, Zillah Midnapore, in the Moonsiffee jurisdiction of Gurbetta, but to Mouzah Rughoonathpore in Zillah Hooghly. This finding was come to on an issue between the parties, and the possession of Juggessuree was upheld. The present suit is brought against Juggessuree and against the other two defendants, who, after Juggessuree's death, carried on the suit as her legal representatives.

The first Court gave the plaintiff a decree, which was reversed on appeal by the Subordinate Judge.

The first ground of special appeal is that the Court was wrong in holding that the decree obtained by Juggessuree in the former suit, which had been instituted in the Moonsiff's Court at Gurbetta, is a bar to the present action, the said Court not having been a Court of competent jurisdiction within the meaning of Section 2, Act VIII. of 1859.

After hearing the arguments of the pleader for the special appellant on this ground, we did not think it necessary to call upon the respondent's pleader. The Moonsiff of Gurbetta, under Section 14, was competent to try whether the land in dispute in that suit was within his jurisdiction or not. There was also a finding on an issue raised that the land in dispute in the present suit was situated in Mouzah Rughoonathpore of Zillah Hooghly, and not in Mouzah Madhubpore in Zillah Midnapore. If this suit, therefore, had been one as between the plaintiff and Juggessuree alone, we have no doubt that the first ground taken in special appeal would fail.

The second ground in special appeal is that the Subordinate Judge ought to have held the two defendants, who were brought on the record on the death of Juggessuree, bound by the terms of the compromise, and the decree passed thereupon in the former suit.

We think that this contention is good. In the former suit between the plaintiff and the two defendants, special appellants before us, they were the principal defendants, they entered into a formal compromise, and a decree was passed in terms of that compromise, and the compromise and the declaration made by the defendants in that compromise are recorded in the decree of the Court. By that compromise the defendants, special respondents, have admitted the title of the plaintiff in the lands in dispute in this suit, and they are not in a position, now that Juggessuree is dead, and they are defending the suit on their own account, to set up any other plea, and they are bound, in my opinion, by the terms of that compromise.

I therefore reverse the decision of the Subordinate Judge, and decree the special appeal with costs.

Markby, J.—I am of the same opinion. Notwithstanding a good deal of refined argument that has been used in this case, the question to be decided by us is a very simple one. The question arises entirely between the plaintiff and the two defendants Ramessur and Ramjeebun. The suit is one for possession, and the plaintiff claims possession against those defendants. In a former suit against these two defendants and a person of the name of Juggessuree, these two defendants solemnly acknowledged the title of the plaintiff to this property, the plaintiff, in return, acknowledging at the same time their title to other property then in dispute; and that agreement between the parties is embodied in a decree of the Court. It seems to me that an arrangement of that kind made under such circumstances, and which has been so recorded, is an absolute bar for ever against the defendants opposing the rights of the plaintiff to recover possession of that land, and it seems to me to be quite immaterial whether or no Ramessur and Ramjeebun had any title at all to the property at that time, for, even if they had none, and it had accrued to them since, it has become equally transferred to the plaintiff by the operation of that arrangement.

I think, therefore, that this special appeal ought to be decreed with costs.

The 23rd September 1869.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Appeal—Decree-holder—Ex-parte judgment—Section 114, Code of Civil Procedure.

Case No. 291 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Backergunge, dated the 13th April 1869.

Kalee Kristo Thakoor and others (Decree-holders), *Appellants,*

versus

Mahomed Kader and another (Judgment-debtors), *Respondents.*

Baboo Nurendronath Chatterjee for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

The judgment-debtors having appeared and raised objections to the execution of a decree, the Court, after investigation, proceeded to pass judgment in the absence of the decree-holder. HELD that the action of the Court was taken under Section 114, Code of Civil Procedure, and that the decree-holder had no right of appeal; but, if aggrieved, might apply for a re-hearing.

Loch, J.—A PRELIMINARY objection to the hearing of this appeal has been raised by the respondent, to the effect that, by the provisions of Section 38, Act XXIII. of 1861, the procedure prescribed by Act VIII. of

1859 is to be followed in miscellaneous cases and proceedings as far as it can be. An execution of a case is a miscellaneous proceeding, and it is necessary, therefore, to see how far the procedure prescribed in Act VIII. of 1859 is applicable to this case.

It appears that the petitioner before us obtained a decree in the High Court, which he now seeks to execute. The debtors appeared and raised certain objections to the execution, and the case came on for hearing on the 13th April 1869 in the absence of the petitioner or his pleader; and the Court then proceeded to investigate the statements made by the debtors, and passed certain orders which the petitioner considered injurious to his interest, and from that order he has preferred this appeal.

It is contended that, if the provisions of Act VIII. of 1859 are applicable to such a case as this, the petitioner's remedy is not by way of appeal, but by applying to the Court which passed the order for a re-hearing under the provisions of Section 119 of the Code of Civil Procedure.

It was urged, on the other hand, that the case was taken up upon a day which was not fixed for its hearing, and consequently neither the petitioner nor his pleader could be present.

It is true that we find no order fixing the 13th April 1869 as the day for hearing the case, but, in the absence of any thing shown to us to the contrary, we must presume that the case came on for hearing at the proper time; more particularly as the Circular Order of this Court of the 29th July 1859 prescribed that the Lower Courts should keep a diary in which they should enter the date on which the cases should come up, and that an extract from that diary should be notified in the Court for the information of the parties or their pleaders. It is, therefore, quite possible that the day might have been fixed without any date being entered on the record. Admitting for argument's sake that the case did come on on the day fixed, it appears to us that the contention now raised is correct, that applying the provisions of the Code of Civil Procedure to this case, we think that the Court below proceeded under the provisions of Section 114, and in the absence of the decree-holder as plaintiff, passed this judgment; and the proper course would have been for the petitioner to have applied for a re-hearing, giving good and sufficient grounds for his absence. Even if the case were taken up upon a day which was not fixed for hearing, it appears to us very doubtful whether that would give to the petitioner any right of appeal to this Court. It would be a very good and sufficient reason for asking the Court which passed the judgment to re-hear his case; and if the provisions of Sections 111 and 114 are applicable to this case, the petitioner has no right of appeal, but should proceed as indicated above. We think, therefore, the objection raised must be admitted, and this appeal be rejected with costs.

The 23rd September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Confirmatory decree—Title—Pleadings.

Case No. 1619 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Hooghly, dated the 16th April 1869, affirming a decision of the Subordinate Judge of that District, dated the 21st July 1868.

Umbica Churn Banerjee (one of the Defendants), *Appellant,*

versus

Digumburee Dabee and others (Plaintiffs), *Respondents.*

Baboos Gopal Lall Mitter and *Gopeenath Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondents.

A decree for confirmation of possession cannot be executed so as to give the decree-holder possession of any thing of which he is not already in possession.

When a suit is brought for confirmation of possession upon a certain title, the plaintiff is bound by the title which he sets up in his plaint, except when he sues to recover immoveable property from which he has been ousted.

Markby, J.—I THINK that this special appeal ought to be dismissed. The case is one which not unfrequently occurs. The plaintiff coming into Court for confirmation of possession of certain property, the defendants deny his title; and the parties have fought the matter fully out upon the merits

in both the Lower Courts, and now that the decision has been given upon the merits, objections are taken here, which in no way affect the real question in dispute, but by which it is sought to invalidate the decision on the ground that the issues raised in the Court below ought not to have been raised and inquired into. We must assume now that the decision upon these issues was right. I must say, I think, it would require a very strong case indeed, where litigation has come to an end, and a final decision has been given, to induce us to say that that inquiry has been wrongly instituted. It is quite a different thing when this question arises while the litigation is still proceeding on the merits.

The defendants, in their first ground of special appeal, say that this suit will not lie at all, and in the plaint, I must say, when I heard it read, it struck me that the suit would not lie, but no such objection was taken in either of the Courts below. The defendants denied the title of the plaintiffs; issues were raised on this point and determined, and I think that that decision ought to stand.

Then it is further objected that the plaintiffs, who sue for confirmation of possession, were not in possession. In the first Court, no issue of that kind was raised. A decree was given confirming the plaintiffs' possession, and no objection was raised in the Lower Appellate Court on that account, that that decree ought not to have been given. The decree for confirmation of possession cannot be executed so as to give to the plaintiff possession of anything of which he is not now in possession. I think also, therefore, that that decree ought to stand, and ought not to be set aside on that ground.

It is next objected that the plaintiff has not established the title which he set up in his plaint. Now, I quite agree in the proposition that, when a suit is brought for confirmation of possession upon a certain title, the plaintiff is bound by the title which he sets up in his plaint, though it may be, and I think it is, otherwise when he sues to recover immoveable property from which he has been ousted; but here in the third issue in the first Court the title as to that part of the property to which that objection applies is clearly put upon an alternative ground. Whether or no the defendant objected to this at the time, we are not informed, but it is clear that no objection was taken on this point in the Lower Appellate Court. What was done was not to object to the issues as drawn in a wrong form, but that the finding upon them was not correct. This ground of special appeal, therefore, fails.

The only other point is that, whereas the plaintiff has admitted in the plaint that he had parted by gift with a portion of the property, a decree ought not to have been given him for the whole. On referring to the plaint, I do not find that the plaintiff made any admission of the kind; all he says is that he permitted some members of the family to occupy a house to live in, and, as I understand it, that is how he was in possession. I think, therefore, that the special appeal ought to be dismissed with costs.

Kemp, J.—I am of the same opinion.

The 23rd September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby *Judges.*

Section 151, Act VIII., 1859—Miscellaneous appeal.

Case No. 426 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 8th June 1869, reversing an order of the Second Subordinate Judge of that District, dated the 16th February 1869.

Bijoy Kishen Mookerjee, *Appellant,*

versus

Joy Kishen Mookerjee, *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

No one for Respondent.

An order directing the realization, by attachment and sale, of the expenses of a witness *after* he was discharged, without being required to give his evidence, was set aside in appeal. A miscellaneous appeal having been filed from the order of the Lower Appellate Court, the High Court issued a rule calling on the opposite party to show cause why the appeal should not be received. On that party's failure to show cause, the appeal was filed.

Note by the Deputy Registrar.—This is an appeal from an order of the Lower Appellate Court, decreeing an appeal from an

order of the Court of first instance, which directed (under the terms of Section 151, Act VIII. of 1859) the realization, by attachment and sale, of the travelling and other expenses of a witness, *after* having discharged him without requiring him to give evidence.

It would appear that the amount that had been deposited by the plaintiff for the expenses in question was in the first instance insufficient, and the Court ordered a further deposit. On failure of plaintiff to comply with that order, the witness was discharged, without being required to give evidence. Upon this, the witness applied for an order on the plaintiff for payment of his expenses, on the ground that he had appeared and was willing to give evidence, and was, therefore, entitled to the whole amount. The Court complied with the application, and gave an order for payment of the entire sum, amounting to 9 rupees and 7 annas, and directed that it be levied by attachment and sale of the goods of the plaintiff.

The plaintiff appealed from that order, and the District Judge decreed the appeal on the ground that the law provided an alternative remedy, and that the Court of first instance, having adopted the one alternative, could not afterwards enforce the other.

The provisions of Section 151 of Act VIII. of 1859, bearing on the point, are as follows:—

"* * * * * *, and in case of de-"fault of payment (the Court) may order "such sum to be levied by attachment and "sale of the goods of the person ordered to "pay the same, *or* may discharge the witness "without requiring him to give evidence."

The law provides no appeal from such an order; and the appellant in the first ground of this appeal admits as much.

The question upon which I beg the Court's order is, whether an appeal will lie to this Court from an order of the Lower Appellate Court where no appeal is provided by law, *simply* because the Lower Appellate Court, as is alleged, acted in receiving the appeal from the orders of the Court of first instance "without jurisdiction;" or whether (if the Lower Appellate Court should be held to have acted without jurisdiction) the appellant has not a remedy by an application under Section 35, Act XXIII. of 1861, rather than by an appeal.

Order passed on the 12th of August 1869.

Kemp, J.—Let a rule be issued on the opposite party to show cause on this day week why the appeal should not be received by the Deputy Registrar.

Final order.

Kemp, J.—Let the appeal be filed.

The 23rd September 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Special appeals—Sections 353 and 375, Act VIII., 1859.

Case No. 233 of 1869.

Application for review of judgment passed by the Hon'ble J. P. Norman and E. Jackson, on the 12th June 1869, in Special Appeal No. 230 of 1869.

Joy Ram Roy and others, Plaintiffs (Respondents), *Petitioners,*

versus

Omrao Roy and others, Defendants (Appellants), *Opposite Party.*

Babooos Gopal Laul Mitter and *Tarruck Nauth Sein* for Petitioners.

Baboo Nil Madhub Sein for Opposite Party.

A case which is tried on special appeal is subject to all rules provided for regular appeals so far as the same may be applicable.

The question whether evidence on the record is legally or reasonably sufficient to support the findings of the Lower Appellate Court may be dealt with in special appeal without a remand or re-hearing.

Norman, J.—In this case a special appeal came on for hearing before this Court, in which a carefully-considered judgment of the first Court, Moulvie Tumeejooddeen Ahmed, was reversed by Moulvie Wahidooddeen, the Subordinate Judge of Bhaugulpore.

On special appeal, a number of objections were taken on the ground that he had decided different points in the case on that which was

either no evidence or evidence not legally sufficient to support his findings.

We had occasion to go into the case at great length. The evidence was read, and the papers were translated, and the case was very carefully considered; and upon the objections of the special appellant, we decided that there was no evidence legally and reasonably sufficient to support the findings of the Subordinate Judge. We therefore reversed his decision, and restored the decision of the first Court.

It is now objected on review that we were wrong in doing this; that, if we thought that the Subordinate Judge had decided the case wrongly upon the evidence, we ought to have remanded the case to the Judge for trial or for a further finding on the evidence, or should have called up the case to our own file, and set it down formally, and after going through all the evidence ourselves, which we had already done, should have decided the case here as a regular appeal.

We think that, in the present case, there was no necessity for any remand or further enquiry. A case which is tried on special appeal is subject to all rules provided for regular appeals so far as the same may be applicable; that is the enactment of Section 375. Section 353 enacts that—"When the "evidence upon the record of the Lower "Court is sufficient to enable the Appellate "Court to pronounce a satisfactory judg-"ment, the Appellate Court shall finally "determine the case, notwithstanding that "the judgment of the Lower Court has "proceeded wholly upon some other ground."

There might have been some foundation for the argument of the petitioner if the question had turned mainly or solely on our belief of the oral evidence of particular witnesses. If, for instance, a number of witnesses had deposed to some particular fact, and we were disposed to disbelieve them contrary to the opinion of the Lower Appellate Court, it may be that we should have tried the case as a regular appeal. Our decision goes entirely on the fact that the evidence on the record is not legally or reasonably sufficient to support the findings of the Lower Appellate Court, and that is a matter with which we can deal without any remand, and without calling up the case and re-hearing it. We had enough before us to enable us to decide the case without further inquiry.

We reject this application with costs.

The 24th September 1869.

Present:

The Hon'ble W. Markby and E. Jackson, *Judges.*

Confession of judgment—Duty of Court—Rights of plaintiffs.

Reference to the High Court by the Recorder of Moulmein, dated the 21st August 1869.

The Bank of Bengal, *Plaintiffs,*

versus

Mark Riddell Currie and Edmund Jameston Stanley, *Defendants.*

HELD (by Markby, J.) that, where a defendant voluntarily appears in Court, the necessity for serving a summons is dispensed with; and where he further admits the claim, the plaintiff is entitled to a decree as of the date of such appearance and confession. The Court has no other course than at once to give judgment for the plaintiff, provided it is satisfied of the identity of the defendant, or that the Advocate who appears for him is duly instructed. No question of fraudulent preference can then be gone into.

HELD (by Jackson, J.) that, where on the presentation of the plaint the defendant appears and confesses judgment, the Judge is not obliged to hear the defendant at that time, but is at liberty to fix a date for hearing, and to refuse to hear him until that date arrives; every Judge having a discretion, where an agreement has been come to or judgment confessed, to decide the suit at once according to such agreement or confession.

Case.—THIS is a suit brought against Currie and Co., a Moulmein Firm, for the sum of Rupees 20,046-8. The point as to which I entertain a doubt is *the right* of the plaintiff to enter up judgment immediately on the presentation of his plaint, there being, at the time of his filing that plaint, another suit upon the file for a far larger sum instituted by Ashburner and Co., a Calcutta Firm, against Currie and Co.

The plaint in Ashburner and Co. *versus* Currie & Co. was presented by Mr. Dawson on Friday, at the rising of the Court. In presenting it, Mr. Dawson stated that the defendants were willing to confess judgment, and asked for a summons returnable at an early date. In the absence of any evidence indicating that the defendants came within the provisions of Section 81, Civil Procedure Code, I declined to make any deviation in that case from the ordinary mode of procedure, and directed summons to issue in the usual way.

The plaint in the present suit was presented by Mr. Law at the sitting of the Court yesterday (Monday), the 16th instant. Immediately upon its presentation, Mr. Porter

appeared for the defendants, and stated that he was instructed to confess judgment. Mr. Law for the plaintiffs thereupon insisted that he was entitled to have judgment signed immediately in his favor. The point appearing to me to be one of great importance in the present state of legislation in this province, I have taken time till this morning to consider the application, and as the importance of the question has increased in my mind in proportion as I have considered it, I purpose making it the subject of a reference to the Appellate Court.

Two points seem to me involved in the question: *first*, whether, under the practice regulating the procedure of this Court, a defendant is entitled to appear before the issue of summons; and, *secondly*, whether on such appearance, and on his confession of judgment, the plaintiff is entitled at once to a decree on which he can proceed to execution. A restriction would appear to be imposed on any anticipation of the period prescribed by the summons in the cognate legislation for the Small Cause Courts of the Mofussil (Act XI. of 1865).

By Section 38 of that Act, it is provided that, if, before the day appointed for the hearing of the suit, the defendant, or his agent duly authorized in that behalf, shall appear before the Registrar of the Court, and admit the plaintiff's claim, and apply for leave to confess judgment, it shall be lawful for the Registrar, if the Judge be absent on duty, and there be no person invested with the powers of a Judge as aforesaid, to enter on the record a decree for the plaintiff by confession, and such decree for the plaintiff shall have the like force and effect as a decree would have had if the suit had been heard by the Judge, and a decree passed by him for the plaintiff. There follows this very important proviso: "Provided that in every case, before "passing a decree under this Section, it shall "be the duty of the Registrar fully to satisfy "himself of the service of the summons, of "the identity of the parties, and of their good "faith in appearing before him." It would seem to follow that the limitations imposed on the Registrar would in like manner be binding on the Judge of the Court in disposing of a case in person.

The Civil Procedure Code, Act VIII. of 1859, seems not to have provided for this particular contingency, very possibly from a belief in the framers of that Act that the contemporaneous action of the bankruptcy laws would prevent the effect of any fraudulent preference which might be effected under the provisions of the Code. If we are to determine the practice of the Court by analogy to the practice which obtains at home, it would seem that the plaintiffs would not be so entitled. The nearest approach to the present case under the Common Law Procedure at home would be that of a judgment by *cognovit*, where the defendant, having no defence to the action, gives the plaintiff a *cognovit* or written confession of the action, which authorizes the plaintiff's attorney, if necessary, to enter an appearance for the defendant, and do every thing necessary for proceeding with the judgment. If a *cognovit* be unconditional, the plaintiff can sign judgment, and sue out execution when he pleases.

To prevent, however, the abuses to which this form of procedure is evidently open, as pecial provision exists as to traders who are subject to the bankrupt laws, it being provided by 12 and 13 Victoria, Cap. 106, Section 136, that any such *cognovit* which shall not have been filed in the Court of Queen's Bench within 21 days next after the execution thereof in manner and form provided by III. Geo. I. Chapter 39 (entitled an Act for preventing frauds upon creditors by secret warrants of attorney to confess judgment), shall be deemed fraudulent, null and void to all intents and purposes whatsoever, and this it appears would be the case, even although the execution had issued before an act of bankruptcy (Bittlestone *versus* Cooper, 14 M. and W. 399).

The bankruptcy law of India (11 and 12 Victoria, Chapter 21) not having been extended to these provinces, there exists, however, no check upon the action of a fraudulent debtor willing to prefer one creditor to another, unless, indeed, the wording of Section 41 of Act VIII. of 1859 be construed in such a manner as to give priority to plaintiffs in the order in which their suits are placed upon the file. By that Section it is enacted that, when the plaint has been registered, a summons shall be issued to the defendant to appear and answer the claim on a day therein to be specified. If such a provision be considered as imperative, the cases would, at the first hearing, appear in the order in which the plaints had been filed, and the decrees would necessarily be in the same order. Notwithstanding the apparent fairness of such a construction, my own opinion is that the Act does, in fact, allow of the course which, by the co-operation of the

plaintiff and defendant, the present suit is taking in this Court, and I am the rather confirmed in this view by the fact that a similar end can be arrived at by the co-operation of the parties under Section 327 of the Civil Procedure Code.

If we are to follow the indications of legislative intention presented by the Small Cause Court Act I have referred to, the case would, no doubt, be much simplified, as in that case, instead of now giving the plaintiff the decree he asks for, the Court would at once go into the question of good faith on the part of the defendants in confessing judgment. Can it be said that, inasmuch as the Civil Procedure Code fails to provide for such a case, the practice is to be regulated by a principle every way so conducive to justice as that expressly embodied in the Small Cause Court Act?

I must say I think not. As Mr. Porter very forcibly urged upon the Court, the period for discussing the question of fraudulent preference (if, indeed, such a question can be entertained by a Court regulated by Act VIII. of 1859) is deferred until steps are actually taken by the fraudulently preferred creditor to execute the decree. By Section 272 of Act VIII. of 1859, it is enacted: "If it shall appear to the Court, upon the application of a decree-holder, that any other decree under which property has been attached was obtained by fraud or other improper means, the Court may order that the applicant shall be satisfied out of the proceeds of the property attached, so far as the same may suffice for the purpose, if such other decree be a decree of that Court, or if it be a decree of another Court, may stay the proceedings to enable the applicant to obtain a similar order from the Court by which the decree was made."

My opinion is that, as the law now stands, the plaintiff is entitled to enter up judgment at once on the appearance and confession of the defendant, and I make a decree, as asked by the plaintiff, for the amount claimed, with costs, accordingly.

I would desire to make one more observation on the case now before me. Whether the plaintiff is justified or not in the course which he is endeavouring to pursue, there can, I think, be no question of the demoralizing effect which such a state of the law, uncorrected by the operation of a bankrupt law, is calculated to have upon a mercantile population. The extension of the Bankruptcy Act to these Provinces has been urged both by myself and my colleague of Rangoon more than once upon the Government in our annual reports.

The questions on which I am desirous of obtaining their Lordships' ruling are these:—

1st.—Is the plaintiff entitled to a decree as of the date on which the defendant appeared and confessed judgment?

2nd.—If he is not so entitled, on what principle are the priorities of the successive plaintiffs to be determined?

The following are the judgments of the High Court:—

Markby, J.—In this case, I think the first question put to us by the learned Recorder ought to be answered in the affirmative.

I think that, the defendant having voluntarily appeared in Court, the necessity of serving a summons for appearance was dispensed with; and that, the defendant having further admitted the debt, the Court had no other course than at once to give judgment for the plaintiff, provided, of course, that it was satisfied of the identity of the defendant, or that the Advocate who appeared for him was duly instructed. I agree with the learned Recorder in thinking that no question of fraudulent preference could then be gone into.

At the same time, I fully concur with the learned Recorder in considering the state of the law most unfortunate, which in the case of an insolvent defendant (the only case in which priority is of any importance) permits the selection by him which of his creditors shall be paid in full, or, as is generally the case, which shall be paid at all. Indeed, the present procedure is easily capable of being abused still further, and as I believe very frequently is so. In many cases, the first in the list of attaching creditors is really only a nominal creditor acting on behalf of the defendant. This is the state of the law all over India, and in large commercial communities the evils of such a system are specially apparent.

I may mention, however, that, in my opinion, if, by the practice of the Court, there are specific rules as to the order in which cases are to be called on, I do not think the Judge is bound to dispose of a case either when the plaint is filed or at any subsequent time before it is called on in regular course. I do not think the

voluntary appearance of the defendant and his willingness to admit the debt make any difference in this respect; and I have found strict rules as to the order in which cases, both defended and undefended, are to be heard of some use in preventing the evils to which the Recorder alludes.

I think we should not be justified in answering the other question put by the Recorder, as the parties between whom it will arise are not before us.

Jackson, J.—Of the two questions in the case of the Bank of Bengal *versus* Mark Riddell Currie and Co., which the learned Recorder of Rangoon has referred to this Court, it seems to me that we can only give an answer to the first. The second question does not arise in that suit. It is a question relating to the execution of the decree in the suit which has been referred and of the execution of other decrees; but no application has as yet been made for the execution of the decree in this suit, and we are totally unacquainted with any of the circumstances relating to the other decrees.

As to the first question, taking the facts of this suit to be that, on the presentation of the plaint the defendant then and there appeared and confessed judgment, I think that the Judge was not obliged at that time to hear the defendant. The Judge was at liberty to follow the ordinary procedure of the Court, and to order that the hearing of the case shall be fixed for a certain date, and to decline to hear the defendant until that date arrived. Even if Section 98 applies as has been suggested, that Section lays down that, when the parties are agreed in a suit, the decision of the suit shall be passed in accordance with such agreement, but no time is fixed. Even if the agreement is filed on any day antecedent to that fixed for hearing, the Judge is not bound to consider the suit in any way until the date fixed for hearing. Certainly, if the Judge entertains any doubts as to the identity of the parties or their good faith, he should not pass an immediate decree, but should take up the suit on the date fixed for its hearing, and then pass what decree is proper.

On the other hand, it seems to me that every Judge has a discretion where parties have come to a mutual agreement, or where the defendant has confessed judgment to decide the suit at once in accordance with such agreement or confession. It is in most instances for the convenience of the parties, as well as of the Court, that such decrees should be passed without delay. But it is obvious that, where there is any doubt of the good faith of the parties or of their identity, the Court would not exercise that discretion, but would allow the case to come on at the regular fixed time. In the case now under reference, the learned Recorder gave the plaintiff a decree on the date on which the defendant confessed judgment. He had a discretion to do so. The decree was a legal decree, and the plaintiff is entitled to have it dated on the day on which it was passed.

The 24th September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Deed of sale—Evidence—Registration.

Case No. 1131 of 1869.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 25th February 1869, affirming a decision of the Subordinate Judge of that District, dated the 18th December 1868.

Shib Pershad Doss (Plaintiff), *Appellant,*

versus

Unnopoorna Dayee (Defendant), *Respondent.*

Baboo Rajendronath Misser for Appellant.

Mr. R. T. Allan and *Baboo Bungshee Dhur Sein* for Respondent.

A bill of sale contains two things, *viz.*, an acknowledgment of the receipt of money, and a conveyance of the property sold, and such a document, though unregistered, is admissible as evidence in the *former character.*

Markby, J.—It seems to me in this case that the Courts below were wrong. The suit was brought to recover the sum of Rupees 2,650 upon the ground that the defendants had executed a bill of sale to the plaintiff of certain immoveable property in consideration of that sum, and that, after having executed the bill of sale, they refused to register the deed, sold the property to some one else, and allowed the deed in favor of the second purchaser to be registered, and that thereby the plaintiff in this suit lost all the benefit of his purchase. That was a perfectly good cause of action, and so the Subordinate

Judge thought and gave a decree on it as to 925 rupees, which was actually paid in cash by the plaintiff to the defendant, as the plaintiff proved by witnesses who saw the money paid; but as to the balance of 1,725 rupees, both Courts thought that the plaintiff must fail, because that 1,725 rupees was not put forward as an actual payment in cash, but was set off against various debts which the defendant owed to the plaintiff at the time of the sale; and the mode by which the plaintiff proposed to prove that set-off was by putting in the unregistered kobalah which both Courts considered could not be received in evidence for any purpose whatever under the provisions of Section 49, Act XX. of 1866.

It has, however, been held upon this Section in a case* reported at page 310, Volume III. of the Bengal Law Reports, that a deed of conditional sale which requires registration under Section 17 may, notwithstanding that it has not been registered, and notwithstanding the provisions of Section 49, be used in evidence to prove by it an agreement to re-pay the money borrowed on a particular day, and I understand a decision to the same effect has been come to by the Full Bench within the last few days. These decisions proceed upon the principle that such a document, although contained in one piece of paper, may be looked upon as containing two distinct things—a promise to re-pay the money, and an undertaking that certain lands shall be held as security for the re-payment. I think, on the authority of those decisions, that the document in this case may be looked upon precisely in the same way as really containing two distinct things; first, an acknowledgment of the receipt of the money, and, secondly, a conveyance of the property sold. Now, it is only as an acknowledgment of the receipt of the money that the deed is sought to be used in this case. The deed contains a distinct recital that the consideration was 2,650 rupees, that 925 rupees was paid in cash, and that the remainder should be set off against these several debts, each of which is specified in the deed. That part of the deed is wholly distinct from the part which conveys the property to the plaintiff, and that is the only part which the plaintiff seeks to have read in evidence; and I think that, upon the principle laid down in the decisions I have mentioned above, to that extent the plaintiff had a right to have the document read, namely, simply as an acknowledgment of the receipt of the money, but inasmuch as the first Court returned the document when the plaintiff's pleader proposed to file it, rejecting it as inadmissible in evidence, the plaintiff has not had an opportunity of giving his evidence in support of the genuineness of the deed.

I think, therefore, that the case must go back to the first Court to try that question. If that Court finds the deed to be a genuine document, then upon these recitals and the other facts which have been proved and found, it is satisfactorily shown that the consideration failed, and the plaintiff will be entitled to a verdict for the 1,725 rupees.

Kemp, J.—I concur.

* *Ante*, p. 222.

The 24th September 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Proceedings to keep a decree alive.

Case No. 294 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Furreedpore, dated the 14th May 1869.

Khajah Abdool Gunnee (Judgment-debtor), *Appellant,*

versus

Mr. N. P. Pogose (Decree-holder), *Respondent.*

Messrs. G. C. Paul, R. E. Twidale, and *C. Gregory* for Appellant.

Messrs. W. Bourke and *G. Gregory* and *Baboo Kalee Mohun Doss* for Respondent.

The principle that persons who are not parties to a suit are not bound thereby is not applicable to proceedings taken out to keep a decree in force; the law simply requiring that some such proceeding shall have been taken out by the decree-holder within 3 years next preceding his application for execution.

Hobhouse, J.—THE facts of this case are peculiar and require to be stated somewhat at length.

On the 6th June 1861, one Nujeeb-oonnissa obtained a decree against Khajah Abdool Gunnee, the appellant before us, and others, jointly for possession of a 3 annas 10 gundahs share in certain properties together with mesne-profits of the same.

On the 14th Falgoon 1270, corresponding with February 1864, one Joynath Mozoomdar applied for execution of this decree against Abdool Gunnee and certain others of the judgment-debtors, on the ground that, under a deed of sale, Nujeeboonnissa had sold the decree to him.

On the 3rd Cheyt 1270, corresponding with the 15th March 1864, Nujeeboonnissa herself applied for execution of the same decree against certain of the judgment-debtors, but without mentioning the particular judgment-debtor (Khajah Abdool Gunnee) before us. So far as Nujeeboonnissa's petition is concerned, we understand that it is admitted that neither she nor any one deriving from her took out execution-proceedings against the judgment-debtors, except in the shape of the application I have mentioned, until the 31st August 1868.

On the 2nd May 1864, the Court having jurisdiction to execute the decree heard the respective applications for execution, which I have above mentioned, apparently under the provisions of Section 208 of the Code of Civil Procedure, and the Court held that no execution could be permitted to either of the rival applicants until the rights of the parties to execute had been determined in some other Court. Nujeeboonnissa appealed against this order to the High Court, and on the 13th December 1864 that Court remanded the case to the Court below with instructions that it should come to some decision as between the parties, that is to say, as between Nujeeboonnissa and Joynath, as to the alleged purchase by the latter.

On the 18th December 1864, some few days after this decision, Nujeeboonnissa died. Then, some time in January 1865, Joynath applied to the Court below for a decision in the terms of the High Court's order of remand. That decision was put off by the Court from time to time in order to give the heirs of Nujeeboonnissa the opportunity to come in; but at last, on the 31st May 1865, the Principal Sudder Ameen declared, as he calls it in an *ex-parte* manner, that Joynath was entitled to execute the decree pending any title that might be established by the heirs of Nujeeboonnissa.

On the 14th June 1865, Ahmed Jan, one of the heirs of Nujeeboonnissa, applied for a review of this order, but the application was refused. He then appealed to the High Court, but that Court, on the 21st December 1865, dismissed his appeal pointing out to him that his apparent remedy was in a civil suit.

Next, on the 20th December 1866, certain of the heirs of Nujeeboonnissa instituted a regular suit against Joynath, and others, not apparently against any of the judgment-debtors, to set aside the deed of sale on which Joynath relied, and to have it declared that they had a right to execute the decree in question.

On the 6th March 1867, the heirs of Nujeeboonnissa got a decree setting aside the deed of sale of Joynath and declaring that they might execute the decree, and thereafter, *viz.*, on the 31st August 1868, Mr. N. Pogose, the respondent before us, having succeeded to the rights of Nujeeboonnissa, prayed to execute the decree of the 6th June 1861.

The objections which are taken by the judgment-debtor, Khajah Abdool Gunnee, before us seem to us to be of two kinds: *First* of all, that the proceedings on the part of Nujeeboonnissa were not carried on in good faith; and, *secondly*, that, if they were carried on in good faith, still they were carried on behind the appellant's back, and therefore could not be looked at as proceedings against him. It is not, as I understand it, contended that the application of Nujeeboonnissa of the 15th March 1864 was not a proceeding in execution of her decree. That point seems to be conceded, and indeed that point has been, as we understand it, conclusively ruled by the Full Bench decision to be found at page 98, Volume VI., Weekly Reporter. That proceeding was obviously in time, and obviously, too, we think, upon the mere statement that I have just made of what was done by Nujeeboonnissa and those deriving from her that all the proceedings we have mentioned must be considered to have been made in good faith. The decree-holders asked for execution against the judgment-debtors. They were opposed in that application by a person who said that he was alone the person who had a right to execute. They at once joined issue with that person. They contested the claim with all diligence in the first Court and with equal diligence in the 2nd Court, that is to say, in the High Court on the 2nd December 1864. Her heirs, on her decease, also contested that claim and with diligence. They did so first in the Court having jurisdiction to execute the decree, and then again in the High Court. It was there pointed out to them that their remedy was in a civil suit. With such diligence as we may expect from natives of this country and with reference to the known

expense of litigation in such a case, they instituted that civil suit, and prosecuted that suit until they got a decree removing the obstacle that lay in the way of their executing the original decree. It seems to us that it cannot be contended that these were not proceedings in good faith, that is to say, with the purpose and intention to carry the original decree into execution.

The next point is whether, when, as a matter of fact, the judgment-debtor, Khajah Abdool Gunnee, never had any notice of these proceedings, they were yet sufficient to keep the original decree in force. The material words of the law are : "No process of exe-"cution shall issue to enforce any judgment "or decree unless some proceeding shall have "been taken to enforce such judgment or "decree, or to keep the same in force within "three years next preceding the application "for such execution." It is contended that the general principle that persons who are not parties to a suit are not bound thereby must be applicable to this case, but we think that here we must take the law as it stands, and that we are not bound to suppose that that law is at all governed by the principle for which the learned Counsel for the appellant contends ; and we think that the very facts of this case show that there are very good reasons why the law in question should not be governed by the principle contended for. The law simply requires that the decree-holders shall have taken out some proceeding to keep his decree in force within 3 years next preceding his application for execution. The rulings of this Court which have been brought under our notice, *viz.*, the one which I have before alluded to in Volume VI., Weekly Reporter, and others at page 24, Volume IV., pages 98 and 99, Volume VIII.; and page 248, Volume X , do not seem to me to go further than this, *viz.*, that the proceeding to be taken out by the decree-holder must be taken out in good faith, and that a suit carried on in furtherance of an intention to execute is a proceeding within the meaning of Section 20 of the Act. I do not, therefore, think that any one of these rulings carries us sufficiently far so as to be rulings on the point we have to decide, although there are, no doubt, in those rulings expressions which seem to show that all that has to be considered with reference to any proceeding of the decree-holder is whether such proceeding was taken by the decree-holder in *good faith* in order to carry out the execution of his decree. But as I have said before, I think that the words of the law are sufficiently clear, and that we may stand upon those words; and I will take this particular case as showing that, in my judgment, it may be impossible in many cases for a decree-holder to proceed against his judgment-debtor, except to the extent that the decree-holder has done in this case, *viz.*, so as always to have the judgment-debtor before the Court.

In this case the decree-holder first applied for execution within the prescribed period, and he prayed for that execution against the properties of his judgment-debtors. He never ceased from the years 1864 up to the year 1867 making persistent efforts through the Courts to get at the judgment-debtors and their properties. It was not his fault in any sense that he did not attain his object. He could not proceed except through the Court, and the Court repeatedly and persistently refused to aid him until he got the final decree in March 1867. I think, then, that, upon the wording of the Act itself, the decree-holder is not bound to show more than that he did proceed within the period laid down, and I would go further and say that I do not see how he could have made the judgment-debtors parties to the suit and to the proceedings which he carried on against his alleged vendees from the year 1864 to 1867.

It seems to me that, in this suit and in these proceedings, he had no cause of action against the judgment-debtor before us, neither do I think that even the Court itself, under the provisions of Section 73, could have made the judgment-debtor a party to the suit. The test is whether the persons whom it is sought to make parties have any share or interest in the subject-matter of the suit, or are likely to be affected by the result. Now, the suit in this instance was between two contending decree-holders. One said he was the decree-holder and the other the contrary, and I do not see what share or interest it can be said that the judgment-debtors had in the suit. Neither do I see how they could be affected by the result of it. They were bound by the decree to give up possession and to pay wassilat to the judgment-creditor, whoever he might be, and it seems to me that it was immaterial to them whether the one person or the other was the judgment-creditor. We think then that, on the whole, the Lower Court was right in holding that this application for execution was not barred by the application of the Statute of Limitation. We, accordingly, dismiss this appeal with costs.

We may mention that there were other lines of argument in support of the respondent's view of the case as taken by the learned Counsel for the respondent; but as we considered that the case went off on the grounds that I have mentioned, we did not think it necessary to go into those points.

The 24th September 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Enhancement of rent—Excess land—Lakheraj.

Case No. 1281 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 6th January 1869, affirming a decision of the Assistant Collector of Chooadangah, dated the 30th November 1867.

Modee Huddin Jowardar (Defendant), *Appellant,*

versus

Mr. F. Sandes and another (Plaintiffs), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondents.

In a suit to recover a kubooleut at enhanced rates for excess lands where defendant filed a pottah on which were endorsed the numbers of certain daghs of a measurement made by the zemindar and composing a mokurruree tenure, and also pleaded that part of the excess land was lakheraj, it was held, in regard to the land claimed as lakheraj, that plaintiff's remedy lay in a suit for resumption and assessment, and, with regard to the land covered by the pottah, that defendant was entitled to hold the whole of the lands comprised within the daghs, notwithstanding that a recent measurement showed a greater extent of area than had been formerly ascertained.

Loch, J.—PLAINTIFF sues to recover a kubooleut at enhanced rates after service of notice. The defendant files a pottah, on the back of which are endorsed the numbers of certain daghs of a measurement made by the zemindar in 1225, which daghs compose the mokurruree tenure held by the defendant. Part of the land is also claimed by the defendant as lakheraj.

The Lower Courts have held that the pottah is valid, and that the rent of the area covered by it cannot be enhanced, but that, as that area has on measurement been found to be in excess of the quantity for which rent had been previously paid, such excess is liable to assessment.

The defendant urges in special appeal—

1st.—That, with regard to the lands found to be in excess of his mokurruree pottah and rent-free tenure, he must be considered as a trespasser, and therefore the present suit for a kubooleut will not lie.

2nd.—That the notice of enhancement did not state Clause 3, Section 17 of Act X. of 1859, as a ground of enhancement.

3rd.—That it has not been shown that the defendant held any lands in excess of the daghs mentioned in the pottah.

4th.—The lands claimed as lakheraj should have been exempted, as plaintiff has failed to show that any relationship of landlord and tenant existed with regard to these lands.

5th.—The Lower Court is wrong in declaring all the lands claimed by defendant as lakheraj to be liable to assessment at present, and referring the defendant to a civil suit to determine how much each is to enjoy as such.

This case appears to be covered by the judgment of this Court reported in 6 Weekly Reporter, page 57, Act X. Rulings; and a judgment of the Privy Council in the case of Rajah Suttesh Churn Ghossal, reported in 11 Weekly Reporter, page 10, Privy Council Rulings (which we quote), appears to be to some extent applicable to the present case: "Their Lordships, however, are of opinion that there are further "objections to the maintenance of the "present suit in respect of these parcels of "land. There is no evidence that the "appellant has ever paid to the respondents "any rent except the sum of Sicca Rupees "136-13-10, being the rent reserved by the "pottah in respect of the 67 beegahs and "3 cottahs. He disputes the title to rent "in respect of the other parcels treating "one parcel as lakheraj, the other as held "of a different landlord. A suit for enhancement implies such a privity of "title or tenure existing between the "parties that a claim to some rent is legally "inferrible from it, and there is here proof "that that relation is denied to have "existed at any time between the parties "in respect of these two parcels of land. "As to the latter portion, when the respond-

"ent's title is denied and the right of another "zemindar set up, the proper remedy seems "to be by a suit in the nature of an eject-"ment. Again, if the lands alleged to be "lakheraj lie within the respondent's zemin-"dary, the law has given them an appro-"priate remedy in a suit for resumption and "re-assessment."

Now, with regard to the land claimed by defendant as lakheraj, the judgment of the Privy Council from which we have quoted clearly shows what course the plaintiff should pursue; and with regard to the land covered by the maurasi pottah which has been found a valid document, we think the defendant is entitled to hold the whole of the lands comprised within the daghs endorsed on the pottah as included in, and appertaining to, his maurasi tenure, notwithstanding that recent measurement makes the area comprised in them of a greater extent than formerly ascertained. It is clear that the land within certain daghs was given to the defendant as forming his maurasi tenure, and he is clearly entitled to hold as such all land found within those daghs. If he have overstepped those boundaries, he has trespassed on land for which he held no engagement, and must be proceeded against as a trespasser. We reverse the judgment of the Courts below, and dismiss the suit with costs to defendant in all Courts.

The 24th September 1869.

Present :

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Resumption of lakheraj—Limitation—Regulation XIX. of 1793—Purchaser's rights—Sale under Section 13, Act XI., 1859.

Case No. 44 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 29th December 1868.

Kasheenath Koonwar (Plaintiff), *Appellant,*

versus

Bunko Beharee Chowdhry and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Hem Chunder Banerjee* and *Umbica Churn Banerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Bipeen Beharee Dutt* for Respondents.

Where a grant of lakheraj land was made subsequent to the 1st of December 1790, the cause of action founded on the proprietor's right to dispossess the grantee under Section 10, Regulation XIX. of 1793, arose immediately on the passing of that law, and no suit could be maintained upon it after the 1st May 1853, *i. e.*, 60 years after the date when it first arose.

Where the share of an estate is sold under Section 13, Act XI., 1859, for arrears of revenue due in respect of that share, the purchaser does not acquire it free of encumbrances or with the right to avoid under-tenures.

Markby, J.—In this case it appears that, on the 6th of Bysack 1198 B. S., an arrangement was made between the Maharajah of Burdwan and one Ram Narain Chowdhry, through whom the defendants claim, for an exchange of two pieces of land; one comprising 175 beegahs held as debuttur lakheraj in Mouzah Kindooly, the other comprising 441 beegahs of mâl lands in Mouzah Goorbaree. What was intended by this transaction I take to be this: that the 175 beegahs which were formerly lakheraj of Kindooly should cease to be so, and the 441 beegahs which were formerly mâl of Goorbaree should become lakheraj; the result as regards the revenue being the same, inasmuch as the collections of the two plots were the same, namely, Rs. 500.

Subsequently, the Maharajah fell into arrears of revenue in respect of the Turuf Muntesser, and a portion thereof, the Hoodah of Mokoondpore comprising the Mouzah Goorbaree in which the 441 beegahs are situate, was sold by the Government to one Gutteenath Roy, who, on the 26th Magh 1201, sold to Ram Narain Chowdhry ten of the mouzahs situate in this Hoodah, including Goorbaree.

In the year 1834, the Government, at the instance of an informer, took proceedings to resume 550 beegahs of land including the 441 beegahs now in dispute. The Collector of Hooghly dismissed the claim of the Government, being of opinion that, though the exchange, as being made subsequently to 1st December 1790, was invalid, so far as it attempted to create a lakheraj, by reason of the provisions of Section 10 of Regulation XIX. of 1793, yet that, under those provisions, only the zemindar, and not the Government, was entitled to resume.

How, or at what date, the zemindary-rights in respect of Goorbaree passed out of the hands of the ancestors of the defendants does not appear, but it appears that at some time prior to 1867, three persons, namely, Man Gobind, Gopee Kristo Ghose, and Issur Chunder Ghose, had been recorded in the Collector's books as proprietors of Goorbaree. These persons, being owners of specific portions of Goorbaree, applied to the Collector under Section 11 of Act XI. of 1859, and the Collector opened separate accounts with each of them for the revenue of their respective shares. The revenue payable in respect of the share recorded in the name of Issur Chunder Ghose having fallen into arrear, that share was put up for sale under Section 13, and purchased by the plaintiff. The plaintiff claimed as part of the share which he had purchased the 441 beegahs given in exchange by the Maharajah of Burdwan to the predecessors of the defendants, and which, after the zemindary-rights passed out of their hands, had still remained in their possession. In the sale-certificate, the share of Issur Chunder is described as consisting of 1,475 beegahs, and I assume, for the purposes of the present argument, that the 441 beegahs are comprised within the 1,475 beegahs, which constituted Issur Chunder's recorded share.

The defendants refused to give up possession of these 441 beegahs to the plaintiff, and he accordingly brought this suit to recover possession. Other property is also claimed in this suit, but the question now under consideration relates to the 441 beegahs only.

The Subordinate Judge held that, as the plaintiff was the purchaser of a share, and not of the entire estate under the provisions of Section 11 and Section 54, he stood in the position of Issur Chunder only; and that, as Issur Chunder has not chosen to call into question defendant's rights, and more than 12 years had elapsed since Issur Chunder's title to resume or assess had accrued, the plaintiff was barred under Clause 14 of Section 1 of Act XIV. of 1859.

The respondent, besides supporting the judgment of the Court below, has also called in aid the proviso of this Clause, which declares that no suit shall be maintained even within 12 years from the time when the title of the plaintiff or the person through whom he claims first accrued, if it be shown that the land has been held lakheraj from the time of the Permanent Settlement. And he has further relied on Regulation II. of 1805.

It appears to me that in this case it is not necessary to go beyond the last of these several provisions of the Legislature for the protection of persons in possession. Had Issur Chunder himself brought this suit, he would have been undoubtedly barred under the first branch of the 3rd article of Section 3 of Regulation II. of 1805. The cause of action which is in this case founded on the right to dispossess undoubtedly arose immediately on the passing of the Regulation XIX. of 1793, which by Section 10 authorized and required the proprietor responsible for the revenue to dispossess the grantee of lakheraj lands if the grant were subsequent to the 1st of December 1790. Had Issur Chunder been the plaintiff in this case, this cause of action would have been transmitted to him, but no suit could be maintained upon it by Issur Chunder at any rate after the 1st May 1853, that is, sixty years after the date when it first arose. This view is, I think, fully supported by the case* in X. Moore, page 214, which was relied upon by the respondent.

The question, therefore, is whether the purchaser of Issur Chunder's share stands in any better position than Issur Chunder himself. If so, it must be by reason of the circumstances under which this sale took place. It was a sale by the Collector for arrears of revenue under Act XI. of 1859. Now, there is here no question of the operation of Section 37, which is expressly limited to the case of the sale of the entire estate. The plaintiff, therefore, cannot claim the benefit of the provision in that Section that the purchaser shall acquire the estate free of all incumbrances, and may avoid and annul all under-tenures. The plaintiff purchased at most that share of the estate in respect of which arrears of revenue were due. That is all the Collector had power to sell, or professed to sell, under Section 13. Now, assuming that Issur Chunder, though he must have been already barred under Section 3 of Regulation XIX. of 1793 from recovering possession or rent in respect of these 441 beegahs, could, as recorded proprietor of the share in which they were comprised, or otherwise, enter into a valid arrangement with the Government for the apportionment of the revenue under Section 11 of Act XI. of 1859; and assuming also,

* Chundrabullee Debia, appellant, 5 W. R. 1.

as was so much insisted on by the Advocate-General, that what has been sold and conveyed to the plaintiff is not Issur Chunder's right and interest in the share, but the share itself in respect of which the revenue was separately assessed, still I should come clearly to the conclusion that the plaintiff did not acquire that share free of incumbrances or with the right to avoid under-tenures. That right is only conferred on purchasers of an entire estate. It is a right which could not exist except by express provision of the Legislature. The principle of the Revenue Laws appears to me to be that the person responsible to the Government for the revenue is the owner of the land, though that ownership and all rights created out of it are liable to extinction. But that extinction is not an absolute one following simply upon a default in payment of revenue, even when that default is followed by a sale. The Government has clearly laid down when and to what extent that extinction takes place. It takes place upon the sale of an entire estate under the provisions of Section 37, and then only subject to certain reservations. Upon the sale of a portion of an estate under Section 13, it does not take place at all. If it did so by virtue of the sale itself, it would be without the reservations contained in Section 37, and the sale of a portion would be more destructive than the sale of the whole. Upon the wording of Act XI., I can come to no other conclusion than that the purchaser of a share, though he may not possibly be said strictly to claim through the defaulting owner, nevertheless acquires the shares recorded in the name of the defaulting owner subject to all rights created by, or gained against, him or his predecessors.

I should have come to this conclusion upon the general provisions of the Act and the principles upon which it appears to me to be founded. But if there could possibly be any doubt upon the subject, I think it is made quite clear by Section 54, which provides that, when a share is sold, the purchaser shall acquire the share subject to all incumbrances, and shall not acquire any rights not possessed by the previous owner.

The result is, in my opinion, that, assuming the 441 beegahs now under consideration to be comprised within the 1,475 beegahs which formed the recorded share of Issur Chunder, the plaintiff cannot maintain this suit to recover them, and that to that extent it ought to be dismissed.

I have said what appears to me sufficient to dispose of this case. I have taken a somewhat different view from the Subordinate Judge, because I think that is a simpler mode of arriving at a conclusion; but I do not wish it to be thereby inferred that I differ from the view taken by the Subordinate Judge. Upon the points of law on which he dismissed the suit, I express no opinion.

The regular appeal is dismissed with costs.

Kemp, J.—I concur in this judgment.

The 25th September 1869.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Resumption—Rent-suit—Section 9, Regulation XIX., 1793.

Case No. 1094 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 17th February 1869, reversing a decision of the Deputy Collector of Khoolneah, dated the 20th July 1867.

Madhub Chunder Bhudro (one of the Defendants), *Appellant,*

versus

Mohima Chunder Mojoomdar (Plaintiff), *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Baboo Nurendronath Chatterjee for Respondent.

A decree for resumption under Section 30, Regulation II. of 1819, does not entitle the proprietor of lakheraj land to bring a suit for a kubooleut in a Revenue Court before the revenue has been fixed, and he has agreed to pay the same. Until this has been done, the relation of landlord and tenant cannot come into existence.

Mitter, J.—THE plaintiff in this case, having obtained a decree against the defendant for the resumption of certain invalid lakheraj lands under the provisions of Section 30, Regulation II. of 1819, brought the present suit for a kubooleut in respect of those lands in the Court of the Deputy Collector of Khoolneah. We are of opinion that the Deputy Collector had no jurisdiction to entertain this suit. It is admitted that the defendant has never attorned to the plaintiff, and it is also admitted that there has been no contract between the parties on the strength of which it can be held that the

relation of landlord and tenant has been established between them. Under such circumstances, it is clear that a suit for a kubooleut would not lie in the Revenue Courts, Clause 1, Section 23, Act X. of 1859, being applicable to cases between landlords and tenants only. It has been contended that the decree for resumption ought to be considered as sufficient to convert the defendant into a tenant of the plaintiff. But this contention is altogether erroneous. That decree merely declared that the lands in question were liable to be assessed with revenue, and it could not have possibly determined that the defendant was a tenant of the plaintiff in respect of those lands. The provisions of Section 9, Regulation XIX. of 1793, appear to us to be decisive on this point. That Section runs as follows:—

"The rules in the preceding Section are "to be held applicable to the lands specified "in Section 6, with this difference that the "proprietor, farmer, dependent talookdar, "or officer of Government to whom the "revenue may be payable, shall ascertain "the produce of the land without subject-"ing the grantee to any expense, and "submit the accounts of it to the Collector, "who shall fix the revenue to be paid for "the lands in perpetuity, reporting the "amount for the confirmation of the Board "of Revenue, who are empowered in cases "in which it shall appear to them proper to "increase or reduce the amount. If the "*proprietor shall agree* to pay the revenue "required of him, he and his heirs and "successors shall hold the lands as a depend-"ent talook subject to the payment of such "fixed revenue for ever."

It is clear from these provisions that the revenue assessable upon invalid lakheraj lands below 100 beegahs must be fixed by the Collector subject to the confirmation of the Board of Revenue, and it is only after the proprietor of the lakheraj lands has agreed to pay the revenue thus fixed that he is to be considered as a dependent talookdar entitled to hold his talook from generation to generation, subject to the payment of that revenue. There can be no doubt that the relation of landlord and tenant cannot come into existence until the lakherajdar has consented to pay the revenue fixed by the Collector, and it is, therefore, clear that the plaintiff ought to have adopted the course prescribed by the Section above quoted, instead of bringing this suit for a kubooleut under Clause 1, Section 23, Act X. of 1859.

It has been argued that the provisions of Section 9, Regulation XIX. of 1793, are not applicable to this case, inasmuch as the Court which passed the decree under Section 30, Regulation II. of 1819, declared that the lands in question were alienated as lakheraj subsequent to the 1st of December 1790. But the answer to this argument is very plain. In the first place, we are bound to take the decree as it stands, and we have nothing to do with the reasons upon which the judgment which led to that decree was based. And in the next place, it is perfectly clear that, if the lands in question were really alienated as lakheraj subsequent to the 1st December 1790, the Court which passed that decree had no jurisdiction to pass it under the provisions of Section 30, Regulation II. of 1819.

Holding this view of the case, we are of opinion that the proceedings held by both the Lower Courts ought to be set aside for want of jurisdiction, and the plaintiff's suit dismissed with costs in all the Courts. Suit dismissed accordingly.

The 23rd November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Acknowledgment by agent—Clause 15, Section 1, Act XIV., 1859.

Case No. 134 of 1869.

Regular Appeal from a decision passed by the Deputy Commissioner of Lohardugga, dated the 12th March 1869.

Lutchmee Buksh Roy (Plaintiff), *Appellant,*

versus

Pandey Runjeet Ram (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

An acknowledgment made by an agent which was not expressly authorized by the principal, and was not a necessary part of the agent's duty on the occasion, cannot be dealt with as an acknowledgment made in conformity with Clause 15, Section 1, Act XIV., 1859.

Jackson, J.—It seems to me that the decision of the Court below must be affirmed. The plaintiff sued to recover possession of

certain property mortgaged to the ancestor of the defendant in 1790, being 78 years before the commencement of the suit. He relied upon a petition filed by an agent of the defendant in a certain miscellaneous civil proceeding before the Principal Assistant Agent of Lohardugga in 1847, as constituting an acknowledgment of the mortgagor's title on the part of the mortgagee, and as giving the mortgagor a period of 60 years from the date of such acknowledgment. But that document was considered by the Deputy Commissioner who tried this suit as not being an acknowledgment such as Clause 15, Section 1, Act XIV. of 1859, contemplates. The petition (which has not been read to us, but which for the purposes of this decision we may assume to contain some acknowledgment of the title of the mortgagor) appears to have been put in before the Court of Lohardugga and signed by a mooktear who was empowered by a mooktearnamah of the mortgagee in possession to defend a certain suit or application made by the mortgagor at that time.

It has been held that such an acknowledgment, signed, not by the principal, but by an agent, is not an acknowledgment within the meaning of Clause 15, Section 1 of the Act. I am far from saying that I do not agree in that decision; but whether we agree in it or not, it is certain that the agent who signed that acknowledgment was not authorized expressly to do so by his principal, and that it was not a necessary part of his duty upon that occasion to make any such acknowledgment. I think it quite clear, therefore, that such unauthorized and needless acknowledgment of title on the part of the agent cannot be dealt with as an acknowledgment made in conformity with Clause 15, Section 1, Act XIV. of 1859, and that consequently the suit was not brought within the proper period of limitation, and was properly dismissed by the Court below. The judgment of that Court must be affirmed with costs.

Mr. Twidale also contended that, although the mortgage took place in 1790, a previous decree of Court between these parties had ordered that the mortgagee was to be entitled to retain possession of the mortgaged premises until payment was made, and that, consequently, under the terms of that decree, the mortgagee had a distinct cause of action arising at the period when payment was made.

It seems to me that this contention has no force whatever, because that was a decree made in the suit in which the mortgagee sought to recover possession of part of the mortgaged property. The whole effect of that decree, therefore, was to restore him to possession, replace the parties in the enjoyment of their rights under the mortgage-agreement, and to point out—possibly with a view to prevent any like proceedings in future—that the mortgagee was entitled to retain possession until payment was made. It was obviously the business of the mortgagor, if he desired to preserve his title and recover possession of his land, to be diligent and to pay the amount of principal and interest, and obviously no declaration of the Court in 1804 can at all affect the express provisions of the law.

Markby, J.—I concur.

The 24th November 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Costs.

Case No. 68 of 1869.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 29th December 1868.

The Collector of the 24-Pergunnahs (one of the Defendants), *Appellant,*

versus

C. J. Wilkinson (Plaintiff) and another (Defendant), *Respondents.*

Baboo Juggadanund Mookerjee for Appellant.

Baboos Kalee Mohun Dass, Taruknath Sein, Obhoy Churn Bose, Grish Chunder Ghose, and *Obinash Chunder Banerjee* for Plaintiff-Respondent.

Where a Collector had been unnecessarily made a party to a suit in which damages might have been awarded against him had he not appeared, he was held entitled to his costs.

In his appeal from the Judge's order passed in favor of the plaintiff and disallowing his own claim for costs, a defendant unnecessarily made a co-defendant a respondent. As this respondent could not be injured in any way in this appeal, it was held by the Chief Justice (Mitter, J.,

dissenting) that, although the appeal was dismissed, the co-defendant was not entitled to costs, simply because he had been present watching the case.

Mitter, J.—I CONCUR with the learned Chief Justice in holding that the Collector is entitled to obtain his costs from the plaintiff, respondent, but the respondent Sreenath Chowdhry also is, in my opinion, entitled to obtain his costs from the Collector. It is very true that the Collector has in his grounds of appeal complained against the judgment of the Lower Court so far only as that Court disallowed his claim for costs against the plaintiff, but he has, in his petition of appeal, placed the respondent Sreenath Chowdhry exactly in the same category as the plaintiff. I do not think that it lies in the Collector's mouth to say that Sreenath Chowdhry ought not to have appeared. If Sreenath Chowdhry had appeared, it is only because the Collector made him a respondent in the appeal; and he was, therefore, justified in appearing to watch his own interests, that is to say, to see that the Collector did not improperly obtain any decree against him. He has good grounds, in my opinion, to say that he has been misled by the course adopted by the Collector; and although he was not interested in opposing the claim of the Collector, so far as that claim related to the demand for costs against the plaintiff, he was nevertheless interested in seeing that no decree was passed against himself.

I would add that, although the Collector has not, in his grounds of appeal, advanced any specific claim against Sreenath Chowdhry, yet, when Sreenath Chowdhry was served with the notice of the appeal, he was not served with a copy of those grounds. But even if he had been furnished with such a copy, he would not have possibly calculated that the Collector would not try to make him responsible by urging new grounds of appeal at the time of hearing. The very fact that a party is made a respondent in an appeal would imply that the appellant asks for some relief against him; and if the appellant is not entitled to such relief, the party who was thus made a respondent is entitled to appear before the Court, and to say that no such relief ought to be given.

If Sreenath Chowdhry had not appeared in this case, notwithstanding that he was made a respondent by the appellant, the Court might have by mistake made a decree against him, and such a decree, when made, would have been just as much binding against him as if it had been passed in his presence. It may be said that Sreenath Chowdhry might have reasonably supposed that no such mistake was likely to be committed by the Court, but he was not bound to trust to his own calculation *of probabilities* as to what the Court would do, or would not do, and to run the risk of such a decree being passed against him in his absence.

Peacock, C. J.—The Collector was unnecessarily made a party to the suit, and he might have had damages awarded against him if he had not appeared. Under these circumstances, I think that he ought to have his costs in the Lower Court.

In this case, a conflict was raised among several persons as to the division of a sum of money which had been assessed as the value of lands taken for public purposes. The plaintiff made the Collector a defendant in the suit. The Collector stated substantially that he had no interest in the claim; that the compensation-money was held in deposit under the order of the Civil Court, and that he was ready to pay over the money according to the directions of the Court. In deciding the case in favor of the defendants, the Judge held that the Collector was not entitled to his costs against the plaintiff, as it was unnecessary to make the Collector a defendant, and it was unnecessary for him to appear. The Collector thought he was entitled to his costs, and he appealed to this Court; but unfortunately he made, not only the plaintiff, but one of the co-defendants, a respondent in the appeal. That co-defendant has now appeared. He has not argued the question as to whether the decree of the Judge was right or wrong in refusing the Collector's costs as against the plaintiff, nor has he any interest in the question. The Collector has succeeded in his appeal, and the ordinary course would be to decree the appeal with costs. The co-defendant who appears, and who is not injured and cannot be injured in any way, and who has not argued the case, and has not supported the decree of the Lower Court, contends that he is entitled to his costs, because he has been present watching the case. It appears to me that, the costs being in the discretion of the Court, we would be exercising a very unsound discretion in giving the co-defendant his costs for watching the case. Under these circumstances, it appears to me that the respondent Sreenath Chowdhry, who has appeared in this appeal, is not entitled to his costs as against the Collector.

The appeal of the Collector is allowed, and the Collector is entitled to his costs in the Lower Court against the plaintiff in the suit, with costs of this appeal as against the plaintiff-respondent, and not against the other respondents.

The 25th November 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of rent—Appeal.

Cases Nos. 1529 to 1532 of 1869 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Patna, dated the 7th May 1869, affirming a decision of the Deputy Collector of that District, dated the 30th January 1869.

Omrao Sing (Plaintiff), *Appellant,*

versus

Toofanee Roy (Defendant), *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Mr. C. Gregory for Respondent.

Where a suit for enhancement of rent is decided by a Deputy Collector upon the issue whether a notice has been served or not, without any question of the right to enhancement arising, the appeal lies to the Collector, and not to the Judge.

Kemp, J.—THESE four appeals will be governed by one decision. The suit was for rent, on the allegation that the defendant had paid at a varying rate in the past and previous years. There can be no doubt that the claim was for a higher rate of rent than that paid in the preceding year, and therefore, under Section 13 of Act X. of 1859, now Section 14 of Act VIII. of 1869 [Bengal Council], the rent of the tenant could not be enhanced unless a written notice was served upon him as enacted by the law. The defendant in this case did not dispute the plaintiff's right to enhance, but rested his case on the absence of any notice of enhancement, and that was the issue on which the parties went to trial, namely, whether a notice had been served or not.

The first Court decided that no notice had been served. On appeal, the Judge held that, as the right to enhance or otherwise vary the rent of the defendant's holding had not been determined by the Lower Court, no appeal would lie to his Court, and that the appeal ought to have been made to the Collector under Section 153 of the old Act, now Section 102 of the new Act.

We are of opinion that this finding of the Judge is correct. There was no determination of the right to enhance, the case not having advanced to that stage of enquiry. The suit went off upon the simple question of whether a notice was served or not; and failing proof of that notice, no question of right to enhance could arise, and therefore the appeal ought to have been made to the Collector, and not to the Judge.

We dismiss the four special appeals with costs in each case.

The 27th November 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo law—Sale of ancestral property—Legal necessity—Cause of action—Consent of sharers—Purchaser's rights.

Case No. 1053 of 1869.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 17th February 1869, affirming a decision of the Officiating Subordinate Judge of that District, dated the 30th June 1868.

Nuthoo Lall Chowdhry (Defendant), *Appellant,*

versus

Chedee Sahee and others (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Unnoda Pershad Banerjee and *Gopal Lall Mitter* for Respondents.

In a suit by the sons and grandson of one *N* to set aside a sale by *N* of a part of the ancestral estate to *S*, whose rights and interests in the estate were purchased at auction by the defendant *N L*, it was—

HELD that the cause of action to the sons would accrue, and limitation run, from the date on which *S* got possession from *N*.

HELD that the consent of the elder brother would not make the transfer valid, inasmuch as, by the Mitak-

shara Law the consent of all the shareholders would be necessary even to the alienation of his own share.

HELD that as the purpose to which the purchase-money was applied was to meet an obligation purely personal to *N*; and as the sale in no way benefited the estate, the sale was illegal, and the purchaser had no right to a refund of the purchase-money.

Glover, J.—THIS was a suit by the sons and grandson of one Nirbhoy Singh to set aside a sale made by their relative to the defendant Soambur Singh, on the ground that it was effected without their consent, and was not justified by any such necessity as the Hindoo Law allows.

The property sold consisted of a 2-annas share of Mouzah Sabaspore, and it is admitted that it formed part of the ancestral estate of the family.

The defendant Nuthoo Lall Chowdhry, the purchaser at auction of Soambur's rights and interests in the estate, and the only defendant specially interested, defended the suit, on the ground, *first*, that the claim was barred by limitation; and, *secondly*, that Nirbhoy was justified in selling to Soambur by reason of urgent necessity.

The Subordinate Judge decreed for the plaintiff unreservedly, holding the sale to be void. But the Additional Judge, although he concurred with the principle of the first Court's decision, amended its decree in the first instance in favor of the auction-purchaser by directing the plaintiffs to refund the purchase-money before executing their decree for possession. This part of his order was, however, altered on review; and the final decree was that the two younger sons and the grandson of Nirbhoy should recover their shares unconditionally; that Chedee Sahee, the eldest son, who was of age when the sale was made, should get his, on payment of a proportionate share of the defendant's purchase-money, and that the remaining share, *i. e.*, that of Nirbhoy himself, should remain in the defendant's possession.

The points taken in special appeal by the defendant Nuthoo Lall are—

(1) That limitation bars the suit;

(2) That the vendee Soambur was justified in purchasing on the ground of his vendor's necessity, and that the conduct of the plaintiffs was an acquiescence in the sale; and

(3) That in any case, the defendant, an innocent purchaser at auction for value, is entitled to a refund of his purchase-money in full.

On the part of the plaintiffs a cross-appeal is preferred under Section 348 of the Procedure Code against that part of the Additional Judge's order which allows the defendant to retain possession of Nirbhoy's share and to keep that of Chedee's until that individual re-pays his share of the purchase-money.

On the issue of limitation, we think that the Court below was right. The Full Bench decision (8 Weekly Reporter, p. 15) quoted by the Additional Judge lays down the rule that in cases like the present the cause of action to the sons would accrue and limitation run from the date of the vendee's taking possession, and on that calculation the suit was undoubtedly brought within time. We see no force in the special appellant's contention that because the suit was to recover possession from him, an auction-purchaser, that therefore the suit was virtually to set aside an auction-sale, and was governed by the one year's limitation. The plaintiffs' claim was not made against the auction-purchaser except in so far as it asked to have his name removed from the register as proprietor, and there is no prayer for reversal of the auction-sale. In point of fact there was no necessity for any such prayer. The defendant bought the rights and interests of Soambur; and if the plaintiffs could show that Soambur had no rights or interests in the property, the sale, although it might have been a perfectly regular and valid one, would still have passed nothing to the purchaser and would not stand in the plaintiffs' way. The plaintiffs, therefore, had no object in setting aside the auction-sale, and there was no necessity for them to bring a suit for the purpose.

Then with regard to the period of adverse possession, it has been argued that one Mudden, who claimed as purchaser from Nirbhoy, held possession before Soambur, and that the limitation ought to have been calculated from the last date on which the father Nirbhoy held possession of the property.

It appears to us absolutely immaterial to determine the nature or extent of Muddun's possession, as it is clear from the record that Nirbhoy came again into possession after the arrangement with Muddun, and it was against Nirbhoy that Soambur got a decree for possession in March 1856. The adverse possession commenced, there-

fore, from the date on which Soambur got possession from Nirbhoy, and on this calculation the plaintiffs are just within the twelve years.

Then as to the "necessity" for the sale, the money is said to have been raised to pay a demand of Government against Nirbhoy as security for the farmer of certain ferry tolls. There is no denial on the part of the defendant as to the purpose to which the money was applied, and we think it quite clear that this obligation was purely one of a personal character, and could not be got rid of by laying it upon the estate. It was Nirbhoy's personal liability, and he had no right to burthen his family with it. The Privy Council, in the well-known case of Hunooman Pershad Pandey (6 Moore's Indian Appeals) have laid down the rule to be followed in estimating a purchaser's liability. He is to make all such enquiry as is possible, and to see as well as he can that there is a necessity for borrowing money for the benefit of the estate. And it seems quite clear that the slightest possible enquiry on the part of Soambur would have shown him the impropriety of lending his money to wipe off a personal debt of Nirbhoy. Soambur must have known that the loan was not for the benefit of the estate, and had he been the substantive defendant in this suit, he would have had so far no defence.

But it was argued that even if there were no proved necessity, still as Chedee, the eldest son, was of age when the transaction was entered into, and made no objection to it, his consent to the sale should be implied; and that as the other sons have allowed many years to elapse since the transfer, they must also be considered as having agreed to the sale.

With regard to the last part of this argument, we remark that all the younger sons of Nirbhoy were admittedly minors at the time of the sale to Soambur, and there is nothing on the record to show that they have even now attained majority, and we cannot imply consent under such circumstances.

As to the elder brother Chedee, even if it be admitted that his silence is equivalent to a consent to the sale, that consent would not make the transfer valid, inasmuch as by the Mitakshara Law the consent of all the shareholders would be necessary even to the alienation of his own share.

Then as to the refund of the purchase-money, it has been ruled by the Full Bench in the case of Modhoo Dyal Singh *versus* Golbur Singh and others (9 Weekly Reporter 511), that there must be proof of certain circumstances before a purchaser can have an equitable right to compel a refund, and these circumstances are stated to be that the purchase-money went to benefit the estate, and that in that way the sons got a direct advantage from it. In this case, as we before remarked, the money paid by Soambur (and for the purpose of the argument we must look upon Soambur and Nuthoo Lall as representing the same interest) was applied by Nirbhoy to his own personal necessities and in no way benefited his estate; and as Soambur, if he were in possession, would have no right to a refund, neither can Nuthoo Lall have such right, as he can stand in no higher position than the party whose interests he purchased.

Nor can he, we think, retain possession of Nirbhoy's share, nor get back such portion of the money as would be represented by that share, inasmuch as the estate being joint and undivided, Nirbhoy had no right to burthen or alienate even his own share without the consent of all his co-sharers. The ruling of the Full Bench in the case of Mussamut Phoolbasoo Kower *versus* Mussamut Parbutty Kower, dated the 30th July 1869, disposes of this point adversely to the defendant.

This is no doubt a case of great apparent hardship, and we should have been most willing to uphold the Additional Judge's order regarding the defendant's retaining possession of Nirbhoy's share and for a refund of the purchase-money on Chedee's share were it possible to do so. But the law on the point has been authoritatively laid down, and we have nothing to do, but to follow it. Neither can we take cognizance of the fact of the defendant's being an innocent auction-purchaser. He had every opportunity of making enquiry, and must have known the extreme danger of purchasing an interest which had been originally bought from a single member of a joint undivided family living under the Mitakshara Law.

The order, therefore, we make in this case is that the plaintiff's suit to have the sale to Soambur set aside as illegal be decreed as regards all the co-sharers, and that the Additional Judge's order regarding the retention by the defendant of Nirbhoy's share and the refund of purchase-money by Chedee be set aside.

Under all the circumstances of the case, however, we feel justified in directing that each party pay his own costs in all the Courts.

The 27th November 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Practice—Stamps—Petitions.

In the matter of

Tarinee Churn Nyabachusputty and others, *Petitioners*,

versus

Taranath Gooho and others, *Opposite Party*.

Baboos Nuleet Chunder Sein and *Poorno Chunder Shome* for Petitioners.

No one for Opposite Party.

Petitions of appeal may be filed on several stamps sufficient to make up the full amount required by law, even though the petition is written on one paper.

Peacock, C. J.—THE practice in this Court appears to be to receive petitions of appeal on several stamps sufficient to make up the full amount required by law, even though the petition is written on one paper. The Judge is directed to file the petition, unless, at the time when it was presented, there was any valid objection to the receipt of the petition other than that mentioned in his order.

The 29th November 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges*.

Notice of enhancement—Intermediate tenures—Sections 13 to 16, Act X. of 1859.

Case No. 1243 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 8th March 1869, reversing a decision of the Deputy Collector of Busseerhaut, dated the 21st July 1868.

Grish Chunder Ghose (Plaintiff), *Appellant*,

versus

Ramtunoo Biswas (Defendant), *Respondent*.

Baboo Kalee Mohun Doss for Appellant.

Baboos Ashootosh Dhur and *Bungshee Dhur Sein* for Respondent.

Under Sections 13 to 16 of Act X. of 1859, the rent of a tenant who is a middleman may be enhanced on notice on the same grounds (except as provided in those Sections) on which he was liable to enhancement prior to the passing of that Act.

A notice of enhancement of the rent of an intermediate tenure, specifying that the tenant holds more land than he originally did, and that the productive powers of the land and the value of the produce have increased otherwise than by the agency or at the expense of the tenant, is sufficient if the grounds are proved to exist, and if the rent claimed as fair and equitable is not more than is paid by the holders of similar tenures in the *pergunnah* or neighbourhood.

Macpherson, J.—THE Judge appears to me to be quite wrong in saying that, because this is an *ousut talook*, the rent cannot be enhanced under Act X. of 1859. The tenure being one intermediate between the ryot and the zemindar or talookdar, Section 17 of Act X. may not be applicable; but under Sections 13 to 16, it is evident that a tenant who is a middleman may be enhanced on notice, on the same grounds (except as provided in these Sections) on which he was liable to enhancement prior to the passing of Act X.

The Privy Council, in the case of Dhunput Singh *versus* Gooman Singh (9 Weekly Reporter, page 3, P. C.), decided that the notice of enhancement must specify accurately the grounds on which the enhancement is desired; and that, when the suit for rent at an enhanced rate is against the holder of an intermediate tenure, the enhancement ought to be made according to the pergunnah rate of the rents payable, *not by the ryots*, but by the holders of similar intermediate tenures.

The grounds specified in the notice which has been read to us (supposing it to be the notice which was, in fact, given, which has not been proved) are that the tenant holds more land than he originally did, and that the productive powers of the land and the value of the produce have increased otherwise than by the agency or at the expense of the tenant; and rent at 3 rupees per beegah is claimed as being fair and equitable. This would, I think, be a sufficient notice, if the grounds are proved really to exist, and if it is proved that Rupees 3 is not more than is paid by the holders of similar tenures

in the neighbourhood, I may remark, however, that the mere fact that one neighbouring tenant has been ordered by a decree of the Court to pay rent at the rate of Rupees 2-8 (if it be the case that any such decree now remains in force, which is doubtful) is not in itself sufficient evidence that Rupees 2-8 is the prevailing rate in the neighbourhood.

But the foundation of this suit is the notice. Notwithstanding that this is so, and that the plaintiff in his plaint prayed that the notice, which was already filed in the Collector's office, be sent for and treated as if annexed to the plaint, the Deputy Collector did not cause the notice to be produced, and did not inquire into its precise terms, but decided the case, resting satisfied with the general admission (which, no doubt, was practically made by the appellant) that a notice had been served. Although I consider that it has been admitted that a notice was served, there is nothing to identify the notice which is now to be found among the papers forming the record, and which was placed among those papers subsequently to the appeal being heard by the Lower Appellate Court, it having been for the first time produced before that Court on an application for review of judgment.

I am of opinion that the decision of the Lower Appellate Court ought to be set aside, and that the case ought to be remanded to the Judge for re-trial by him with reference to the remarks which I have now made, and that he ought to admit further evidence as to the service of the particular notice which the plaintiff says was served, and as to the rates paid by the holders of similar tenures in the neighbourhood.

The costs of this appeal will depend on the result of the re-trial.

Loch, J.—I concur.

The 29th November 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Section 26, Act VIII., 1859—"Description" defined — Rejection of plaint.

Case No. 400 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorshedabad, dated the 23rd August 1869, affirming an order of the Moonsiff of that District, dated the 2nd August 1869.

Kishen Chand Guleecha (Plaintiff), *Appellant,*

versus

Meghraj Kobhria Roy Bahadoor (Defendant), *Respondent.*

The Advocate-General and *Baboos Mohootosh Chatterjee* and *Jadub Chunder Seal* for Appellant.

Baboo Kalee Kishen Sein for Respondent.

The object of Section 26, Act VIII. of 1859, is to identify the parties to the suit; and the term "description" applies rather to the patronymic than to a title such as *Roy Bahadoor.*

A plaintiff's omission to insert in his plaint the words "Roy Bahadoor," though ordered to do so, in describing the person sued, was held to be no sufficient reason for the rejection of his plaint.

Glover, J.—We think that the order of the Officiating Judge in this case is wrong, and must be set aside. The plaintiff sued the defendant for a kobalah. The defendant in the first instance appeared and asked the Court for a postponement of seven days for the purpose of procuring the attendance of certain witnesses whose evidence was said to be important to the defence. This indulgence was granted to him. Afterwards, he made an objection to the wording of the summons, stating that his proper title was Roy Bahadoor, which title had not been written in the summons calling upon him to defend the case.

The Moonsiff, on the defendant's application, ordered the plaintiff to amend his plaint within five days, and, on his failure to do so, rejected his plaint under Section 29 of the Code of Civil Procedure.

On appeal, the Judge decided that, although the decision of the Moonsiff was not exactly called for or necessary under the circumstances of the case, still he thought that he had the power to reject the plaint, the plaintiff having omitted to obey the order of the Court directing him to amend his plaint. He also thought that there was another reason why the plaint should be rejected, namely, because the trade or profession of the defendant had not been stated as required under Section 26 of the Code. He, therefore, upheld the Lower Court's order, and dismissed the appeal.

It appears to us that there was no necessity for any such rejection of this plaint. The object of the law is to identify the parties to the suit, and it is perfectly clear in this case that the right person was brought before

the Court, for he appeared and himself admitted that he was the party sued, and only applied for a certain delay in the first instance in order that he might procure the attendance of some witnesses whom he stated to be necessary to the defence, and it was only on an after-thought that he subsequently raised the objection that his title had not been properly set out in the summons.

Section 26 says that the summons shall contain the name, description, and place of abode of the defendant so far as they can be ascertained. In this case, the name and place of abode were given, and the only thing that was not given in the summons was the title of Roy Bahadoor. If there had been any doubt as to the identity of the person sued—if, for instance, there had been two persons of the same name—it may be that it would have been necessary to put in the summons the title of the defendant, but we think that the term description in the Section applies rather to the patronymic of parties summoned—the father's name is required to be stated, so as to make it certain that the right party attended the Court.

Both the Lower Courts seem to have rejected the plaint in this case on account of what they call the contumacious disobedience of the plaintiff to the Court's order to amend his plaint by the insertion of the words "Roy Bahadoor," but the only power given by the Act under which the Judge can reject a plaint is when the plaintiff has omitted to insert certain information which the law requires to be inserted, and the law nowhere says that the plaintiff's refusal to insert certain words other than those required to be inserted would be any sufficient reason for rejecting the plaint. It appears to us, therefore, that the object of the law, which was to properly identify the defendant, has been fully carried out in this case, and that the suit ought to be tried on its merits.

We remand the case to the Lower Court for this purpose, and this special appeal is allowed with costs.

The 29th November 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Right to sub-let—Section 6, Act X., 1859.

Case No. 1839 of 1869.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 6th May 1869, reversing a decision of the Moonsiff of that District, dated the 5th November 1869.

Khoshal Mahomed (Plaintiff), *Appellant,*

versus

Joynooddeen and others (Defendants), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Pitambur Chatterjee for Respondents.

A tenant who has a permanent right to occupy land subjectto the payment of fair and equitable rent has, as a matter of course, a right to sub-let the land to the extent of his own interest therein.

Mitter, J.—THIS was a suit instituted by the plaintiff, now special appellant before us, to recover possession of 18 kanees of land with mesne profits. The plaintiff alleged that he had obtained a kaemee pottah of the land in question from one Surman Bibee on the 16th Srabun 1275, and that he was dispossessed by the defendants on the 5th Bhadro of that year.

The defendants asserted that the tenure of Surman Bibee was included in the gantee of one Doolub Narain, that Surman Bibee was a mere tenant-at-will, that she had absconded from the village, and thereby relinquished the land, on the 28th of Bysack 1275, and that Doolub Narain, the ganteedar, had subsequently granted a mowrosee pottah to the defendants Joynooddeen and others.

Both the Courts below have found as facts that Surman Bibee was not merely a tenant-at-will, but that she had a permanent right to occupy the land subject to the payment of fair and equitable rent, and that the plea of Surman Bibee having relinquished the land in Bysack 1275 was false. The Lower Appellate Court, however, goes on to inquire whether Surman Bibee had a right to create a permanent sub-lease in favor of the plaint-

iff or not, and being of opinion that she had not, it has dismissed the plaintiff's suit with costs.

We think that this decision is erroneous. Both the Courts having found as a fact that Surman Bibee was not a tenant-at-will, but that she had a permanent right to occupy the land subject to the payment of fair and equitable rent, it would follow, as a matter of course, that Surman Bibee had a right to sub-let it to the extent of her own interest therein. Whether the arrangement between Surman Bibee and the plaintiff was of such a nature as to create a right in the plaintiff's favor to hold the land in perpetuity subject to the payment of a fixed rent, or not, is a question in which the defendants are in no way interested, they having been found by both the Lower Courts to be trespassers upon the land; and it would follow that if Surman Bibee had a right to recover possession of the land from the defendants, the plaintiff, to whom she has granted a kaemee pottah to the extent of her own rights, has also by virtue of that pottah a right to recover possession. The learned Judge in the Court below seems to have been of opinion that Surman Bibee had no right to sub-let. We find no authority in law for this proposition, and indeed it is admitted by the pleader for the respondent, that the Judge is wrong in arriving at such a conclusion. On the contrary, we find by reference to the provisions of Section 6 of Act X. of 1859, that ryots who have a mere right of occupancy can sub-let their lands to third parties, and we do not see any reason in justice or equity why they should not be permitted to do so. This being our view of the case, we think that the plaintiff is entitled to recover possession of the land from which he has been wrongfully dispossessed by the defendants.

If the tenure of Surman Bibee is liable to enhancement, the proprietor of the land can take such steps as he may be advised to enhance the rent, but a right to enhance is altogether distinct and separate from a right to eject, and he is not, therefore, competent to dispossess a party who has been let into possession by one who had a permanent right of occupancy.

The decision of the Lower Appellate Court is, therefore, reversed, and that of the first Court restored. The defendants will pay all the costs incurred by the plaintiff in this appeal, and the costs of the Lower Appellate Court.

The 30th November 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Ejectment—Right of action.

Case No. 1743 of 1869.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 5th May 1869, affirming a decision of the Moonsiff of that District, dated the 11th December 1867.

Gouree Sunkur Surmah and others (Plaintiffs), *Appellants,*

versus

Tirtho Monee and others (Defendants), *Respondents.*

Baboo Rash Beharee Ghose for Appellants.

Babooo Anund Chunder Ghossal for Respondents.

Where a tenant has been admitted to possession by all the co-partners in an estate, a suit for ejectment cannot be brought against him unless all the partners join in the action.

Loch, J.—The suit in this case was to have a mokururrec pottah filed by the defendant in a rent-suit declared to be a forgery, and for the ejectment of the tenant from the share of the plaintiff in certain lands.

The question before the Judge in appeal was whether the pottah was genuine, and whether, if it was executed by the plaintiff's naib, he had authority to grant a mokurruree pottah.

The Judge found that the pottah had been executed by the naib; but he has not distinctly found whether the naib had authority to grant it.

On the part of the respondent, it is urged that the judgment of the Lower Court should be upheld and the special appeal dismissed, because the plaintiff was not in a position to bring a suit for ejectment, he being one of three co-partners.

This contention is supported by a ruling of a Division Bench of this Court reported in Weekly Reporter, Volume V., page 93. Another decision of a Division Bench reported in Weekly Reporter, Volume IV., page 39, has been brought to our notice by the

special appellant, who contends that, under that ruling, he is entitled to bring this action for ejectment.

It appears to me that the facts of the latter case are not similar to the facts of the present case. It was held that, when a party obtained a lease from, and was admitted to possession by, some of the co-partners without the consent of the others, the tenant was liable to be ejected. But here the position of the plaintiff is different. He has been admitted by all the co-partners, and, having been admitted, he has set up a lease which the plaintiff now seeks to set aside. It appears to me that, unless all the partners join in the action, the suit for ejectment cannot be brought; and the plaintiff has failed to make the co-partners in this suit co-plaintiffs, nor has he made them defendants.

There is one point, however, which the Judge should have decided clearly and distinctly, *viz.*, whether the naib had authority to grant a mokurruree pottah. I think that the plaintiff is entitled to a judgment on this point, and we therefore remand the case to the Judge, who will come to a clear and express finding whether the naib had authority to grant such pottahs. The only part of the Lower Court's judgment which will stand is the finding that the pottah had been executed by the naib.

The only decree that can be given by the Lower Appellate Court will be a declaratory one as to the validity or otherwise of the pottah, which will depend on the finding which the Judge may come to as to the authority of the naib to grant such a pottah. No costs will be allowed to the special appellant.

Macpherson, J.—I concur.

The 30th November 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Hindoo Law—Inheritance—Widow—Daughter.

Case No. 1793 of 1869.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 14th May 1869, affirming a decision of the Moonsiff of Jungleepore, dated the 26th January 1869.

Koolodah Debia (Defendant), *Appellant,*

versus

Ramjotee Debia (Plaintiff), *Respondent.*

Baboo Bungsheedhur Sein for Appellant.

Baboos Sham Lall Mitter and *Mohendro Lall Seal* for Respondent.

Under the Mitakshara Law, a daughter can inherit a separated share; but where the property is held jointly, the widow or daughter cannot succeed, but are only entitled to maintenance.

Loch, J.—We see no reason for interfering with the judgment of the Court below, except on the ground taken in the third objection of the special appeal.

It appears that the property in dispute was the joint acquisition of Ram Dutt and Hitcha Roy, and that it had been held jointly by their descendants up to the time when this dispute arose, and the plaintiff, as she alleges, was ousted by the defendant.

The family is admittedly governed in matters of inheritance by the Mitakshara Law, and the question raised in special appeal is whether under that law the plaintiff, who is a daughter of one of the proprietors, can inherit her father's share in the property which is held in joint possession.

The first Court held that she could succeed, and has referred, in support of its opinion, to a passage of Elberling and also to Wilson's Edition of Macnaghten's "Hindoo Law" and to the Mitakshara; but the passages to which the Moonsiff apparently refers relate to the separated share of a deceased proprietor. Such a share the daughter can take, but she has no right as heiress under the Mitakshara Law when the property is held jointly. Where the property is held jointly, it is a rule of the Mitakshara Law that the widow or the daughter do not succeed, but are only entitled to maintenance. It was urged before us that Lucka Roy, the son of Ram Dutt, died in 1238; that he was succeeded by his widow Jussoda, who died in 1243; and that, on her decease, the plaintiff, her daughter by Lucka Roy, took possession. If this were the case, it is clear that the family is not governed by the Mitakshara Law. It is not, however, proved that Jussoda did hold possession; and both the first Court and the Lower Appellate Court have found that the property was held by the male members of the family till plaintiff succeeded, and her share was managed by her husband.

As plaintiff admits that the inheritance in her family is governed by the Mitakshara Law, we think she is not entitled to succeed as heir to the property. We therefore reverse the judgment of the Lower Court; but as the case now tried before us contains an objection in special appeal which was not taken in the Courts below, we shall not give costs in any Court to the special appellant. The plaintiff's suit will be dismissed without costs.

The 25th November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Invalid lakheraj.

Case No. 1742 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 31st May 1869, affirming a decision of the Deputy Collector of Kulnah, dated the 16th February 1869.

Imdad Hossein and others (Defendants), *Appellants,*

versus

Richard Francis Stack and another (Plaintiffs), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellants.

Baboos Juggadanund Mookerjee and *Bykuntnath Paul* for Respondents.

HELD that the principle of the Full Bench decision in the cases decided on the 19th March 1868 (10 W. R., Full Bench Rulings, 14) applies as much to cases in which defendant has held under an invalid lakheraj as to ryots whose rents are to be enhanced.

Jackson, J.—THE decision of the Judge on the second question raised before him at the first hearing of this appeal on the 10th of February 1869 appears to be erroneous. The defendant appealed, contending that, as the plaintiff, who sued for a kubooleut at a specified rent, had not been able to make out defendant's liability to pay that precise rent, the suit ought to have been dismissed—and the decision of the Full Bench* is referred to in support of that contention. The Judge says that that decision will not apply to cases like the present in which the defendant had held under an invalid lakheraj title, but only to cases of ryots who already held jummas, by which, I suppose, he means ryots who had previously been paying rent, and whose rent was sought to be enhanced by the expedient of suing for a kubooleut at enhanced rates.

I think the principle on which that decision of the Full Bench was arrived at applies equally to cases like the present and to ryots whose rents are to be enhanced, because in either case the plaintiff seeks to compel the defendant to enter into a specific contract; and if he fails to show that the defendant was bound to enter into that precise contract, the Court is not at liberty to substitute for it another contract which it considers to be an equitable contract between the parties. I think, therefore, that, on the same considerations which guided the Full Bench, this suit ought also to have been dismissed, and we have no choice but to reverse the judgment of the Court below, with costs.

Markby, J.—I concur; but I act in this case entirely upon the authority of the Full Bench decision which has been referred to. Upon that decision itself, I wish to express no opinion of my own whatever.

* 10 W. R. 14.

The 26th November 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson *Judges.*

Certificate — Jurisdiction—Wills—Act XXVII., 1860.

Case No. 350 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 19th May 1869.

Kalee Chunder Surma, *Appellant,*

versus

Gobind Pershad Surma, *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Kishen Dyal Roy for Respondent.

When an application is made under Act XXVII. of 1860, it is the duty of the Judge to determine the right to the certificate, and for that purpose to decide the question of the genuineness of the will, although his decision would not be binding and conclusive if a regular suit were afterwards brought.

Norman, J.—THIS was an application by the now appellant, Kalee Chunder Surma Sandyal, under Act XXVII. of 1860, for a certificate to enable him to collect the debts of Ram Chunder Sandyal. The petitioner set forth his title, which was under an alleged will by Ram Chunder, who was his brother.

The application was opposed by Gobind Pershad Surma on behalf of Brohmo Moyee, the widow of Ram Chunder, who impugned the will set up by the petitioner as a forgery.

Under Section 3, Act XXVII. of 1860, it was the duty of the Judge to have determined the right to the certificate, and for that purpose he ought to have inquired whether the will was genuine or not. He says: "The "question of the validity of the will or other-"wise cannot, however, be adjudicated on in "this summary proceeding." But that is a mistake. He was bound to take up and decide the question of the genuineness of the will, although his decision would not be binding and conclusive between the parties if a regular suit should be brought hereafter.

The case must go back, and the Judge will take up and try the question whether the will put forward by the petitioner is a genuine will of Ram Chunder Sandyal or not; and whether under that will the petitioner is entitled to a certificate as the representative of the deceased Ram Chunder Sandyal or not.

The decision of the Lower Court is reversed with costs. The petitioner will recover 2 gold mohurs as his costs of this appeal, and the costs incurred in the Lower Court will abide the result of the Judge's enquiry.

The 26th November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Transfer of parties—Witnesses—Jurisdiction—Right of appeal.

Case No. 1822 of 1869.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 5th June 1869, affirming a decision of the Moonsiff of Mahomedpore, dated the 11th January 1869.

Rakhal Doss Mundul and another (Plaintiffs), *Appellants,*

versus

Protab Chunder Hazrah and others (Defendants), *Respondents.*

Baboo Tarucknath Sein for Appellants.

Baboo Nubo Kishen Mookerjee for Respondents.

Where a defendant assented to an order of Court making her one of the plaintiffs, and appealed as plaintiff in the case without questioning the propriety of the transfer, it was held that she could not afterwards object in special appeal to having been made a plaintiff.

The fact of a witness not having been named in the plaintiff's list of witnesses is no ground for refusing to examine him when produced.

It is in the discretion of a Court of first instance, after the plaintiff's case is closed, to allow him to call further witnesses. There is no right of special appeal upon that point.

Jackson, J.—THE position of the special appellant in this case is a little peculiar. She is a person who was originally a defendant in the suit. Afterwards, by order of Court, she was transferred to be a plaintiff. She appears to have accepted this position, and to have fought the case out as plaintiff, and also, as plaintiff, to have appealed to the Zillah Court.

Judgment was given against her in both Courts. She appeals now on the ground that the Court of first instance had no power under Section 73 of the Code of Civil Procedure to make her a plaintiff.

It seems to me that this objection is taken much too late. The course which was adopted by the Court was assented to by her; and it was as plaintiff that she appealed to the Zillah Judge, and there even she never questioned the propriety of what had been done.

The second objection is, that the Court of first instance refused to examine a witness of the appellant, and that the Lower Appellate Court has improperly confirmed that refusal.

It seems that this witness, who was not originally a witness named by the appellant, was produced in Court after the case of the plaintiff had closed; and it was on the ground of the defendant's witnesses being then under examination, or about to be examined, that the Moonsiff refused to take the evidence of the witness in question. I cannot say that the reason for which the

Judge confirms the order of the Moonsiff in this respect is correct. Even if it were so, that the witness had not been named in the plaintiff's list of witnesses, still that would be no ground for refusing to examine such witness when produced. But it seems to me quite in the discretion of the Moonsiff, after plaintiff's case was closed, to allow him to call further witnesses; and I do not think there is any right of special appeal upon that point. I therefore think that the decision of the Court below must be affirmed with costs.

Markby, J.—I concur.

The 29th November 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Registration—Collusion.

Case No. 680 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 21st December 1868, reversing a decision of the Moonsiff of that District, dated the 6th December 1867.

Gouree Kant Roy (Defendant), *Appellant,*

versus

Gridhur Roy (Plaintiff), *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

Where a purchaser bought *bonâ-fide* without any notice or knowledge of any previous sale of the property, taking the precaution which the law allowed him to take by Act XVI. of 1864, and registered his purchase-deed, his registered deed would have priority over an unregistered deed of anterior date; but if he bought knowing that the property had been previously sold to another party who had not registered, his deed would not be entitled to priority.

Glover, J.—In this case, two parties claimed the same parcel of land under two separate bills of sale from the same vendors. The plaintiff's deed of sale is dated the 6th of Pous 1272; the defendant's is dated the 25th Bhadro of the same year. The plaintiff's deed was registered, the defendant's was not registered.

The Judge has reversed the decision of the Court of first instance, on the ground that the mere fact of registration will not give priority to a deed later in date than one not registered when there is collusion or fraud between the purchaser on the registered deed of sale and the vendors; and he appears to have taken the fact that the vendors had previously sold this land to other parties (a sale which the Judge considers to be amply proved by very credible evidence) as sufficient reason to presume collusion on the part of the holder of the registered deed. He has, therefore, held that the defendant's deed of sale, being prior in date, takes precedence of the plaintiff's deed of sale, although that deed of sale is registered.

It appears to us that the Judge has erred. If he means to say that a party who purchases an estate, and registers his purchase-deed, knowing that, previous to his purchase, the land had already been *bonâ fide* sold to another party who had not taken the precaution of registering, then probably he would be right in saying that the holder of the registered deed would not be entitled to priority over the holder of a non-registered deed of anterior date, on the ground of collusion between the vendor and the vendee; but if a purchaser buys *bonâ fide* without any notice of any previous sale of the property, and takes the precaution which the law advises him to take by Act XVI. of 1864, and registers his purchase-deed, then, no doubt, his registered deed would have priority over a deed of a date anterior to it, but not registered. In this case, the Judge has not stated on what grounds he has come to the conclusion (if this be the conclusion he has come to, of which we have some doubt) that the plaintiff had been colluding with his vendors.

The mere fact of the land having been previously disposed of by his vendor would be no proof that the subsequent purchaser was acting fraudulently or collusively, for it may very well be that he knew nothing whatever of the previous transactions.

We think that the special appellant in this case has the right to have the Judge's opinion clearly given as to whether he bought with knowledge of the prior sales to the defendants, or not. If he bought

with knowledge, then the Judge's decision may stand; if, on the contrary, he was an ignorant purchaser for value, there is no reason why the provisions of Section 68 of Act XVI. of 1864, which is the Act applying to this case, should not give him a prior claim to the land in suit.

An objection was taken in the course of the argument by the special respondent's pleader to the effect that the original plaint did not ask for possession of the land, or for the cancellation of the defendant's deed of sale, but was confined merely to the recovery of the value of certain jack fruits which one of the parties accused the other of having plundered. This objection appears to us untenable. In the first place, the omission was rectified before the case came on for hearing, and when the issues were fixed, they included the whole matter in dispute between the parties. No objection was made as to the insufficiency of the plaint at any time, and the case went to trial with the whole of the evidence which both parties were able to give in support of their respective contentions, and at this stage of the case we cannot allow such an objection to influence our decision.

Another point which has been brought to our notice is that the Judge has come to no finding as to the question of possession, and it is argued that if a party claiming under an unregistered deed of sale, could show that at the time of the sale he got possession of the property sold, that would have a very great effect in determining the issue between the parties notwithstanding that the second deed of sale was registered; and we have been referred to a decision of this Court in the case of Salim Shaikh *versus* Boydonath Ghuttuck, reported in the 12th Volume, Weekly Reporter, page 217, in which it has been laid down generally that the fact of obtaining possession has always been treated as a most important element in the acquisition of title. As the case is now going back in order that the Judge may re-try the whole question, we do not think it necessary to lay down any rule with reference to this objection; the Judge will of course consider it with the rest of the evidence when he passes a fresh decision in the case.

The case is remanded with reference to the above remarks, and costs will follow the result.

Mitter, J.—I concur.

The 29th November 1869.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Attachments—Section 240, Code of Civil Procedure.

Case No. 1741 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 30th April 1869, affirming a decision of the Moonsiff of Busseerhaut, dated the 11th September 1868.

Ramdhun Mitter (one of the Defendants), *Appellant,*

versus

Koylashnath Dutt (Plaintiff), *Respondent.*

Baboo Jogendronath Bose for Appellant.

Baboos Bhowanee Churn Dutt and *Anund Chunder Ghossal* for Respondent.

If the debt to secure which an attachment has been made is satisfied, a subsequent alienation of the property is not void, merely because the attachment has not been formally withdrawn.

The right of attachment after judgment exists for the purpose of realizing sums actually due under a decree, and not for that of securing property, so that it may at some future period become available for the realization of moneys not yet due, but to become payable under the decree.

Loch, J.—It appears that the property in question in the suit had been attached in execution of decree for about Rupees 50, and the day fixed for the sale was the 15th July 1865. Previous to the day of sale, the debtor had sold the property to the plaintiff in this case, and from the sale-proceeds paid the whole amount for which the property had been attached.

It is clear, therefore, that the whole of the decree-holder's decree for which the attachment was taken out had been satisfied, and the decree-holder took the money; and therefore it appears to me that he could not object to the sale which had been made, nor ask the Court to continue the attachment on account of other sums which may fall due on his kistbundee. And though the Moonsiff did accede to his request to continue the attachment, yet as the sum for which the attachment had been made had been realized, the decree of the decree-holder must be considered to have been satisfied.

I think, therefore, that the judgment of the Lower Appellate Court should be upheld, and the special appeal dismissed with costs.

Macpherson, J.—I also would affirm the decision of the Lower Appellate Court, and with costs.

I think that the Judge was right in his interpretation of the decision of the Full Bench in the case of Anundo Lall Dass *versus* Radhamohun Shaw, II. Bengal Law Reports, page 49, F. B., and that that decision does support the principle on which the Judge has acted. The Full Bench held substantially that an attachment is only "for the purpose of levying the money due under the particular decree" under which the attachment is made, and that the object of Section 240 of the Civil Procedure Code is to secure the execution of the decree, and to prevent the attachment from being rendered worthless.

Further, I think that if the debt to secure which an attachment has been made is satisfied, a subsequent alienation of the property attached is not void, merely because the attachment has not been formally withdrawn.

The learned Chief Justice, in delivering judgment in Anundo Lall's case, to which I have already referred, says: "If the attachment is to be held to be a continuing attachment after the decree has been satisfied, merely because the attachment has not been withdrawn, what is to be done if it is reversed either in review or appeal?"

In the present instance, the only attachment in existence when the alienation took place was one for Rupees 50 or Rupees 56, the amount which alone was then payable under the decree. That attachment was fully satisfied by the money which was paid into Court, and which was drawn out by the decree-holder. The Court afterwards ordered that the attachment on the property was to continue until all the subsequent instalments which should thereafter become payable under the decree should be satisfied But the Court had no power to make any such order. The right of attachment after judgment exists for the purpose of realizing sums actually due under a decree, and not for that of securing property, so that it may at some future period be made available for the realization of moneys not yet due, but which are to become payable under the decree.

As the total amount payable, under the decree in the case now before us was payable by instalment, and as all the instalments which had become due, and in respect of which the property was attached, were satisfied when the alienation took place, it appears to me that no order subsequently made by the Court directing the attachment to remain in force till the remaining instalments should fall due and be paid, could in any way affect the validity of the alienation.

The 1st December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp and A. G. Macpherson, *Judges.*

Section 15, Letters Patent—Appeals—Limitation.

Motion connected with Special Appeal No. 1208 of 1868, decided by L. S. Jackson and Mitter, JJ., in which the said Judges differed in opinion.

Huruck Singh and others, *Petitioners,*

versus

Toolsee Ram Sahoo, *Opposite Party.*

Mr. C. Gregory for Petitioners.

No one for Opposite Party.

In Section 1 of the Rules of 5th August 1 67, for the admission of appeals under Section 15 of the Letters Patent, the words "unless the Court in its discretion on good cause shown shall grant further time," refer to the Appellate Bench of the High Court, and not to the Division Bench.

If an appeal is presented under Section 15 of the Letters Patent within 30 days from the time at which a written judgment is put in, the applicant has a reasonable ground for applying to the Court in its discretion to admit the appeal, though filed after 30 days from the time when the judgment was delivered orally in Court.

THE appeal in this case under Section 15 of the Letters Patent of the High Court was presented after 30 days from the date on which the oral judgment was delivered had expired, but within 30 days from the time in which the written judgment was sent into the office. A Division Bench, consisting of L. S. Jackson and Markby, *JJ.*, rejected the appeal as filed beyond time. Hence this motion to the Appellate Bench to admit the appeal.

The following is the judgment of the Appellate Bench:—

Peacock, C. J.—WE think that the appeal ought to be admitted. Referring to the 1st Section of the Rules of the 5th August 1867, regarding the admission of appeals under Section 15 of the Letters Patent to which Mr. Gregory has referred, we think that the words

"unless the Court in its discretion on good cause shown shall grant further time," refer to the High Court, and not to the Division Bench. That being so, the High Court, for the hearing of an appeal of this nature, must consist of a Bench of at least three Judges. That is analogous with the practice laid down in Section 333, Act VIII. of 1859, in which it is enacted that appeals shall be made in the form of a memorandum which shall be presented in the *Appellate Court* within the period thereinafter specified, unless the appellant shall show sufficient cause to the satisfaction of the *Appellate Court* for not having presented it within such limited period.

Upon the refusal of the Registrar to admit the appeal on the ground of its having been presented beyond time, an application might have been made to the Chief Justice for the appointment of a Division Bench for the purpose of hearing it, as provided by Section 7 of the Rules of August 1867.

The case now comes before the Appellate Court, and it appears to me that the Court in its discretion ought to allow the appeal to be filed. On the Original side of this Court, it has been held that delay in obtaining office-copies of the judgment in a case is no ground for postponing the filing of the memorandum of appeal, as the Counsel should note the judgment on the brief. On that side of the Court, Judges do not always put in a written judgment; but on this side of the Court, where the first hearing is upon appeal, a written judgment is always put in, in order that it may be transmitted to the Court from which the appeal comes. That being the practice on this side of the Court, it appears to me that, if an appeal is presented within 30 days from the time at which a written judgment is put in, the applicant has a reasonable ground for applying to this Court in its discretion to admit it even though filed after 30 days from the time when the judgment was delivered orally in Court.

The appeal is admitted.

Kemp and *Macpherson, JJ.*, concurred.

The 1st December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp and A. G. Macpherson, *Judges.*

Review—Jurisdiction—Section 15, Letters Patent.

Case No. 2 of 1869.

Appeal preferred under Section 15 of the Letters Patent of the 28th December 1865, against a judgment of the Hon'ble G. Loch and Dwarkanath Mitter, two of the Judges of this Court, dated the 2nd January 1869, in Special Appeal No. 1307 of 1867, from a decree of the Zillah Court of Gya, dated the 17th May 1867, the said Judges having been equally divided in opinion.

Mussamut Rughoo Bibee (Defendant), *Appellant,*

versus

Noor Jehan Begum and others (Plaintiffs), *Respondents.*

Mr. C. Gregory for Appellant.

Moonshee Mahomed Yusuff for Respondents.

To reject an application for a review is not a function which can be performed by the High Court generally, but merely by the Court which passed the original decision; and the order of rejection is not a judgment within the meaning of Section 15 of the Letters Patent.

Peacock, C. J.—In this case, an application was made to Mr. Justice Loch and Mr. Justice Dwarkanath Mitter, to review a judgment which they had passed. Mr. Justice Dwarkanath Mitter thought that the review ought to be granted. Mr. Justice Loch, who was the Senior Judge, thought that the application ought to be rejected, and it was rejected. From this decision an appeal has been preferred under Section 15 of the Letters Patent. A preliminary objection is taken that this is not a case in which an appeal lies.

There is no doubt that the preliminary objection ought to prevail. The whole object of the provisions of Act VIII. of 1859 regarding reviews of judgments is that the Court which passed the decree may re-consider the case if it thinks fit, and that, as a general rule, Judges are not to review a decision of other Judges—(*see* Section 379).

Section 371 declares that the order whether for rejecting the application or granting the

review shall be final. It appears to me that the order rejecting the review was not a function which could be performed by the High Court generally, but merely by the Court which passed the original decision; and that the order rejecting a review is not a judgment within the meaning of Section 15 of the Letters Patent. I do not think that the High Court at Madras intended to give any opinion to the effect that an order rejecting a review was a judgment within Section 15 of the Letters Patent, although in the case cited they expressed their opinion in general terms which might possibly embrace such a case. If they had had the question of rejecting a review before their minds when they decided the case, they would probably have excepted it from the general rule which they laid down.

This appeal is rejected with costs.

Kemp and *Macpherson, JJ.*, concurred.

The 1st December 1869.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Mahomedan Law—Divorce.

Case No. 1860 of 1869.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 29th July 1869, modifying a decision of the Moonsiff of Salkhia, dated the 7th May 1869.

Ibrahim Moollah (Defendant), *Appellant,*

versus

Enayut-or-Ruhman (Plaintiff), *Respondent.*

Moulvie Syud Murhumut Hossein for Appellant.

Baboo Mohendro Lall Seal for Respondent.

According to Mahomedan Law, the divorce of one acting upon compulsion from threats is effective.

Jackson, J.—We are compelled in this case to reverse the decision of the Lower Appellate Court, because, according to the Mahomedan Law, as laid down in Volume I., Hedaya, page 203, the divorce of one acting upon compulsion from threats is effective. We are not at liberty to substitute for the express rule of Mahomedan Law as expounded by the best authorities that which, according to our opinion, might be a more enlightened and proper rule of law. The judgment of the Lower Appellate Court must be reversed with costs. The result is that the plaintiff's suit will be dismissed with costs.

Glover, J.—I concur.

The 1st December 1869.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Sale of mortgaged under-tenures—Section 105 Act X. of 1859—Issues.

Case No. 1890 of 1869.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 6th May 1869, modifying a decision of the Moonsiff of that District, dated the 27th November 1869.

Chunder Monee Debee and others (Plaintiffs), *Appellants,*

versus

Mohesh Chunder Banerjee and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellants.

Baboo Sham Lall Mitter for Respondents.

After foreclosure, a mortgagee was executing his decree for possession when an objection was preferred on the part of the landlord as purchaser of the tenure which had been sold in satisfaction of his own decree for rent. A suit was accordingly framed under Section 229, Code of Civil Procedure, in which the mortgagee was made plaintiff, and the claimant defendant.

Held that the whole question was, which of the two parties claiming was entitled to possession; and the issue to be decided was whether or no the tenure was sold subject to previous incumbrances.

Jackson, J.—This suit, which was a suit commenced under Section 229 of the Code of Civil Procedure arising out of the execution of a decree, related to two plots of land. The plaintiff, it seems, had taken a mortgage of this land from the late holder thereof, had foreclosed, and had got a decree for possession, and as he was executing that decree, an objection was preferred on the part of the landlord, who showed that he had got a decree for rent against the mortgagor, and in satisfaction of that decree had procured the tenure to be sold under Section 105, Act X. of 1859, had purchased it himself, and was in possession.

This suit was therefore framed under the 229th Section of the Code, making the mortgagee decree-holder, plaintiff, and the claimant, defendant.

The plaintiff alleged that one of the two plots of land to which the suit related was the lakheraj property of his mortgagor. This was denied by the defendant. The Court of first instance gave the plaintiff a decree which went on appeal before the Subordinate Judge. This officer, misconceiving, as it seems to me, the real questions in issue, proceeded to enquire whether the plaintiff had made out his allegation as to the first plot of land being lakheraj.

It must be borne in mind that the zemindar, as such, is not a party to this suit. The circumstance that the purchaser of the under-tenure at the sale under Section 105 happened to be a zemindar, makes, I think, no difference in his position in this case. The whole question is which of the two parties claiming this under-tenure is entitled to the possession of it. The question whether the land is to be held free of the payment of rent can arise afterwards. The issue which has to be decided really between these parties is whether or no this tenure (sold, not under Act VIII. of 1865, but under Act X. of 1859, Section 105) was sold subject to previous incumbrances.

The pleader for the special appellant has referred us to the case decided by a Full Bench of this Court, to be found in 7 Weekly Reporter, page 260. In that case, it has been laid down that it ought to be ascertained whether the lease on which the lands had been held contained a stipulation reserving a right of sale for arrears of rent; and the Court thought that, if such a right was specially reserved, coupling Section 105 with the other Section to which reference has been made, a sale would be free from incumbrances; and, if not, a sale would not be free of incumbrances.

That point has not been enquired into in the present case. It seems to me necessary that the case should go back to the Lower Appellate Court in order that there should be a trial of this issue. The whole of the land appears to have been sold as an under-tenure, and, as I have said before, I think the question whether there is any valid lakheraj will be reserved for another occasion.

A further point will have to be considered, namely, whether, if the plaintiff has a right to the land, the buildings and houses upon it will go with the land, or whether the defendant will be entitled to remove the materials.

Glover, J.—I am of the same opinion.

The 1st December 1869.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Review.

Case No. 1904 of 1869.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th May 1869, reversing a decision of the Subordinate Judge of that District, dated the 25th January 1869.

Khelat Chunder Ghose (Plaintiff), *Appellant,*

versus

Pran Kristo Roy and others (Defendants), *Respondents.*

Baboo Motee Lall Mookerjee for Appellant.

Mr. H. E. Mendies and *Baboo Prosunno Coomar Roy* for Respondents.

An application for review with the object of introducing fresh matter into a case cannot be admitted unless verified and supported by proof of the kind referred to in the case reported in 10 Weekly Reporter, p. 432.*

Jackson, J.—THE Subordinate Judge in this case first dismissed the suit of the plaintiff on the ground that the plaintiff had not substantiated his right to maintain the suit as the purchaser of the rights of the parties entitled to the wassilat. Thereupon the plaintiff applied to that Court for a review of judgment on four grounds: "1st, "that the plaintiff could not file his deed of "purchase as it had been filed in a summary "case, No. 41 of 1868, which was still pend-"ing; 2nd, that case No. 41 is a case for "mesne-profits of the same property, but "only for an antecedent period, hence he "was obliged to file the deed of purchase in "that case; 3rd, that his vendors had "admitted the purchase by him in the name "of Rohinee Nundun Mitter in case No. 41,

* The ruling in that case was: "A Judge ought not to admit a review for the purpose of receiving fresh evidence in the suit, except upon being satisfied by legal evidence that the fresh evidence was not known to the applicant, or could not be obtained by him at the time of the original trial."

"and Rohinee Nundun in the same case "admitted his purchase, and that he has "brought no objection in this case, and is "willing to put in a petition of consent; "4th, that the applicant is willing to "prove his purchase." "With this petition," the Judge observes, "the applicant filed "copies of the deed of sale and of the admis-"sions." On this, the Subordinate Judge admitted the review making his order in these words: "Whereas the grounds urged "in the petition for review by the applicant "are sufficient, and the vendors also have "admitted the sale by petition, it is ordered "that the application be granted and the "case be restored." Thereupon the Subordinate Judge heard the case *de novo*, and gave judgment for the plaintiff.

Against the judgment so obtained, the defendant appealed to the Zillah Court. The Judge, on hearing the appeal, considered that the Subordinate Judge had irregularly admitted the application for review, and thereupon set aside the whole of the proceedings founded upon that irregular admission of the review, and decreed the appeal, thereby dismissing the plaintiff's suit. The Judge supports his decision by reference to the case reported in 10 Weekly Reporter 432 (Civil Rulings).

It is urged before us in special appeal that we ought to assume that the Subordinate Judge, in admitting the review, had good and sufficient reasons for so doing, and that, upon that assumption, the admission of the documents tendered by the plaintiff would be justified; and reference is made on this argument to the case reported in III. Bengal Law Reports 346.*

It seems to me perfectly clear that the Subordinate Judge admitted this review upon the grounds stated in the petition for review, and upon no others; and it seems perfectly clear that those grounds related exclusively to the fresh matter tendered as evidence by the plaintiff, and that the object of that application was to get in that fresh matter, and nothing else. It is not denied that the petition so presented was unverified and supported by no proof of the kind referred to in the case cited in 10 Weekly Reporter. That being so, it seems to me that we ought to follow the ruling laid down in that case, and that the Judge's decision was therefore right, and that this special appeal ought to be dismissed with costs.

Glover, J.—I am of the same opinion.

Ante, p. 223.

The 1st December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Contribution — Voluntary payment — Suretyship — Rules of Equity.

Case No. 1746 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 28th May 1869, reversing a decision of the Moonsiff of Noornuggur, dated the 5th March 1869.

Luckhee Kant Doss (Plaintiff), *Appellant.*

versus

Shib Chunder Chuckerbutty (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Okhil Chunder Sein* for Appellant.

Baboos Hem Chunder Banerjee and *Huree Mohun Chuckerbutty* for Respondent.

In a suit to recover contribution on the allegation that plaintiff and defendant were joint tenants, and that there was an arrear of rent due from them for which the zemindar was about to sue, when plaintiff paid it together with several other cesses and expenses, it was held that, as there had been no demand upon the defendant or any suit or other effectual proceeding for the recovery of the rent, the payment by the plaintiff was voluntary and officious, and that, as the demand with which plaintiff complied was an excessive demand, his compliance with it would not bind the defendant to pay the amount of contribution sued for.

HELD, further, that the rules which govern Courts in England in matters of suretyship could not be applied to a case like this, where joint and several liability was not found as a fact, and where the sum alleged to be due was not certain but contested.

Bayley, J.—I THINK that this special appeal should be dismissed with costs.

I think that the question before us is a very narrow one, and the argument addressed upon it has gone far beyond the legitimate issue.

The suit was to recover Rupees 43-1 anna by way of contribution, on the allegation that the plaintiff and the defendant were joint tenants in a talook having a sudder jumma of 67 rupees and odd; that there was an arrear of rent due from them for the year 1277 T. E.; that the zemindar was *about to sue for it*, when on the 17th Srabun 1270 B. E., the plaintiff paid it, together with several other cesses and expenses, which on the whole amounted to Rupees 83-8 annas.

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The plaintiff alleged that the defendant was consequently liable to him for the sum of Rupees 41-12 annas, being the amount of his (defendant's) share of the rent, and he, therefore, sued the defendant for that sum together with Rupee 1-5 annas on account of interest upon that sum.

The first Court gave the plaintiff a decree for Rupees 33-15 annas, disallowing his claim for the cesses, expenses, and interest.

The defendant appealed against this decision, on the ground that the plaintiff made a voluntary payment, and that, therefore, he, the defendant, was in no way liable for the contribution sued for.

The Lower Appellate Court held that, though the plaintiff and the defendant were equal owners of the talook, still there was no such express or implied contract between them that the one should pay the whole rent, without the knowledge of, or consultation with, the other. The Lower Appellate Court, therefore, held that the payment by the plaintiff was officious, and further that the plaintiff had no right to include in the payment any illegal cesses asked for by the zemindar, and that the defendant could not be made liable until a demand for rent had been actually made upon him, or the property put up to sale on account of his refusal to pay, neither of which contingencies had occurred in the present case.

Against this decision the plaintiff appeals specially, and the contention is that, although there was no express or implied contract on the part of the co-parcener defendant to pay the rent, still on the general principles of equity he was liable for contribution for the payment made by the plaintiff on account of the rents due for the year 1277 T. E., and in respect of which the zemindar was about to sue.

Now, there may be some doubt on the record as to whether the tenancy was a pure unmixed joint tenancy; but looking to the terms used by both the Courts, it seems to have been proved that that joint tenancy was, in fact, the state of the parties. Certainly, the written statement of the defendant contained no clear averment of joint liability or joint tenancy, but I think it would be quite compatible with the case pleaded that there were separate shares with separate liabilities. Be that as it may, I think it is quite clear that the payment was voluntary and officious, as no demand, no process, no suit, or other effectual proceeding for re-payment or recovery of the rents had actually taken place at the time when the plaintiff made his payment on account of which he now sues for contribution. It was quite possible under the facts that, without any jeopardy to the plaintiff's rights and interests, or to the safety of the joint tenure, the defendant might still have paid the rents when they were demanded from him, and the plaintiff would thus have had no occasion to pay for him. But, irrespective of this, there is the fact that the first Court has found that the sum claimed by way of contribution was not really the sum due, and therefore, that fact not being open to question in special appeal, the demand with which the plaintiff complied was an excessive demand, a compliance with which would not bind the defendant to pay the amount of contribution as sued for by the plaintiff.

It now remains to make some observations with reference to the authorities relied on by the pleader for the special appellant. The first case relied upon is to be found at page 377, Volume VII., Weekly Reporter, Full Bench Rulings. That case, as a matter of decision, simply decided that a suit for contribution was not such a suit for damages as would give jurisdiction to a Small Cause Court to adjudicate it. It is perfectly true that in that case the Hon'ble Chief Justice did make some remarks as to the state of the law in England with reference to sureties and other parties jointly liable, but those remarks have no direct bearing on the question which we have now to decide, so as to be binding upon us. Further, that case so far differs from the present that that was a case for contribution for arrears of Government revenue, which, under the provisions of Act XI. of 1859, would become a matter of compulsory payment under the statute at a certain specific time fixed by that law. Now here, in a matter of rent, it is quite possible that, when *about to sue*, the zemindar might be satisfied with the plaintiff's half share, and would not proceed to compel the defendant to pay at all. Had the zemindar actually made any specific demand on the joint tenants for the joint tenure, or proceeded to sue, or exposed the joint tenure to injury or liability to sale, the state of the case would be different, but we have to deal with the case as it was put, and I see no compulsion or legal force in this case which made the plaintiff's payment of the entire rents legally compulsory or otherwise than officious and voluntary.

The pleader for the special appellant then quoted a passage from Addison on Contract, 4th edition of 1863, but that merely contains an enunciation of the principles of English Law on the subject of suretyship, and of the recognized rules of the Courts of Law and Equity in England. Granted that the principles of equity would be the same in most countries, it by no means follows that the technical and special rules of the Equity Courts in England should bind our Courts commonly known as Courts of equity, justice, and good conscience.

On the whole, I think there is no error in law in the judgment of the Lower Appellate Court, and I would, therefore, dismiss this appeal with costs.

Hobhouse, J.—I have a few words to add. I agree in thinking that the question before us is simply whether or not the plaintiff in this case made a voluntary payment of the rents in question. I do not think in the first place that we can apply the rules which govern Courts at home in matters of suretyship to the parties before us, because, even if those rules could be held to govern this case, there is not a sufficient finding of fact to enable us to apply those rules. The case particularly relied upon is where two persons were liable under suretyship for a certain sum of money due on a certain day, and it was held that, when one of the two parties paid the sum in question on the date on which it became due, the other was liable for contribution; but expressly and necessarily this was a case in which the sureties were jointly and severally liable and for a sum certain; and although it does seem probable, on the nature of the tenure before us, that there was some such liability in this case, yet there is no finding of it as a fact; and, on the other hand, the plaintiff distinctly avers that he and the defendant held the lands in equal shares of 8 annas, and the defendant as distinctly avers that there was no compulsion on the part of the plaintiff to pay his (defendant's) share of the rent, and admittedly there was no sum certain due but rather a sum contested. I do not think, therefore, that the rules which govern suretyship in the Courts at home can be applied in this case, and on the facts as found I have no sort of doubt that the payment was entirely voluntary. The facts found are that the rents of 1277 were due when the sum was paid, and that the zemindar was about to sue for them. But this last fact is explained away in a very peculiar manner. The Court which finds this last fact explains it in this way. The zemindar was about to sue, that is, "an account was prepared and sent to Comillah." Now, it does not seem to me in the first place that it at all followed from the fact that an account was prepared and sent to Comillah that the zemindar was about to sue on that account. On the contrary, it is quite possible, when the fact was, as found by both the Courts, that the amount contained in that account was not the amount due, it is very possible that the preparation of the account and sending it to Comillah were acts, not done in preparation for a suit, but simply to put the screw on and get as much as possible from the ryots. However, supposing the facts to be that the rent was due and the zemindar was about to sue for it, still there is a finding of fact which modifies these other findings, to the effect that the rent for which the zemindar was about to sue was not that which was actually due. Then, what compulsion was there upon the plaintiff to pay, not only his own share, but another's share of a sum of money which was not altogether due? He was not bound to pay even his own share. There is nothing to show that he was bound to pay his co-sharer's share, and it does not follow that, if he had paid his own share, and not paid his co-sharer's also, any evil result would have followed to that part of the tenure which belonged to him. The zemindar might not, and probably would not, and certainly did not, put the tenure up to sale, and it seems most likely from what we know of suitors in the Courts below that what the zemindars would have done in such a case would have been this, *viz.*, that he would either have put up the defaulter's share of the tenure to sale, or else would have sold any other property of the defaulter; or he might, in fact, have resorted to another remedy—a very common one—that of attaching the crops. At any rate, there is nothing to show that that portion of the tenure which alone belonged to the plaintiff was in any danger from the defendant's failing to pay the rents of that share which belonged to him, and not to the plaintiff.

In this view, I agree in dismissing this appeal with costs.

The 4th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suit by Foreigner—Section 34, Act VIII., 1859.

In the matter of

Koroona Moyee Debia, *Petitioner*,

versus

Ooma Churn Deb, *Opposite Party*.

Baboo Rash Beharee Ghose for Petitioner.

Baboo Karoona Dass Bose for Opposite Party.

When an inhabitant of foreign territory sues within British territory, it is imperative on the Court to demand security from him for the payment of all costs that may be incurred by the defendant in the suit, even though the defendant also is a resident of foreign territory.

Peacock, C. J.—THE plaintiff files this suit, stating that he is an inhabitant of Independent Tipperah, at present residing in Comillah, a place within British territory. Being an inhabitant of foreign territory, he is a person ordinarily residing out of the British territories in India, and under Section 34, Act VIII. of 1859, a suit by such a party is not to be entertained unless the plaintiff, at the time of presenting the plaint or within such time as the Court shall order, furnish security for the payment of all costs that may be incurred by the defendant in the suit. In the event of such security not being furnished, the Court is required by the Section to return the plaint to the plaintiff, It was, therefore, imperative on the Court to demand security from the plaintiff, but the Subordinate Judge thought that he was not bound to demand security from the plaintiff because the defendant also resided within foreign Tipperah; but the fact of the defendant's being a resident of foreign Tipperah gave him no security as to the recovery of costs from the plaintiff in foreign Tipperah, if the plaintiff should fail in the suit against him. It is said that equal justice ought to be rendered to both parties; but if the plaintiff, being an inhabitant of foreign Tipperah, chooses to come to British territory to sue, he is bound by the law of the land, and that is, that his suit is not to be entertained until he furnishes security.

Let two months' time be granted to the plaintiff to furnish security to the satisfaction of the Subordinate Judge; and in the event of security not being furnished within two months, the plaint must be returned according to the provisions of Section 34.

The 4th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Verification—Agent—Default—New trial—Vakalutnamah.

In the matter of

Rajah Sutto Churn Ghossal, Bahadoor, *Petitioner*,

versus

Suroop Chunder Doss and others, *Opposite Party*.

Baboos Hem Chunder Banerjee and *Obhoy Churn Bose* for Petitioner.

No one for Opposite Party.

It is not competent to a Judge of a Small Cause Court to raise any objection to the verification of a plaint by an agent, after such verification has been expressly sanctioned by him at the commencement of the suit.

A fresh vakalutnamah is not necessary in an application for a new trial before a Small Cause Court, where the pleader presenting the application is one who was employed in the original suit.

Mitter, J.—WE are of opinion that this rule ought to be made absolute. The facts of this case are as follow: The petitioner instituted a suit before the Judge of the Small Cause Court at Backergunge, Baboo Gunga Churn Shome. At the time of filing his plaint, the petitioner asked the Judge's permission to have it verified by an agent who was duly authorized for that purpose. This permission was given, and the plaint was admitted and registered in the usual course. On the 26th of May last, the day fixed for the final hearing of the case, the Judge of the Small Cause Court raised an objection that the plaint had been irregularly verified by an agent, whereas it ought to have been verified by the plaintiff himself. This point was argued on behalf of the petitioner by three pleaders of the Small Cause Court who were duly authorized by him to

conduct his case, but the Judge, after hearing the argument, and without expressing any opinion as to whether the plaint had been duly verified or not, struck off the case for default, stating in his judgment that no one had appeared on behalf of the plaintiff. Subsequently, the petitioner filed an application for a new trial on the 1st of June 1869, urging that the Judge was under a mistake in supposing that there was no one present on his behalf to conduct the case. This petition also was struck off on the 12th June, on the ground that the pleader by whom it was filed had not been authorized by a fresh vakalutnamah from his client to file it. The petitioner again presented an application for a new trial on the 24th of June, urging that a fresh vakalutnamah was not necessary, inasmuch as the pleader by whom the petition was presented was one of the pleaders employed by the plaintiff in the original suit. The provisions of Section 18 of the Code of Civil Procedure and the decision of this Court in the case of Shah Mukhun Lall, dated 26th June 1857, were cited in support of this application. Without expressing any opinion on this point, the Judge of the Small Cause Court called for a report from his Head Clerk as to whether the last application, that is, the one bearing date the 24th June, had been presented within seven days from the date of the first order for striking off the case from the file; and after the receipt of this report, he dismissed the application on the ground that it was filed too late.

It is quite clear from the facts set forth above that there has been a total denial of justice in this case. In the first place, it was not competent to the Judge of the Small Cause Court to raise any objection to the verification of the plaint by an agent, when such verification had been expressly sanctioned by him at the commencement of the suit; and it was still less competent to him to dismiss the case for default when it had been argued by three pleaders of his Court on behalf of the petitioner.

Then, again, when the first petition for new trial was filed, the Judge of the Small Cause Court was entirely wrong in striking it off on the ground that a fresh vakalutnamah was necessary. The Judge of the Small Cause Court ought to have known that the point has been settled by repeated decisions of this Court; and instead of rejecting the application for new trial upon such a ground, it was clearly his duty to rectify the mistake which he had committed in the first instance by striking off the case on the ground of a supposed default on the part of the plaintiff, when no such default had been actually committed. Unfortunately for the petitioner, however, this application too was refused; and when the petitioner again applied for new trial upon the ground that a fresh vakalutnamah was not necessary, and when he pointed out to the Judge a decision of this Court directly bearing on the point, the Judge of the Small Cause Court ought to have followed the rule laid down in that decision instead of striking off the application on the ground that it was not filed within seven days from the date of his first order.

It is difficult to conceive how, under the circumstances stated, the last application could have been filed within seven days from the date of that order. The first petition for new trial was filed within the time required by law, but the Judge of the Small Cause Court erroneously rejected it when that time was already over. Strictly speaking, neither the first nor the second petition was a petition for new trial, for the case was never tried, the Judge of the Small Cause Court having dismissed it for default when no default had been committed by the plaintiff. But whether this is so or not, it is perfectly clear that the delay in filing the second application for new trial was entirely owing to the Judge's own fault for which the petitioner is no way responsible.

The result of all these proceedings on the part of the Judge is that his original order for striking off the case for default stands, and the petitioner must go without a remedy if we refuse to interfere with that order. It is quite clear, therefore, that there has been a gross failure of justice, and we should be wanting in our duty if we did not direct the Judge of the Small Cause Court to hear the case on its merits.

The above facts are fully corroborated by authenticated copies of proceedings held by the Judge of the Small Cause Court himself, and although he was authorized by an order of this Court to submit any explanation which he might think proper, no explanation whatever has been offered. The allegations of the petitioner are, therefore, uncontradicted, and we have accordingly assumed them to be correct.

The order of the Judge of the Small Cause Court, bearing date the 25th May

1869, for striking off the case of the petitioner, is therefore quashed, and the Judge is directed to hear and determine it on the merits.

The 6th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Declaratory decree—Cause of action.

Case No. 1864 of 1869 and analogous cases.

Special Appeals from a decision passed by the Subordinate Judge of Chittagong, dated the 21st June 1869, reversing a decision of the Moonsiff of Seetakoond, dated the 15th July 1868.

Woodoy Chunder Mundul and others (Plaintiffs), *Appellants,*

versus

Ahmedoollah and others (Defendants), *Respondents.*

Baboos Okhil Chunder Sein and *Grish Chunder Ghose* for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

No suit lies for a declaration of a right of occupancy unless there has been some act to disturb that occupancy. The mere fact of the landlord having given a *talookee* pottah to a third party, and of having obtained against such third party a decree for arrears of rent, is not a sufficient cause of action to the occupant.

Hobhouse, J.—THESE were suits to have the plaintiff's right of possession declared in certain lands, and to set aside certain alleged fraudulent talookee pottahs which it was averred by the plaintiff stood as obstacles to his attaining to his right.

The plaintiff's statement was that the lands in question were originally khas lands of Government; that Government had sold their rights to Ahmedoollah, defendant No. 2, and that the said defendant had created a certain talookee pottah in favor of defendant No. 1, Abool Reza, a pottah, namely, which plaintiff averred was that obstacle to his right which he wished to remove.

The Lower Courts have in substance found that the plaintiff has a right of occupancy of some kind or other, they do not say what; but in substance they hold that, notwithstanding that right of occupancy, the defendant Ahmedoollah was not prevented by the agreement under which he bought the land from Government from executing the talookee pottahs to which the plaintiff objected. Whether this last finding is a correct finding or not, it does not seem to us necessary to determine, because from the mode in which the plaintiff has laid his suits, we think that they do not either disclose a sufficient cause of action or a sufficiently distinct right to entitle, or indeed to enable the Courts to make any declaration in favor of the plaintiff. The plaintiff simply claims a right of occupancy of some kind. Until, therefore, that occupancy was disturbed by some act on the part of the defendants, there would necessarily be no cause of action. Now, in this case there is nothing on the record to show that the right of occupancy in question was disturbed by any act on the part of the defendants. These defendants possibly did as between themselves come to some agreement by which one was to be a talookdar holding under the other; and it seems also that one of the defendants did sue the other for arrears of rent, and got a decree. But the decree was never executed, much less did defendants or either of them, under color or by virtue of that decree, attempt after it to disturb the plaintiff's occupancy. It is possible that it may have been the intention of the defendants so to act hereafter, but, as a matter of fact, they did not do so, and the plaintiff, therefore, had no cause of action so far as they were concerned. This fact alone would be fatal to the plaintiff's cause; but when we come to look into the nature of the plaintiff's statements and to the nature of the declaration which he demanded of the Court, we find it impossible to say what exactly that right was which the plaintiff called upon the Courts to declare. In one part of his plaint, he seems to demand a right of occupancy without paying any rents at all. In another part, he seems to demand a right of occupancy after settlement of rent, which he seems to say that the defendant Ahmedoollah was bound to make with him, and nowhere does he distinctly declare the exact nature of the occupancy which he sued to have declared. Looking, therefore, whether to the absence of any cause of action on the part of the plaintiff, or to the indistinctness of that right which he sought to have declared, we have no sort of doubt that the plaintiff did not put himself in that position that the Courts could have come to any decree in his favor.

In this view of the case, we think that the decision of the Courts below were substantially right, and that each and all of these appeals must be dismissed—appeals Nos. 1814-15-16 with costs, and appeals Nos. 2072-73-75 without costs, no one appearing on the other side in those last three cases.

The 6th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart, Judges.*

Limitation—Onus probandi.

Case No. 1444 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 30th March 1869, reversing a decision of the Sudder Ameen of that District, dated the 31st January 1868.

Brojonath Paul Chowdhry and another (Defendants), *Appellants,*

versus

Sreegopal Paul Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Tarucknath Sein and *Mohendro Lall Shome* for Appellants.

Baboos Sreenath Doss and *Grish Chunder Mookerjee* for Respondents.

In a suit to recover possession of a tank which was included in an undivided mehal of which plaintiffs were the shareholders, where defendants contended that the tank had, for more then 12 years before the suit, been separate and in their separate possession and enjoyment.

HELD that, as there was *primâ-facie* proof that the shareholders, or certain of them, had enjoyed the use of the tank, the burden lay upon the defendants to prove their separate enjoyment.

Hobhouse, J.—THE first, second, and fourth grounds in the written petition of appeal before us were admittedly not taken in the Courts below, and as they are all of them highly technical grounds and the question before us is a very simple and a very broad question between the parties not involving necessarily any of the technical grounds taken, we decline to allow those grounds to be raised before us in special appeal.

The only ground then remaining is the third ground, and that is to the effect that the plaintiff's suit as regards certain 7½ beegahs of a tank in village Nassra is barred by the application of the Statute of Limitation, inasmuch as there is no evidence that the plaintiffs were in possession thereof within 12 years of suit. To determine, then, whether the Lower Appellate Court has arrived at a sound judgment on this point, it is necessary to consider what was the real issue between the parties. The issue was this. The defendants admitted that this particular tank was included in an undivided mehal of which the plaintiffs were admittedly the shareholders, which they alleged themselves to be, but it was contended that this particular tank had not been enjoyed by the shareholders generally, but had for more than 12 years before suit been separate, in the separate possession and enjoyment of the defendants, special appellants before us. Therefore, it was upon the plaintiffs to prove that at some time within 12 years of suit this particular tank had been enjoyed by the shareholders generally, and not by the defendants, appellants before us, exclusively.

Now, there is admittedly in the evidence of one Nubeen Chunder Bose, upon whom the Lower Appellate Court relies, a statement to the effect that more than once, at some time within 12 years of suit, not the defendants exclusively, but other shareholders of the mehal generally, had enjoyed the use of this particular tank. When, therefore, there was first this admission on the part of the defendants that this particular tank formed part of an undivided mehal of which the plaintiffs were shareholders, and when the Lower Appellate Court further found on the evidence that the shareholders, or certain of them, had enjoyed use of the tank, and not the defendants exclusively, then we cannot say that there was not such *primâ-facie* proof of the plaintiff's enjoyment of this particular tank, that is proof, in accordance with the nature of the contention between the parties, as entitled the Court to throw upon the defendants the burden of proving, which they have not done, their separate enjoyment of the tank.

In this view, we think that there is a good finding on the question of limitation, and we, therefore, dismiss this appeal with costs.

The 6th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart.*, *Judges.*

Pleadings—Non-traverse.

Case No. 1818 of 1869.

Special Appeal from a decision passed by the Officiating Additional Subordinate Judge of Chittagong, dated the 15th June 1869, modifying a decision of the Moonsiff of Seetakoond, dated the 1st July 1868.

Chundee Churn and another (two of the Defendants), *Appellants*,

versus

Mobaruck Ali and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Okhil Chunder Sein for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

Where plaintiffs claim on an alleged title, and their allegation is not traversed by the defendant, their position requires no further proof.

Bayley, J.—We are of opinion that this appeal should be dismissed with costs.

It appears that, in the first instance, a suit was brought in the Revenue Court by the plaintiffs against certain ryots for rent. In that suit, the present special appellants intervened on the strength of certain alleged talookee pottahs, and their intervention was so far successful that the plaintiff's suit against the ryots for rent was dismissed. The allegation of the present plaintiffs in that suit was that they were the sudder putneedars, and as such entitled to rents from the ryots. But their suit being dismissed by the present special appellants intervening and putting in the talookee pottahs, the plaintiffs now sue in the Civil Court, distinctly alleging that they are the sudder putneedars, and as such entitled to rents from the ryots; that the pottahs set up by the defendants, special appellants, in the Revenue Court are false and fabricated; and the plaintiffs pray, therefore, that those pottahs of defendants may be set aside, and possession given to them.

The defendants, special appellants, do not traverse the plaintiffs' allegation of their being the sudder putneedars, but their case is that, by virtue of their talookee pottahs, the rents were due to them, and not to the sudder putneedars.

The first Court dismissed the plaintiff's suit, holding the defendants' pottahs to be established.

The Lower Appellate Court has, however, found in most distinct terms as a matter of fact on the evidence, which finding, therefore, cannot be disturbed in special appeal, that the pottahs set up by the special appellants are false and fabricated. The decree of the Lower Appellate Court runs in these terms: "The pottahs, dated respectively the 6th "Assar 1208, 6th Bysack 1210, and 10th "Bysack 1210 M. C., filed by defendants, "respondents, Ram Guttee and Chundee "Churn, be set aside, that plaintiffs do not "get khas possession of the disputed lands "other than the rent."

In special appeal, the main contention before us is that, whereas there is no proof of the plaintiffs' title as sudder putneedars, the Lower Appellate Court was wrong to set aside the defendants' talookee pottahs, or to give the plaintiffs any decree for rent until they had established a clear title. A case reported at page 373, Volume XI., Weekly Reporter, has been cited in support of this contention.

This plea, however, is quite untenable. The plaintiffs' allegation was that they were the sudder putneedars, and as such entitled to remove, between them and the ryots from whom they sought to recover the rents, the intervening pottahs set up by the defendants, special appellants. There was no traverse by the defendants, special appellants, of this allegation of the plaintiffs being the sudder putneedars, and, therefore, under the ordinary rules of pleading, this position of the plaintiffs required no further proof. The only question, then, that remained was whether the plaintiffs could be prevented from recovering the rents they sought for from the ryot-defendants by reason of the defendants, special appellants' talookee pottahs. Now, these talookee pottahs having been found as a fact to be forged and fabricated, the obstacle to the plaintiffs' recovering the rents from the ryots is removed. The case cited in Weekly Reporter, Volume XI., page 373, has no bearing upon this case. In the first place, the context of the judgment there shows that there was a clear denial of the plaintiffs' title, and not-

withstanding that denial the plaintiff gave no proof of his title or right of action.

We think, therefore, that the judgment of the Lower Appellate Court should on the main stand good, and that our decree should run in these terms: *viz.*, that, as regards the defendants, special appellants before us, the plaintiffs' suit should be decreed, that is to say, the talookee pottahs will be set aside, and possession given to the plaintiffs as prayed for by them. As regards the ryot-defendants, the plaintiffs' suit is dismissed so far as khas possession is concerned. The plaintiffs should recover from the special appellants the costs of this Court.

The 7th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart.*, *Judges.*

Objections—Special appeal—Evidence.

Case No. 1449 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 31st March 1869, affirming a decision of the Deputy Collector of Alipore, dated the 29th October 1868.

Nobo Kristo Sircar (Plaintiff), *Appellant*,

versus

Kala Chand Doss (Defendant), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Anund Chunder Ghossal for Respondent.

Where an objection taken in the grounds of appeal is not pressed at the hearing of the case, it cannot be raised again in special appeal.

It is for a party to adduce his own evidence, and not for the Court to ask him to do it.

Bayley, J.—We think this special appeal should be dismissed with costs.

The *first* ground taken is that the Lower Appellate Court has not tried the genuineness or otherwise of the dakhillas produced by the defendant upon which the special appellant asked for a judgment of the Lower Appellate Court. The *second* ground is, that the special appellant had adduced evidence to show that there had been an enhanced variation of the jumma subsequent to the Decennial Settlement; and the *third* ground is, that the Lower Appellate Court has wrongly affirmed the decision of the first Court in regard to not issuing a subpœna in the name of Rajah Komul Kishen when there was ample time between the 10th October, the date of the petition, and the 29th October, the date when the case was decided, to enforce the Rajah's attendance. The vakeel for the special appellant relies, however, on the first two grounds as his main points.

On the first ground, it is not shown to us that the Lower Appellate Court was pressed at the hearing of the case to try whether the receipts which the first Court found good were proved or not. The presumption would rather be to the contrary from the very words of the Judge. It is clear from the judgment of the Lower Appellate Court that the main contention raised there was whether Komul Kishen having taken a benamee ijarah in the name of Hur Cally Ghose, a subpœna on the Rajah for the production of the jumma-wassil-bakee papers should not have been issued. The Lower Appellate Court dismisses the appeal upon this contention, and affirms *in toto* the judgment of the first Court. Nothing has been shown to us to prove that what the Judge stated to be the contention before him is incorrect. It is quite possible that the objection taken in the written grounds of appeal may have been, at the discretion or otherwise of the vakeel, omitted to have been pressed upon the Lower Appellate Court. The question of dakhillas seems to have been thoroughly considered by the first Court, and it is evident that the Lower Appellate Court has in substance not interfered with, and in so many words indeed upheld, the finding of the first Court on that point.

With regard to the second objection, *viz.*, that there was evidence to show that there was a variation of the jumma subsequent to the Decennial Settlement, the Judge's words

re as follow: "The plaintiff alleges that the rent was varied in 1256, but he has not supported this allegation by evidence."

It is quite clear from these words of the Lower Appellate Court that the question before it was not whether there was any evidence on the record or not, but that the plaintiff's allegation was not *supported* by any evidence placed before the Lower Appellate Court.

With regard to the third objection, we quite concur with the Lower Appellate Court in affirming the decision of the first Court on that point. The case was instituted on the 2nd July. On the 4th August the defendant appeared. On the 5th August, the plaintiff gave his deposition, but did not apply for the subpœna in question until the 10th October. The suit was decided on the 29th October, and it is stated that, between the 10th and the 29th October, there was ample time to issue the subpœna in the Rajah's name. We think that the judgment of the Lower Appellate Court is quite right. It is for the party to adduce his own evidence, and not for the Court to ask him to do it. It was the duty of the party when the order was first given for the issue of the subpœna, at once to take measures and have the subpœna severed, but he failed to do so, and it was, therefore, his own fault that the subpœna was not issued. But, irrespective of this, there is no evidence to show that Komul Kishen had the custody of the papers on which the defendants relied, and that his testimony, therefore, was material.

On the whole, we see no reason to disturb the judgment of the Lower Appellate Court, and we, therefore, dismiss this appeal with costs.

The 7th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction — Damages — Section 27, Act XXIII., 1861.

Case No. 1602 of 1869.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 8th April 1869, affirming a decision of the Moonsiff of Durbhangah, dated the 12th September 1868.

Toolsee Ram (Plaintiff), *Appellant,*

versus

Nund Kishore Lall and another (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Anund Gopal Paleet* for Appellant.

Baboos Bhowanee Churn Dutt and *Gopal Chunder Mookerjee* for Respondents.

A decree-holder having taken out execution, the judgment-debtor paid a sum of money in satisfaction of the decree, and got a surety to execute a security-bond on his behalf. The decree-holder thereupon took out proceedings under Section 204, Act VIII., 1859, had the surety arrested, and realized from him the amount due under the decree. The surety then brought an action to recover damages for illegal arrest, the sum claimed not exceeding Rs. 500.

HELD that the suit was cognizable by a Small Cause Court, and that, under Section 27, Act XXIII. of 1861, no appeal would lie.

Kemp, J.—A PRELIMINARY objection has been taken in this case to the effect that no special appeal will lie to this Court under Section 27 of Act XXIII. of 1861, inasmuch as the claim is one for a sum not exceeding 500 rupees, and is of a nature cognizable in Courts of Small Causes. It appears that the plaintiff sued to recover Rupees 500 as damages, alleging that, in the case of Nund Kishore Lall *versus* Jhumun, Nund Kishore had taken out execution against his judgment-debtor Jhumun; that Jhumun paid 100 rupees in satisfaction of the decree; that the plaintiff executed a security-bond on behalf of Jhumun; and that the decree-holder, under Section 204 of Act VIII. of 1859, took out proceedings against him, the plaintiff, as surety, had him arrested, and realized the amount due under the decree. The legality or illegality of this proceeding under Section 204 is not a point now before us, as we think that this special appeal will not lie under the Section quoted above.

Under Section 6 of Act XI. of 1865, suits for damages are cognizable in the Courts of

Small Causes for sums not exceeding 500 rupees, and the Act proceeds to state that no action will lie in any such Court for the recovery of damages on account of alleged personal injury, unless actual pecuniary damages should have resulted from the injury.

Now, in this case, it is clear that the injury to the plaintiff, if any, was the act of the decree-holder in arresting him, and realizing the balance due under the decree. It is admitted that the plaintiff did pay up the balance of that decree under what the plaintiff considers to be an illegal arrest, and that an actual pecuniary damage did result from that injury, namely, from that illegal arrest.

We are, therefore, of opinion that this is a suit clearly cognizable by the Small Cause Courts, and that, under Section 27 of Act XXIII. of 1861, the sum claimed being not in excess of 500 rupees, no special appeal will lie.

The special appeal is, therefore, dismissed with costs.

The 7th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Old documents—Custody—Ejectment—Pleadings—Onus probandi.

Case No. 1343 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 1st May 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 30th October 1868.

Gour Paroy and another (two of the Defendants), *Appellants,*

versus

Wooma Soonduree Debia and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondents.

Where a party offers documents of such an age as to be incapable of being proved by direct evidence, he is bound to prove their custody.

In a suit to recover possession on the allegation of previous possession and forcible ouster, both being denied by defendants, who set up a title of their own, it i for plaintiffs to prove the alleged ouster. If they do to the satisfaction of the Court, the burden of proof wi be on the defendants to show the title on which the ousted the plaintiffs. Should the defendants prove su a *primâ-facie* title, then it will be the duty of the Jud to call upon the plaintiffs to establish their title.

Hobhouse, J.—THE plaintiffs in this su prayed to recover possession of a certai khal. They said that the proprietor of th khal had leased it to them by a certain potta and also a certain likhun; that they ha been in possession up to the year 1274; an that then they had been forcibly ousted b the defendants.

The defendants denied the previous posse sion, also the alleged dispossession and th title of the plaintiffs, and set up a title their own.

The issues were these: *1stly*—To who did the right and interest in the dispute property (khal) belong? *2ndly*—Who hold possession of the property in dispute? An *3rdly*—Whether the defendants ousted th plaintiffs from the disputed khal and julkur

On these issues, the first Court foun against the plaintiffs, and dismissed the suit.

The Lower Appellate Court reverse that decision.

It will be seen from the issues that we laid down that the plaintiffs based their titl not simply upon the title-deeds which the said they had derived from the owners the khal, but also, as by the second issu upon their alleged possession of the kha The Lower Appellate Court went first all into the Appellant's title-deeds, then in the evidence of appellant's witnesses, an lastly, into the question of what had or ha not been proved on the part of the defend ants. The Lower Appellate Court cons dered those title-deeds which had been re jected by the first Court as no evidence all, to be good evidence; and after discussin the depositions given by certain witnesse the Lower Appellate Court went on to sa that it was disposed to believe that th plaintiffs did possess the khal in questio from the date of lease, and further that it wa disposed to believe that they had held it u 26th Assin 1274, the alleged date of di possession. Then the Lower Appella Court, after going into the evidence for th defendants, and giving its reasons for discr diting that evidence, concludes in these words: "I am, therefore, of opinion that

the document is a genuine and valid one and decree the case."

Reading this judgment as a whole, it seems to us that it was upon the joint ground of proof of the title-deeds and proof of possession on the part of the plaintiffs that the Judge in the Lower Appellate Court gave the plaintiffs a decree.

It is, however, contended before us in special appeal that those documents on which the Judge in the Lower Appellate Court based his findings in favor of the plaintiffs' title-deeds, *viz.*, the pottah of 1209 and the likhun of 1233, were no legal evidence at all, and that as the plaintiffs failed to prove their title-deeds, their suit should have been dismissed. We are of opinion that the documents which the Judge has treated as evidence are no evidence at all. It is very true that the documents in question may be of such an age that it was impossible to adduce direct evidence of the validity of them, but it was always within the competency of those who produced the documents at least to start their case by proving the custody of them; and it is clear from the judgment of the first Court in this instance that the plaintiffs' attention was actually pointed to this very question of proving the custody of the documents. They failed to do so, and, it is clear, therefore, to us that those documents were not proved, and were not, therefore, evidence on which the Lower Appellate Court was entitled to rely.

The question, then, that remains is whether, because, the plaintiffs failed to prove their title-deeds, their suit is in this particular case liable to be at once dismissed. We think that it is not. The plaintiffs alleged that they had been in previous possession of the property in dispute and had been forcibly ousted from it. If they should prove such forcible ouster to the satisfaction of the Court below, then the burden of proof would, in our judgment, be in this particular case on the defendants to show the title on which they had presumed forcibly to oust the plaintiffs. Should the defendants prove such a title *primâ-facie*, then, and not till then, it would be the duty of the Judge to call upon the plaintiffs to establish their title—a title either by reason of 12 years' occupation, or of whatever nature it might be.

We think, therefore, that the best course to pursue is to remand the case to the Lower Appellate Court. That Court should exclude from its consideration the pottah of 1209 and the likhun of 1233, and upon the rest of the evidence on the record should come to a finding on these issues—

Were the plaintiffs in possession of the property in suit, and were they forcibly ousted therefrom in the year 1274 as alleged? If they were, then have defendants established a title *primâ facie* sufficient to justify the ouster; and if they have, to what extent, if to any, have the plaintiffs proved a better title?

The costs will follow the result of the remand.

The 7th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ex-parte decree—Evidence.

Cases Nos. 1644 to 1646 of 1869 under Act X. of 1859.

Special Appeals from a decision passed by the Additional Judge of Tirhoot, dated the 29th August 1868, reversing a decision of the Deputy Collector of that District, dated the 22nd October 1868.

Mr. G. Toomy (Plaintiff), *Appellant,*

versus

Durrup Singh and others (Defendants), *Respondents.*

Mr. G. Gregory and *Baboo Debendro Narain Bose* for Appellant.

Moulvie Syud Murhumut Hossein and *Baboo Bama Churn Banerjee* for Respondents.

The fact of a decree in a rent-suit having been given *ex-parte*, does not detract from its value as evidence of the relationship of landlord and tenant between plaintiff and defendant, provided due notice had been served on the latter; and such a decree may be filed as evidence without the judgment on which it was founded.

Glover, J.—THESE three cases are analogous. They were tried together in the Court

below, and one decision will govern the three in special appeal.

The plaintiff sued the defendants for rent for the years 1273, 1274, and 1275 F. S., on a jummabundee. The defendants pleaded that they held the land in lieu of malikana, that they were not the plaintiff's tenants, and had never paid rent to him.

The first Court gave the plaintiff a decree, which the Additional Judge has reversed on the ground that the plaintiff has not been able to show that there was any relationship of landlord and tenant between him and the defendants.

It appears to us that this decision is wrong. In all three cases and as against all three defendants, there have already been decisions by competent Courts on the question of tenancy. In special appeals Nos. 1644 and 1646, there have been decrees given by the Deputy Collector; and in special appeal No. 1645 there has been a decree of the Judge. The Additional Judge has got rid of the effect of the first two decisions by saying that they were *ex-parte* decisions, and that he "declines to be guided by decisions "given on an issue altogether foreign to the "question before the Court and by a Deputy "Collector so ignorant of the Act he was "administering as to have given decree for "10 years arrears of rent." The mere fact of the decrees being given *ex-parte* would not, so far as these cases are concerned, necessarily detract from the value of the decisions; for so long as there had been due notice served on the defendant, the decree against him, although passed *ex-parte*, he not choosing to appear, would be perfectly good evidence of the existence of the relationship of landlord and tenant between him and the plaintiff.

We have not been shown by the vakeel for the special respondent what was the issue which the Judge considered to be foreign to the question before the Court. The case was one for arrears of rent. Those arrears were claimed for 10 years, and the only issue in the case was whether the amount claimed was or was not due by the defendant. No doubt, the Deputy Collector was wrong in giving a decree for 10 years arrears of rent, but that error does not make his decree, so far as the relationship of landlord and tenant between the parties is concerned, a bad one. In special appeal No. 1645, in which there is a decree of the Civil Court, the Additional Judge refuses to give any weight as evidence to that decree, on the ground that the plaintiff had only filed the decree, and not the judgment itself, and that therefore he, the Additional Judge, was ignorant of the reasons of the Judge for deciding the case as he did. This reason appears to us an altogether inconclusive one. The only thing the Additional Judge had to look to was what was the order passed, and not to what the reasons were which induced the Judge to pass that order. If the decree decided that the defendant was the plaintiff's tenant and adjudicated him liable to pay rent, that decree, so far as the question of relationship of landlord and tenant between the parties was concerned, put an end to the dispute.

Then, as regards the jummabundees, they show the relationship of landlord and tenant as also the amount of rent due by the defendants. The Judge has discredited these documents under a mistaken view of their meaning. He has supposed that they show 433 rupees to have been due as rent by Bidya Singh; that 15 annas only out of 333 rupees had been paid by Acharj Singh; and that 13 annas only out of a sum due of 466 rupees had been paid by Durrup Singh—the fact being that these were the sums paid respectively by these parties, and that the balance in the case of Bidya Singh was nothing, and in the case of the other two defendants 15 annas and 13 annas respectively. The Judge says it is impossible to be believed that had such large arrears of rent been due, the plaintiff would have taken no steps to realize them. Under the explanation just given, this argument at once falls to the ground. As regards the evidence of the witnesses for the plaintiff, that of the gomashtah and putwaree, the Judge admits that it would have been reliable had it been supported We have shown that it is supported by the jummabundee, and therefore it follows, according to the Judge's own showing, that there is nothing against the credibility of these two witnesses. It appears to us quite clear that the relationship of landlord and tenant has been made out between the parties to these suits, and that the jummabundee shows the rate of rent which was demanded from the tenant-defendants.

We think it, therefore, unnecessary to remand the case in order that the Judge may pass a fresh decision upon it. We reverse his order and restore that of the first Court with costs.

The 8th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Intervention—Section 230, Act VIII., 1859.

Case No. 1447 of 1869.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 8th April 1869, reversing a decision of the Moonsiff of Khoolnea, dated the 22nd August 1868.

Ram Gopal Chuckerbutty (Plaintiff), *Appellant,*

versus

Poorno Chunder Banerjee (Defendant), *Respondent.*

Baboos Kalee Mohun Doss, Grija Sunkur Mojoomdar, and *Bungshee Dhur Sein* for Appellant.

Baboo Debendro Chunder Ghose for Respondent.

D having sued to recover possession of certain lands, *P* intervened, and *D's* claim was decreed without prejudice to *P's* rights. In execution of that decree, *D* took possession, and thereupon *P* applied to be heard under the provisions of Section 230, Act VIII. of 1859.

HELD that, having been a party to the decree, *P* had no remedy under that law.

Hobhouse, J.—THE material facts of this case are these. The defendant before us was the plaintiff in a suit to recover possession of the lands now in dispute, among other lands. The plaintiff intervened in that suit, and a decree was passed between him and the present defendant to the effect that the present defendant was to obtain possession of the land that he sought to recover, but that his (the present plaintiff's) rights were not to be prejudiced by that decision.

In execution of that decree, the present defendant took possession of the lands in dispute, and thereupon the present plaintiff applied to the Court, under the provisions of Section 230, Act VIII of 1859, to be heard on the question of his right to the lands in question.

The Lower Appellate Court has dismissed the plaintiff's application on the ground that he was a party to the suit in which the decree given to the present defendant was passed, and therefore he is not entitled to be heard in the summary manner provided by the Section referred to. That Section says: "If "any person other than the defendant shall "be dispossessed of land in execution of a "decree, and if such person shall dispute the "right of the decree-holder to dispossess him, "on the ground that the property is *bonâ* "*fide* in his possession, and that it was not "included in the decree, or, if included in "the decree, that he was not a party to the "suit in which the decree was passed, then "each person may apply to be heard in the "summary manner provided."

Now, clearly upon the very terms on which the decree in the defendant's suit was given, the present plaintiff was a party to that decree. He intervened, and was made a party to the suit, and as such party his rights were by the terms of the decree declared protected. Possibly, if the fact is that the present defendant has ousted the plaintiff from the lands in question under color of the decree, and if that decree does not warrant the ouster, the plaintiff, as a party to that decree, may have his remedy under the provisions of Section 11, Act XXIII. of 1861. But being a party to that decree, it was quite clear that he has no remedy under the provisions of the Act under which he has chosen to appear before the Lower Appellate Court.

In this view, we think that the decision of the Lower Appellate Court is right, and we dismiss this special appeal with costs.

The 9th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Enhancement—Error of measurement.

Case No. 1534 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 16th March 1869, reversing a decision of the Deputy Collector of that District, dated the 31st August 1868.

Woomanath Roy Chowdhry (Plaintiff), *Appellant,*

versus

Ashumburee Bewa (Defendant), *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A suit for enhancement of rent after notice should not be dismissed merely because the landlord has made a mistake as to the exact area of the lands which his tenant holds.

Where enhancement is sued for on the ground that the rent paid by the defendant is below the rate prevailing in the neighbourhood, it is not enough for the plaintiff to show that the adjacent lands are of a similar description to those held by defendant; he must also show that they are held by persons of the same class with the defendant.

Hobhouse, J.—THIS was a suit for arrears of rent at enhanced rates.

The Lower Appellate Court has dismissed the suit on two grounds: *firstly*, because, by the plaintiff's contract with the defendant, the plaintiff was bound to make a measurement, which the Court finds he had not made; and, *secondly*, because, when the plaintiff sued for enhanced rents on 32 beeghas, and the area found to be occupied by the defendant was only 25 beeghas, then the Judge thought that the plaintiff was not entitled to obtain any enhanced rate at all.

We think that the Judge is in error in regard to both the grounds on which he has based his decision.

In the matter of the first ground, the Judge is, no doubt, right in saying that the plaintiff was bound to measure, but he is wrong, in fact, in saying that there was no measurement, because it appears clearly on record that both the parties agreed to the despatch of an Ameen to the spot, and because that Ameen, in the presence of both parties, made that very measurement of the lands which the Judge apparently found to be correct—a measurement showing that the area held by the defendant was beegahs 25, and not beegahs 33.

The Judge is also in error on the second ground, because this is not a suit for a kubooleut, but a suit for enhancement after notice, and there is nothing in the law which says that, if a landlord should have made a mistake in regard to the exact area of the lands which his tenant holds, he is not entitled to assess rents upon whatever area the tenant does hold; for instance, if the landlord should sue on the ground that the defendant holds 25 beegahs in excess, and if it should be found on investigation that the defendant only holds 24 beegahs and a half, then, according to the Judge's judgment, the landlord's suit should be dismissed at once. This seems to us to be an error on the very face of it. The landlord can only make the best measurement which can be made by such ordinary means as zemindars have at their command, and he cannot be supposed always to make that exact measurement which can be made by skilled officers of Court.

The question then remains with us as to whether we shall remand the case. The plaintiff sued for enhanced rent on the ground that the rent paid by the defendant was below the prevailing rate payable by ryots of the same class as the defendant for lands of a similar description with similar advantages in the place adjacent. The plaintiff was, therefore, bound to prove, amongst other material facts, that the defendant came within the category of ryots here mentioned, and that his lands came within the provisions of the Act quoted. It was not sufficient, therefore, that the plaintiff should simply show that the lands in the neighbourhood were of a similar description to those held by the defendant. He was also bound to show that those lands were held by persons of the same class with the defendant. We have, therefore, called upon the pleader for the special appellant to show us if there is any evidence on the record upon this last point, and he is unable to show us any. This being so, it is obviously unnecessary to remand the case upon this question.

Being unable, therefore, to order a remand, we affirm the decision of the Lower Appellate Court, and dismiss this appeal with costs.

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The 10th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Damages for personal injury—Jurisdiction—Finding by Criminal Court— Evidence.

Case No. 1569 of 1869.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 11th June 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 30th March 1869.

Ali Buksh, Doctor (Defendant), *Appellant,*

versus

Shaikh Sumeerooddeen (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Appellant.

Moonshee Mahomed Yusuff for Respondent.

A suit for damages for personal injury cannot be tried by a Court of Small Causes unless some actual pecuniary damage has resulted from the injury.

A Civil Court cannot rely on evidence taken in the Criminal Court, but is bound to record its own evidence, and come to a determination on the evidence taken before it as to the fact found by the Criminal Court.

Hobhouse, J.—THE plaintiff sued in this case to obtain damages from the defendant, on the ground that the defendant had committed a personal assault upon him, and so had caused injury to his reputation. He laid his damages at the sum of Rupees 100.

The first Court found that the assault was not proved, and dismissed the suit.

The Lower Appellate Court held in substance that the first Court had no jurisdiction to try the matter of the assault, that that was conclusively proved by the evidence taken in the Criminal Court, and that, therefore, all that the Civil Court had to do was, in the words of the Judge, to try "whether any loss or detraction to plaintiff's social position has been suffered in consequence of the assault," and the Judge thereupon remanded the case to be tried by the first Court upon that issue.

The defendant appeals specially before us, urging that the Judge is wrong in law in holding that the first Court had no jurisdiction to try the *factum* of the assault, and that that *factum* was established by the judgment of the Criminal Court, and that the Judge, therefore, should not have remanded the case, but should have tried and determined the question of assault upon the evidence on the record.

A preliminary objection is taken to the hearing of this special appeal, on the ground that, as this was a suit for damages below Rupees 500 in value, therefore the provisions of Section 27, Act XXIII. of 1861, read with the provisions of Section 6, Act XI. of 1865, barred a special appeal to this Court. The words of the law on which the pleader for the special respondent relies are these: "Provided that no action shall lie in any such Court," that is, a Court of Small Causes, "for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury."

It is not contended that there is any allegation, much less any evidence or finding on the record, that actual pecuniary damage did in this case result from the alleged personal injury on the basis of which the plaintiff sues; but the pleader for the special respondent relies on the judgment of a Division Bench of this Court, special appeal No. 202 of 1869, decided on the 29th July 1869, Nuddia Churn Roy, appellant. In the judgment on which the pleader for the special respondent relies, no doubt the Judges do in a general way state that suits of the nature before us are suits cognizable by the Courts of Small Causes, and that, therefore, no special appeal will lie to this Court in such suits. But in the first place, neither the facts of the case nor the reasons which led the Judges to a decision in that case are given in the judgment, and on the other hand, we find that one of the Judges of that Division Bench, in a decision to be found at page 115, Volume X., Weekly Reporter, distinctly holds that a suit of the nature before us is *not* cognizable by a Court of Small Causes, and the judgment given in that case is supported by another judgment of a Division Court to be found at page 7, Volume IV., Weekly Reporter.

We think, too, that those judgments are clearly in accordance with the words of the law. By those words it is evidently meant that, unless some actual pecuniary damage shall have resulted from the personal injury for which a plaintiff sues for damages, such a suit shall not be tried by a Court of Small Causes. We can, of course, understand many cases in which actual pecuniary damage

should result from a personal injury, but in this case no such damage is, as I said before, either alleged or proved or found to have resulted. We think, therefore, that a special appeal will lie in this Court.

On the other point, we have no doubt but that the Judge below is wrong. The evidence of assault taken in the Criminal Court was clearly no evidence on which the Judge of the Civil Court was in this case entitled to rely. He had jurisdiction to determine the fact of assault, and was bound, therefore, to take the evidence on record in his own Court on either side, and come to a determination upon that evidence.

We reverse the judgment of the Lower Appellate Court, and we also reverse his order remanding the case; and we direct that he re-call this case from the Court of first instance, and determine the question of assault upon the evidence on the record in this case, irrespective of the evidence as given before the Criminal Court.

The costs will follow the result.

The 11th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Hindoo Law—Joint family—Right of action—Legal necessity—Sale of ancestral property.

Case No. 228 of 1865.

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 31st May 1865.

Rajaram Tewaree and others (Defendants), *Appellants*,

versus

Luchmun Pershad and others (Plaintiffs), *Respondents*.

Mr. R. T. Allan for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

Plaintiff, on behalf of himself and his minor brother, as sons and heirs of *J*, deceased, sued to recover possession of certain lands being ancestral property, by reversal of certain deeds of absolute and conditional sale alleged to have been executed without any necessity.

The deeds were executed by *J* and his brother *O*, but the plaintiff's claim was confined to the one-half share alleged to have belonged to his father *J*. The property was subject to the Mitakshara Law.

HELD that, as the family was not separated, nor the property partitioned, the suit should have been brought by all the joint owners to set aside the deed as to the charge created by *O*, as well as to the charge created by *J*.

HELD, that if plaintiff's case were sustainable in other respects, it would be necessary to try the issue whether the persons who advanced the money did, after due enquiry into the necessities of the father and uncle, act honestly in the belief that a sufficient necessity existed for taking up the money for the benefit of the family.

HELD that, if a larger sum was borrowed or raised than was legally necessary, or a larger portion of the estate mortgaged or sold than was necessary to raise the sum legally necessary, the vendees or mortgagees would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes recognized by Hindoo Law.

In a case where the plaint sought to set aside the deed *in toto*, on the ground that the whole of the money was used by the father for his own extravagance, the Court might, upon the defendant's establishing a necessity for part of the loan, decree that the deed should be set aside, and the plaintiff recover possession, upon his paying the amount which was legally taken up for necessary purposes, or that the deed should be set aside in proportion.

Peacock, C. J.—THIS appeal arises out of one of many cases joined in one suit in which the plaintiff Luchman Pershad, on behalf of himself and Radha Mohun, his minor brother, as sons and heirs of Jeetun Lall, deceased, sued *in formâ pauperis* to recover possession of certain lands by reversal of certain deeds of absolute and conditional sale executed by his father Jeetun Lall, and which the plaintiff alleges were executed without any necessity. The deeds were all executed by Jeetun Lall and Oodit Singh, the brother of Jeetun Lall, jointly, but the plaintiff's claim is confined to the one-half share alleged to have belonged to Jeetun Lall, his father. Jeetun Lall and Oodit Singh were the sons of Brijoo Lall. It was admitted in the course of argument that Luchmun Pershad was born in the year 1837, and Radha Mohun about the end of 1856 or the beginning of 1857, and that Jeetun Lall, the father, died on the 12th of Bhadro 1264, corresponding with the 8th of August 1857. The property in this and the other cases is situate in Zillah Sarun, and is subject to the Mitakshara Law. It was ancestral property inherited by Jeetun Lall and Oodit Singh before the birth of either of the plaintiffs.

The Court has already in a Full Bench decision in this case, reported in the 8th Volume of the Weekly Reporter, page 15, pointed out the great inconvenience arising from the joinder

in one suit of many defendants having separate interests in distinct portions of the subject-matter of the suit, and each claiming under different circumstances. The inconvenience is still more apparent when we consider the issues of fact which were raised in this case, and bear in mind the dates of the several deeds which were sought to be set aside.

The issues of fact were—

1st.—Did plaintiffs' father, Lalla Jeetun Lall, sell his ancestral estates in suit conditionally and absolutely for small sums of money when there was no such necessity for their sale as has received the sanction of Hindoo Law, and spend the consideration-money of the same extravagantly; or were the said alienations effected by plaintiffs' father at proper valuations, to pay off his ancestral debt, to contribute to the expenses of the education of his sons and the marriage of his daughter, to meet the demand of Government revenue, and to defray expenses which were considered necessary and sanctioned by Hindoo Law?

2nd.—Are the deeds of absolute and conditional sale, whereof the reversal is sought, reversible or not? If so, which of the documents is reversible, and on what grounds?

3rd.—Are the liabilities under loans contracted and bonds executed by plaintiffs' father, on the strength of which decrees have been passed by the Civil Court, valid or not? Is the claim for possession of properties which were publicly sold in satisfaction of those debts just or not?

4th.—Even if it be proved that plaintiffs' father was an extravagant person, and that alienations of his ancestral estate were effected, when there was no such occasion for the same as has received the sanction of Hindoo Law, can the plaintiffs be held entitled to possession of the properties in suit, with mesne-profits, or not? If so, then from what time, and at what amount, is the claim for mesne-profits to be reckoned, and which of the defendants are to be held liable, and which not, for the payment of the same?

5th.—Is the plaintiffs' claim to the property, for the alienation of which their father had executed certain documents before their birth, just and valid or not?

Each of these issues applied, not to any one particular deed, but to each of the several deeds under which the defendants respectively claimed.

In determining the issues of fact, the Principal Sudder Ameen who tried the case, and who appears to have given it considerable attention, observed: "The plaintiff has based his claim on the right of succession, under instructions laid down in Hindoo Law current in this (part of the) country; and on a reference to the Sudder Court precedents adduced by the plaintiff, the general principle which governs Hindoo Law here appears to be that a father is incompetent, when his son is alive, to alienate any of his immoveable ancestral properties, unless there exists necessity sanctioned by Hindoo Law to warrant such alienation. In such a state of things, the plaintiff, after complaining of the extravagance of his father, has caused the fact of the latter's selling absolutely and conditionally, in the absence of necessity sanctioned by Hindoo Law, his ancestral properties in dispute, and wasting the consideration-money thereof in incurring such expenses as were not valid, to be proved by five of his witnesses. I am of opinion that their testimonies are sufficient for (determining) the validity or otherwise of such alienation; for when, according to Hindoo Law, the right of both father and son is involved in ancestral properties, how can any alienation effected only by a father without the consent of his son be held valid, unless there exists such necessity for it as is sanctioned by Hindoo Law. Inasmuch as the defendants, vendees, persistently hold that the deeds which were executed by the plaintiffs' father are valid, the burden of proof on the point that the plaintiffs' father, having sold *his ancestral properties to meet such necessities* as are sanctioned by Hindoo Law, *spent the consideration-money for the same in meeting the said necessities*, rests with (them) defendants, vendees; and it is very necessary for the latter to prove the said point in order to show that those alienations were effected in good faith and are valid. So now it is for the Court to see how they have proved it. The point as to which of the documents whereof reversal is sought are reversible, and which are maintainable, and on what grounds, is dwelt upon at large in the following paragraphs."

The Principal Sudder Ameen then very properly proceeded to consider separately the merits of each particular case.

With reference to that part of the judgment in which the Principal Sudder Ameen says that "the burden of proof on the point "that the plaintiffs' father, having sold his "ancestral properties to meet such necessities "as are sanctioned by Hindoo Law, spent "the consideration-money in meeting the ne-"cessities, rests with the vendees, and it was "very necessary for the latter to prove the "point in order to show that those alienations "were effected in good faith and were valid" —he is not quite accurate. The principle laid down by the Lords of the Judicial Committee in Hunooman Pershad Pandey *versus* Mussamut Babooe Munraj Koeree, VI. Moore's Indian Appeals, page 399, was as follows: "Their Lordships think that the lender is "bound to enquire into the necessities for "the loan, and to satisfy himself as well as "he can, with reference to the parties with "whom he is dealing, that the manager is "acting in the particular instance for the "benefit of the estate. But they think that "if he does so inquire and acts honestly, the "real existence of an alleged sufficient and "reasonably accredited necessity is not "a condition precedent to the validity of "his charge, and they do not think that, "under such circumstances, he is bound to "see to the application of the money."

The same principle has been applied in the case of sales of ancestral property governed by the Mitakshara Law—*see* Special Appeal No. 1404 of 1865, 6 Weekly Reporter, Civil Rulings, page 193.

If the plaintiffs' case were sustainable in other respects, it would be necessary to direct issues in this and in the other cases as to whether the persons who advanced the money to Jeetun and Oodit upon the security of the lands or for the purchase of them, did, after due inquiry into the necessities of the father and uncle of the plaintiffs, act honestly in the belief that a sufficient necessity for taking up the money for the benefit of the family existed.

In the case out of which appeal No. 228 arises, the Principal Sudder Ameen says: "As the plaintiffs' father saved his estate "which had been advertized for sale in "execution of a decree obtained by Pur-"messur Pandey, by paying out of the "consideration-money covered by this deed "Rupees 1,246, or a moiety of the decretal "money due from him to the said decree-"holder, the sale of pie 4-10 krants and 7 "mussants out of anna 1-7-4, the property "in suit, or that of the share of plaintiffs' "father Jeetun Lall, reckoned in proportion "to the said decretal money (Rupees 1,246) "ought to be considered good. The defend-"ant has failed to prove that the remainder "of the consideration-money was spent in "meeting any other similar legal necessity. "Consequently, the sale of anna 1-4-13 is "invalid, and ought to be cancelled. More-"over, the defendant's statement regarding "the payment of zur-i-peshgee is not suffi-"cient to validate the sale, for it was un-"necessary to have recourse to sale for the "purpose of paying the zur-i-peshgee."

The Principal Sudder Ameen, therefore, has treated the conditional sale as valid in respect of a portion of the lands in proportion to that portion of the consideration-money borrowed for and spent in a matter of legal necessity, and held that it was void as to the residue of the lands conveyed; and he decrees that the plaintiff should recover a certain portion only of Mouzah Pokhera.

I think it very doubtful whether the principle of upholding the deed as to that portion of the land which bears the same proportion to the whole quantity conveyed, as the money borrowed for and applied in discharging a legal necessity bore to the whole amount of the consideration-money, is a correct one. If a larger sum of money was borrowed or raised by sale than was required for a legal necessity, and a larger portion of the estate than was necessary for the purpose of raising the sum legally required was mortgaged or sold, the vendees or mortgagees, as the case may be, would be entitled to a charge upon the lands mortgaged or sold to the extent of the money required and taken up for purposes for which, according to the Hindoo Law, the plaintiffs' father and uncle were entitled to alienate the estate during the minority of the plaintiffs. This was the principle upon which the Lords of the Judicial Committee of the Privy Council acted in regard to an estate sold by a Hindoo widow, and the same principle appears to be applicable in a case like the present—*see* the case of the Collector of Masulipatam *versus* Cavaly Vancata Narainapah, VIII. Moore's Indian Appeals, pages 500, 504, and 555.* The same principle

*2 W. R. 59-61.

seems to have been acted upon in the case of Muddun Gopal Thakoor and others *versus* Ram Buksh Pandey and others, 6 Weekly Reporter, Civil Rulings, page 71.

It is unnecessary, however, to decide whether, if an ancestor borrows 20,000 rupees when he is not justified in borrowing for the necessities of the family more than 10,000, and mortgages an 8-annas share of the ancestral estate as a security for the 20,000 when he could borrow the 10,000 upon the mortgage of a 4-annas share of the estate, the law may treat the mortgage as void as to a 4-annas share and good as to the other 4-annas share. It is certainly more convenient than compelling the heir to re-pay the 10,000 lawfully borrowed before he can set aside the mortgage as to any part of the estate, for the heir may be unable, pending the suit, to pay the 10,000 rupees, or even to borrow it upon the security of the estate, upon the chance of his succeeding. It may well be assumed in such a case that the share mortgaged was a sufficient security for the whole loan, and consequently that one-half would be a sufficient security for half the loan.

In the case above cited from the Weekly Reporter, it was held that, if any portion of the money borrowed by the ancestor was for purposes recognized by the Mitakshara Law as necessary, the plaintiff is not entitled to recover under a plaint which seeks to set aside the deed *in toto*, and to recover possession upon the ground that the whole of the money was used by the father for the purposes of his own extravagance. See also the same case after remand, same reports, page 74.

I am not, however, prepared to admit the correctness of that ruling as regards the form of the pleadings. The plaintiff, to whom in all probability the circumstances under which the transaction with his father took place are not so well known as they are to the defendants, seeks to recover possession of the land alienated by his father by reversal of the deed of conditional sale. It was for the defendants to prove that a legal necessity for taking up the money upon loan existed, or that, after due and honest inquiry, they had reason to believe that such a necessity did exist. I see no reason why, in such a case, upon the defendants establishing a necessity for part of the loan, the Court might not decree that the deed should be set aside, and the plaintiff recover possession upon his paying the amount which was legally taken up for necessary purposes recognized by law, or that the deed should be set aside in proportion.

In the case above referred to, of the Collector of Masulipatam *versus* Cavaly Vancata Narainapah, 8 Moore's Indian Appeals, page 555,* the suit was to set aside an alienation *in toto*, and to recover possession of a zemindary upon the ground that the vendor was a widow who had no power to alienate, and there was no offer to pay what, if anything, might appear to be due for advances made to her for purposes for which, according to the Hindoo Law, she was entitled to alienate the estate (see page 504); yet the Lords of the Privy Council directed an enquiry as to whether any, and what, advances had been made to the widow for which, according to the Hindoo Law, she would have been entitled to alienate. It does not follow that they would not have set aside the deed as to a certain proportionate share of the estate, if there had been a finding that there was a legal necessity for raising one-half of the purchase-money, but no legal necessity as to the other half.

There are many other cases in the Courts of Equity in England in which the relief prayed for has been granted upon equitable conditions annexed by the Court, though the relief was prayed for absolutely. Thus, in Head *versus* Egerton, III. Pere William's Reports, page 279, in a suit to compel the defendant to deliver up certain title-deeds to the plaintiff which he claimed as owner, the Court refused to order the deeds to be delivered up unless the plaintiff would pay the defendant certain money which was equitably due to him.

In Towers and Davis, I. Vernon 479, the plaintiff filed a bill to compel the defendant to give up certain deeds which concerned his estate. Defendant refused to deliver up the deeds until her jointure was confirmed, the plaintiff insisting that the jointure was after marriage, and was purely voluntary. But the Court refused to order the delivery of the deeds to the plaintiff except upon the terms of his confirming the jointure.

If, therefore, this question depended merely upon the form of the pleadings, I should refer the case to a Full Bench.

These cases stood over until after the decision of the Full Bench in the case of Sudabart Pershad Sahoo *versus* Foolbash Koer, and the analogous cases. Those cases have now been determined, see 12 Weekly

* 2 W. R. 59-61.

Reporter, Full Bench Rulings, page 1, and it has been held that, under the Mitakshara Law, one of several members of a joint Hindoo family cannot without legal necessity alienate any portion of the undivided ancestral property without the consent of the whole of his co-sharers, and that such alienation is not valid even for the share to which the alienor would have been entitled on partition.

In the appeal No. 228 of 1865, the deed sought to be set aside was a deed of conditional sale, dated the 11th of June 1847. It recited that Jeetun Lall and Oodit Narain, the father and uncle of the plaintiff, on the 16th of May 1824, had borrowed 5,500 sicca rupees from the father of Purmessur Dutt, and had given him a zur-i-peshgee lease of that date to secure the amount; that the holder of the zur-i-peshgee had sold it to Bundee Ali, and had executed a deed of assignment to him, and that Bundee Ali was then in possession; that afterwards, in order to pay off a decree for 2,293 rupees recovered against them by Purmessur Dutt and other moneys, Jeetun Lall and Oodit Narain had taken up 3,440 rupees upon a deed of conditional sale, dated the 12th of February 1845; that in consequence of the debt due under the deed of 1845 not having been paid, Purmessur Dutt had applied for foreclosure, and had served notice on the 26th of June 1846; that, in order to protect the estate, and to pay off Purmessur Dutt, Jeetun and Oodit had borrowed the money secured by the conditional sale of the 11th of June 1847.

The deed of the 11th of June 1847 contained a proviso that, if the mortgagors should fail to pay off the mortgage-debt on the day stipulated, the mortgagees should be at liberty to take possession of the mortgaged property by paying off the debt due on the mortgage of the 16th May 1824. The defendants allege that they foreclosed the mortgage of 1847, paid off the debt due to one Bechai Panday under the mortgage of the 16th May 1824, and obtained a decree for possession in 1852. The rent reserved by the zur-i-peshgee of 1824 was 710 rupees, of which Rupees 50 were to be paid to the mortgagors, and 660 rupees were to go in discharge of the interest on the debt.

The Principal Sudder Ameen found that there was legal necessity for the plaintiff's father raising 1,246 rupees, and that, therefore, the mortgage of the share of the plaintiffs' father was good for a portion of the property in proportion to that portion of the money raised. But Jeetun alone did not borrow 1,246 rupees on his share of the estate, but Jeetun and his brother Oodit Narain borrowed the whole sum necessary to pay off the decree, *viz.*, 2,943 rupees, upon their joint interest in the estate.

Jeetun and Oodit Narain were members of the joint family, of which the plaintiffs, on their respective births, became members. So long as the family was joint, Jeetun and Oodit had no certain definite shares in the estate, although upon partition, if it had taken place at that time, Jeetun and his sons might have been entitled to one-half, and Oodit and his son, if he had one, to the other half. The money borrowed by Jeetun and Oodit, so far as it was for a legal necessity, was borrowed by them jointly, and was a charge upon the joint estate. The whole amount is a charge upon what is called the plaintiff's share as well as upon what is called Oodit's share. Oodit's half of the money borrowed is not chargeable upon what is called his share only, and Jeetun's half upon what is called his share only, but the whole of the money borrowed by the two, so far as it was for a legal necessity, was a charge upon the whole of the joint estate in the property mortgaged. There is nothing to show that the joint family has been separated, or the joint property partitioned; and in the absence of such partition, the plaintiffs have no defined or certain share which they can call their own, or for which they can sue alone without making all the members of the joint family parties to the suit.

It appears from some of the statements that Oodit Narain had a son, but there is not distinct evidence upon that subject, or to show that he is living. The plaintiffs are not entitled to sue alone, unless they can show that they were, at the time of the commencement of the suit, the sole surviving members of the joint family of which Oodit Narain was one, and entitled by descent or otherwise to the interest of Oodit as well as of Jeetun.

Further, it appears from the recitals in the deed of 1847 that Oodit Narain and Jeetun jointly borrowed money upon the security of the lands on the 16th of May 1824, which was before either of the plaintiffs was born. Jeetun and Oodit at that time had power to borrow money upon

the security of the lands, for they appear to have been at that time the only members of the joint family. It is alleged that the defendant paid off that mortgage, but there is no distinct proof of that payment or that the mortgage of 1824 was then outstanding; and no distinct issue appears to have been raised upon either of those points.

The recitals in the deed of 1847, if true, showed a legal necessity for borrowing. An issue ought, therefore, to have been tried, not only as to whether legal necessity for borrowing existed, but also whether the lenders acted with due caution, and made due enquiries as to whether such a legal necessity existed, as justified the mortgage for the full amount for which it was given, or for any other, and what, amount. It is unnecessary to send the case back for the trial of such an issue, as it is clear that the plaintiffs are not entitled to recover any portion of the estate until the charge created by Oodit, as well as that created by the plaintiff's father, has been set aside; and the charge created by Oodit cannot be set aside in this suit. Further, the plaintiffs, as two only of the members of a joint family which does not appear to have been separated, and as two only of the owners of joint property which does not appear to have been partitioned, are not entitled to any certain definite share for which they can sue alone—see Appoovier's case,* 11 Moore's Indian Appeals 75.

The right of action has been misconceived, and the proper persons have not been made parties. The suit should have been brought by all the joint owners to set aside the deed as to the charge created by Oodit, as well as to the charge created by Jeetun; and the suit should have been brought by all the members of the joint family, and not by two of them alone who, before partition, have no definite share. If the deed were to be set aside, it would be impossible by the decree to define the share which the plaintiffs are entitled to recover, so long as the property is joint. If the other members of the joint family refused to join as plaintiffs, they might have been made defendants in the suit. A case like this, in which the plaintiffs sue to set aside a deed executed by their own father and uncle upwards of 20 years ago, upon the ground that the conveyance was void under the Mitakshara Law, is one, to say the least of it, strictissimi juris.

* 8 W. R. 1.

It appears to me, for the reasons above stated, that the decision of the Principal Sudder Ameen ought to be reversed, and the plaintiff's suit dismissed with costs in the Lower Court, and the costs of this appeal.

[The Chief Justice then entered into the facts and merits of the other analogous appeals, in which also the decision of the Lower Court was reversed, and the plaintiff's suit dismissed with costs.]

Loch, J.—I concur in thinking that the suit has not been properly brought, and should be dismissed.

The 25th November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Misdescription of land—Identification.

Case No. 1787 of 1869.

Special Appeal from a decision passed by the Officiating Judge of West Burdwan, dated the 17th June 1869, affirming a decision of the Moonsiff of Radhanuggur, dated the 3rd March 1869:

Ram Gopal Barick (Plaintiff), *Appellant,*

versus

Shib Pershad Sircar and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Where lands claimed under a certificate of sale as being in one village are found to be in another, it is open to the plaintiff to show that there has been a misdescription, and that, although the name of the former was used, the intention was to convey the lands he claimed situated in the latter.

Jackson, J.—THE plaintiff in this case sued to recover possession of 3 beegahs of land which, according to the plaint originally filed, were situated in Mancha. These lands, the plaintiff alleged, he had acquired by successive conveyances, the first of which was a bynamah or certificate of sale granted by a Court of justice on a sale in execution of a decree, and that was granted to one Khettronath.

It afterwards appeared that the three beegahs in question belonged to Dehee Lapore, and the plaintiff seems to have halted between two contentions—the one that Lapore and Mancha were in fact the same—and the other, that there had been a misdescription, and that the lands really belonged to Lapore; and he, therefore, following the latter contention, filed a petition asking leave of the Court to amend his plaint by describing the lands as being situated in Lapore, and the Court complied with this prayer.

Several issues were framed, and the Moonsiff, after going into the evidence and discussing these issues, dismissed the suit. On appeal to the Judge, he determined the case upon one point only, that is to say, he observed: "I cannot possibly give the plaintiff a decree for land in Dehee Lapore on the strength of a bynamah for land in Mancha, it being clear that these villages are separate." He goes on to say: "It is possible that the lands claimed by the plaintiff and those claimed by the defendant are identical, and formed the holding of Dinonath Nundee. But it is not for me now to strive to clear up the confusion which arose in the Court which gave Khettronath a bynamah for Dinonath's land in Mancha, when it may have meant to give it for land in Dehee Lapore," and therefore he dismissed the appeal.

It seems to me clear, upon these words, that the Judge was of opinion that the lands, being described as lands in Mancha, formed an insurmountable difficulty in the way of the plaintiff, and that the Court was incompetent to give a decree for lands which turned out to be in Lapore. In this view I think the Judge was mistaken. I think it was open to the plaintiff to show that there had been a misdescription, and that, although the name of Mancha was used, the intention was to convey the lands he claimed situated in Lapore. There are various ways in which this might have been shown; and it seems that the plaintiff did give evidence by showing what the boundaries were, and that his vendor had been in possession of the lands which he claimed.

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I, therefore, think that this case ought to go back to the Zillah Judge, and that he be instructed that it was competent to him to consider, notwithstanding the description of the land as situate in Mancha, whether the conveyance really referred to lands claimed by the plaintiff as being situated in Lapore, and further, advertence being had to the other issues which were framed and tried in the Court of first instance, whether the plaintiff had made out his title to those lands.

Markby, J.—I am of the same opinion.

The 27th November 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan Law—Pre-emption (Shuffa)—Tullub-i-ish'had—Under-valuation—Stamps.

Cases Nos. 1440 and 1441 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 9th April 1869, reversing a decision of the Moonsiff of Sewan, dated the 9th November 1868.

Wahed Ali Khan (Plaintiff), *Appellant,*

versus

Hunooman Pershad (Defendant), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Respondent.

Where what a plaintiff substantially asked for was to have his right of pre-emption declared on the ground that he was a partner in the thing sold, a mistake in the wording of his claim, *viz.*, the use of the word "*shuffee khulleet*" (which means a partner in the immunities and appendages of the land) instead of *shuffee shureek* was held not to prejudice his status in the suit.

HELD (by Kemp, J.) that a partner's right of *shuffee* or pre-emption is not extinguished until a formal division has taken place defining each co-proprietor's share.

HELD that the ceremony of *tullub-i-sh'had*, when it cannot be performed by a pre-emptor personally, is valid if done through an agent.

Where a Lower Appellate Court finds that a suit was under-valued in the first Court, it should give the plaintiff the option of supplying the necessary stamps; such an error does not subject the first Court's order to reversal.

Glover, J.—THIS was a suit to declare the plaintiff's right of pre-emption as a Shuffee Khuleet in an 8-annas share of Mouzah Hujoojeepore.

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The Court of first instance gave him a decree. but the Subordinate Judge threw out his claim on three grounds—1st, because the suit was under-valued; 2ndly, because the property had been divided into two separate estates, and plaintiff was, therefore, not a Shuffee Khuleet or partner in the thing sold; and, 3rdly, because the ceremony of tullub-i-ish had had not been properly performed.

In special appeal, exceptions are taken to the Subordinate Judge's finding on all these points. The argument, however, has been chiefly confined to the second, and it will be convenient to take that first in order.

We were a good deal pressed by the special respondent's pleader as to the form in which the plaintiff had brought his suit, and it was argued that his status, according to his own explanation of it, was not that of a Shuffee Khuleet, which meant a partner, not in the thing sold, but in its appendages or rights. If he had any right at all, it was either as Shuffee Shureek, or as Shuffee-jur (neighbour), in neither of which capacities had he come forward.

It appears to me, after going through the record, that what the plaintiff did substantially ask was to have his right of pre-emption declared on the ground that he was a partner in the thing sold. No doubt, there has been some confusion caused by the way in which the Arabic terms have been employed, and strictly speaking, the plaintiff's claim, as I understand it, would be that of a "Shureek," or partner in the thing sold, and not that of a "Khuleet," or partner in its rights only. This mistake in the wording of a claim to pre-emption is not uncommon—indeed the term Shuffee Khuleet is, so far as my experience goes, generally, although wrongly, used to describe one who claims as partner in the thing actually sold.

And that the plaintiff's intention was to claim on this ground is, I think, clear from the issue that was drawn up by the first Court, which was whether there had or had not been a partition of the property into two estates—this being the defence set up by the vendee.

The difficulty on this point has been increased by the first Court's mistake in using the word "Khuleet" instead of "Shureek," but there can be no doubt, I think, that the decision in favor of the plaintiff was come to by the Moonsiff on the ground that the defendant had failed to prove that the property had been divided. The words "pre-emptor by contiguity" are improperly entered in the translation. There are no such corresponding words in the original, and the whole tenor of the Moonsiff's judgment is against the supposition that he decided on the ground that the plaintiff was a "shuffee-jar."

The objection in special appeal to the Subordinate Judge's finding on this issue is that he has reversed the decision of the Lower Court on what was not evidence.

What the Subordinate Judge has gone upon is the Collectorate record, which proves (and indeed the fact is not denied) that the rent of the property was collected by two parties in separate accounts in shares of 8 annas each. Now, it is argued that this would only prove a division of rents, and would not establish the fact of a mutual partition between the co-sharers.

I do not see how the judgment of the Lower Appellate Court on this point can be said to be wrong in law. It is not necessary, according to Mahomedan Law, that a partition should be made by decree of a Judge. Any mutual separation and partition would do away with the right of pre-emption, and where two parties give separate pottahs, in which their shares are described, and sue and get decrees against ryots for their separated shares of rent, I do not think that the inference is either an illegal or unfair one that the property has been mutually partitioned.

If the separation in this case had been merely one of rents, of course that would have been a very different thing, but each shareholder is described as holding an 8 annas puttee or separate estate, and the plaintiff in his written statement calls his 8 annas his "milkeeut," and the other half the "milkeeut" of the vendor.

I do not see, therefore, how we can, in special appeal, interfere with the finding of the Subordinate Judge on the question of partition. It is a question of fact.

Under ordinary circumstances, the case might stop here, but as the Subordinate Judge has, in my opinion, fallen into errors of law on the other two points involved in this special appeal, it will be as well to point them out to him, even though they will have no effect on the decision of this appeal.

And first, as to the question of under-valuation, the first Court tried the issue and found in favor of the plaintiff; and if the Subordinate Judge thought the Moonsiff wrong, he ought at least to have given the plaintiff the option of supplying the necessary stamps, as the first Court would have done under Section 31 of the Code of Civil Procedure. If there was an error in valuation, it was an error of the first Court, and the plaintiff should not have been made to suffer.

But in any case the question was not one that should have subjected the first Court's order to reversal, even if that order were wrong. Section 350 of the Code of Civil Procedure lays it down very clearly that no decision of a Lower Court shall be reversed on appeal on any point not affecting the merits of the case or the jurisdiction of the Court, and in this case the error in valuation did not affect the jurisdiction.

Then, as to the non-performance of the tullub-i-ish'had, the Subordinate Judge thinks that this ceremony can only be performed by the pre-emptor in person and cannot be done through an agent. We have not been referred to any authority for this dictum, and the law is otherwise enunciated in Mahomedan law-books.

In Baillie's Mahomedan Law, page 483, I find that the personal performance of the tullub-i-ish'had by the pre-emptor depends on his ability to perform it, and that this ceremony is valid if done by means of a letter or messenger.

It may very well be that a pre-emptor is incapacitated by distance or illness from himself attending on the seller and declaring his right and intention to purchase.

In Macnaghten's Mahomedan Law, page 182, a similar rule is laid down, *viz.*, that a pre-emptor may depute an agent if he is at a distance, and cannot afford personal attendance.

I think that the special appeal should be dismissed with costs.

Kemp, J.—I concur with Mr. Justice Glover that, looking to the substance of the plaint, the pleadings in the suit, and the issue tried, the plaintiff, special appellant, claimed his right of *shuffa* as a partner in the property (in this case land) sold, and not as a partner in the immunities and appendages of the land, such as the right to water and to roads.—Hedaya, Volume III., page 562.

But I cannot concur with my learned colleague in finding that any mutual separation or partition has been made between the parties, whereby the plaintiff's right of pre-emption is lost to him.

Suits claiming rights of *shuffa* must be tried strictly according to the Mahomedan Law, the right being a creation of that law.

Now, the right of *shuffa* or pre-emption "relates to a thing held in joint property, and which has not been divided off."—Hedaya, Volume III., page 563. "When there has been a division, and the boundary of each partner is particularly discriminated, the right of a *shuffa* can no longer exist."—Hedaya, Volume III., page idem.

In this case, there has been no such division "discriminating the boundary of each partner." The plaintiff and his co-putteedars have for tehsil purposes collected their rents and taken kubooleuts from their tenants in proportion to their respective interests in the whole estate, but there has been no division, no separate and distinct record of shares. The plaint states that the *milkeeut* or property of the plaintiff is represented by an 8 annas puttee, but there is no allegation of a formal separation of shares, and it was on this very question of division or no division that the parties went to trial.

The intention of the Mahomedan Law in granting the right of *shuffa* "to a partner is to prevent the inconvenience arising from a division; for if a party were not to get that share which is the subject of the claim of *shuffa*, a new purchaser might insist upon a division, and thereby occasion to him a great deal of unnecessary vexation."—Hedaya, Volume III., page 563.

It is well known that both in the Behar Provinces from which this suit comes as also in Bengal, joint proprietors collect according to their shares in the whole estate, although no formal division has taken place. Pottahs and kubooleuts are interchanged between the co-proprietors and their tenants according to the respective shares of the co-proprietors; but until formal division has taken place defining each co-proprietor's share, the right of *shuffa* is not extinguished.

In this case, the defendants, special respondents, have failed to prove any such formal division, and I must hold that, according to the Mahomedan Law which governs this case, the plaintiff's right of *shuffa* exists.

I would reverse the decision of the Subordinate Judge, and restore that of the Moonsiff

I concur in the view taken by Mr. Justice Glover on the question of under-valuation, as also on the question that the *tullub-i-ishhad* may be made by an agent, and that it is not under the Mahomedan Law absolutely necessary that this should be done by the pre-emptor in person. Mr. Justice Glover has quoted the authorities in support of this proposition.

This special appeal must be decreed with costs payable by the special respondent.

The 2nd December 1869.

Present :

The Hon'ble H. V. Bayley and J. P. Norman, *Judges.*

Changing the frame of a suit—Pleadings—Issues.

Case No. 26 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Rungpore, dated the 10th January 1868.

Ishan Chunder Chowdhry and others (Plaintiffs), *Appellants,*

versus

Sharoda Goopteah and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Unnoda Pershad Banerjee, Kishen Dyal Roy,* and *Kalee Prosunno Dutt* for Appellants.

Mr. R. E. Twidale and *Baboos Onookool Chunder Mookerjee, Grija Sunkur Mojoomdar, Bungshee Dhur Sein,* and *Bama Churn Banerjee* for Respondents.

N died leaving a widow (*K*) to whom he gave a power to adopt sons. *K* adopted *J C G* who after taking possession of the property demised, leaving a widow and daughter, both of whom also died. Thereupon *K* adopted another son who also died, leaving a widow. Subsequently *K* died. A suit was then brought by one *J C R*, claiming the property as heir of *N*, and denying the genuineness of the power of adoption.

HELD that, as plaintiff failed to make out title as heir of N, he could not be allowed to proceed with the suit as if he had claimed as heir of *J C G*.

Norman, J.—THIS is a suit. by the plaintiff, claiming certain lands in Rungpore, as heir of Nubo Coomar Chowdhry.

Nubo Coomar Chowdhry died in 1210, leaving a widow Kashessuree Chowdhrain, to whom he gave by an *onoomottee-puttro* a power to adopt several sons in succession. Kashessuree, in the year 1212 or thereabouts, adopted Issur Chunder Goopto. Issur Chunder took possession of the property as heir of Nubo Coomar, married, and died in 1831, being then about 30 years of age, leaving a widow named Ruttun Monee and a daughter named Nubo Doorga. Issur Chunder gave his widow Ruttun Monee power to adopt a son, under which she either adopted, or at least proceeded towards the adoption of Prosunno Coomar. It is doubtful on the evidence whether the adoption of Prosunno Coomar was completed or not. Be that as it may, Ruttun Monee, Prosunno Coomar, and Nubo Doorga all died before the year 1251.

In 1251, Kashessuree, the widow of Nubo Coomar, adopted Kristo Coomar. Kristo Coomar died in 1266, leaving a widow, the defendant Sharoda Monee.

In 1273, Kashessuree died, on which the present suit was brought by the plaintiff Ishan Chunder Roy, claiming the property as heir of Nubo Coomar, and denying the genuineness of the *onoomottee-puttro*, which is now admitted by the Advocate-General as his Counsel to have been given by Nubo Coomar to Kashessuree.

It was contended before the Subordinate Judge that on the facts which were proved as above stated, Kashessuree, upon the death of the other heirs of Issur Chunder Goopto, took as his mother and heiress an interest for her life only, and that on the death of Kashessuree in 1273, the plaintiff, as the nearest collateral heir, became entitled. The Subordinate Judge held that as the plaintiff did not in this suit claim as heir of Issur Chunder Goopto, but chose to assert that this adoption of Issur Chunder Goopto was invalid, and claimed as heir of Nubo Coomar, his suit must be dismissed.

The Advocate-General contended that the estate having descended to Issur Chunder Goopto and having become vested in him as full owner according to Hindoo Law, having subsequently descended to his heirs, his wife, daughter, or adopted son, Kashessuree could not any longer exercise the power of adoption conferred on her by her husband. He cited on this point the case of Bhoobun Moye Debia *versus* Ram Kishore Acharjee, 10 Moore's Indian Appeals, p. 309.*

* 3 W. R. 15.

Secondly, he contended that even if she could adopt after the property had come to her hands upon the death of the last survivor of the heirs of Issur Chunder Goopto, the child adopted as son to her husband must succeed, not as heir of her husband Nubo Coomar, but as the brother and collateral heir of Issur Chunder Goopto, the first adopted son—the person last shown to have been in possession as full owner. In support of this position, he cited two cases, one from the first Select Reports, Sudder Dewanny Adawlut, page 209, and another decided by Loch and Macpherson, JJ., III. Wyman, 255. He contended that Kristo Coomar, the second adopted son, could come in only after the decease of his adopting mother Kashessuree, and that Kristo Coomar having died in the lifetime of Kashessuree leaving a widow only, the estate on the death of Kashessuree descended to the plaintiff, and not to Sharoda Monee, the widow of Kristo Coomar.

But Baboo Onookool Chunder Mookerjee for the respondent showed that if the adoption of Issur Chunder Goopto was valid, the plaintiff must make title as heir of Issur Chunder.

Now, from the admitted pedigree, it appears that the plaintiff stands to Issur Chunder Goopto in the relation of paternal grandfather's brother's great-grandson, and according to Hindoo Law the succession of such a person is postponed to that of a number of relations on the mother's side; such, for instance, as the maternal grandfather, the maternal uncle, the maternal uncle's son, and the maternal uncle's grandson. Now, it must be admitted that in claiming as heir of Nubo Coomar, the plaintiff sought to make a title which would have excluded the relations of the adopting mother of Issur Chunder.

To allow the plaintiff on his failure to make title as heir of Nubo Coomar, to proceed with the suit as if he had sued as heir of Issur Chunder, would have been to change the frame of the suit, and allow the plaintiff to make an entirely new case. It would have necessitated fresh inquiries, *viz.*, inquiries as to the relations of Issur Chunder on the mother's side, instead of enquiries as to the maternal relations of Nubo Coomar, the bringing in of fresh pedigrees, and the trial of fresh issues upon new questions.

We, therefore, think that the Subordinate Judge was right in dismissing the suit, because the plaintiff failed to prove the case upon which he came into Court, and on that ground we dismiss the appeal with costs.

The 2nd December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Notice under Section 213, Civil Procedure Code —Proclamation under Section 249—Sale—Irregularity.

Case No. 334 of 1869.

Miscellaneous Regular Appeal from an order passed by the Judge of Patna, dated the 8th May 1869.

Laek Ram (Judgment-debtor), *Appellant,*

versus

Mohesh Doss (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale and *Moonshee Mahomed Yusuff* for Respondent.

The intention of Section 213, Act VIII. of 1859, is that the description in a notice of attachment should be sufficient to identify the property; and in the case of an estate paying revenue to Government, that there should be a specification of the revenue.

The object of the proclamation under Section 249 is to give notice to intending purchasers, not to the judgment-debtor.

An irregularity in a sale does not necessarily vitiate the sale unless the judgment-debtor has been injured by such irregularity.

Kemp, J.—THIS is a regular appeal on behalf of the judgment-debtor. He takes the same two objections in this Court which he took before the Judge; *first*, that under Section 213 of Act VIII. of 1859, the notice of attachment should have issued according to the register of the Patna District and not according to that of the Shahabad District; and, *second;* that no proclamation of sale was issued on the spot under Section 249 of Act VIII. of 1859.

With reference to the first point, the intention of Section 213 clearly is that the description of the property should be such as may be sufficient to identify it, and where the property is an estate paying revenue to Government, a specification of

the revenue of such estate is required. Now, in this case, it cannot be said that the fact of the estate sold having been very recently transferred from the Collectorate of Shahabad to that of Patna, in any way destroyed the identity of the estate sold. The name remained the same, the jumma remained the same, and the revenue of the estate payable to the Government was specified. We overrule the first objection which we look upon as nothing more or less than a quibble.

On the second objection, there can be no doubt that the object of the proclamation under Section 249 of the Code is to give notice to intending purchasers and not for the information of the judgment-debtor.

We are also of opinion that supposing any irregularity in the sale to have been established, it would not necessarily vitiate the sale unless the judgment-debtor could prove to the satisfaction of the Court that he had been injured by such irregularity.

It is said that the Judge refused to go into the question of the irregularity alleged by the judgment-debtor, and that he has decided this case on inferences to be drawn from the conduct and petitions of the judgment-debtor. We admit, as argued by Mr. Gregory, that it is very possible that the judgment-debtor may have made statements in petitions which may not be compatible with the facts of an irregularity having taken place in publishing the sale-proclamation, and yet that the judgment-debtor may not have been aware of these irregularities when he made these inconsistent statements in his petition; but in this case we think that looking to the conduct of the judgment-debtor as shown in his petitions on two occasions—namely, in the petition of the 20th March which was ten days before the sale, and that on the day of the sale, namely, on the 31st March—that he was fully aware that the sale-proceedings were regular, and that they could not be impeached. He threw himself in his first petition on the mercy of the Court, and asked for a postponement of the sale and for the appointment of a surburakar under Section 243 of the Code, and he sought to enlist the sympathies of the Court by stating that there were a great many parties desirous and ready to purchase the property which was a valuable one; that the mohajuns had leagued together against him and were demanding from him exorbitant rates of interest; and that he had on that account great difficulties in raising money on the estate. In the second petition, he did not object to the sale-proceeding, but asked that the two smaller properties might be sold first in order to save larger one, stating that most probably the amount due under the decree would be recovered from the sale-proceeds of the smaller properties, and this prayer of his was acceded to. After the sale, he petitioned the Judge raising the question of irregularity not in very distinct terms, but substantially he did raise that question. On that petition, notice was given to the decree-holder, and the case was not decided until the 8th of April, but at the time of presenting the petition, or within the period which elapsed from the date of the petition to the date of disposal of the case, he tendered no evidence in support of his allegation. Looking, therefore, to his conduct throughout the case, we do not think that he has established to our satisfaction that he has been injured in any way by the sale in question, and if any irregularities had really existed, he would have taken measures to prove such irregularities before the Judge.

We dismiss the appeal with costs.

The 3rd December 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Jurisdiction—Inoperative decree.

Case No. 938 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 30th January 1869, affirming a decision of the Deputy Collector of that District, dated the 31st August 1868.

Mussamut Phool Koer (Plaintiff), *Appellant,*

versus

Sheoburun Singh and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboos Nil Madhub Sein and *Bhyrub Chunder Banerjee* for Respondents.

Where a Court of justice has jurisdiction over the subject-matter of a suit, its judgment or decree, even though irregular or illegal, cannot be said to be *null* and *void.*

Norman, J.—THIS is a suit for rent. The original plaintiff, Baboo Luchmun Pershad, suing, as he says in his plaint, through Baboo Ram Sahoy Lall, karpurdauz, obtained a decree on the 16th of June 1868 in the Deputy Collector's Court for the sum of Rupees 385-13 annas, with interest.

On the same day, the defendant made an application which was in form an application for a review of that decision. It purported to be an application under Section 376 of Act VIII. of 1859. The Deputy Collector, apparently after hearing the evidence of the plaintiff, remarked that the suit had been instituted by the plaintiff's karpurdauz. He thought further inquiry was necessary and re-opened the case. On the further hearing, which took place on the 31st of August, he examined the plaintiff himself and his books, and after a full inquiry decided that the plaintiff's case was a false one, and dismissed the suit.

The plaintiff appealed to the Judge of Bhaugulpore on the merits. The Judge, after going through the evidence, and remarking that the books produced by the plaintiff in the Lower Court had been returned to him, and that he had not produced them in his (the Judge's) Court, found that the plaintiff's claim was entirely false, and dismissed the appeal with costs.

On special appeal by the plaintiff to this Court, it is objected that the only case in which a Deputy Collector has power to order a re-hearing in a case not passed *ex parte* is under the 154th Section of Act X. of 1859, and that the Deputy Collector was not authorized, under the provisions of that Section, to admit a review of his judgment, the case being one in which an appeal would lie. It was contended that the judgment of the Judge affirming the decision of the Deputy Collector could not be supported; that all that the Judge could do, on appeal, was to set aside the order of the Deputy Collector made on the second hearing, and upon that the Deputy Collector's original decision would stand. In support of this argument, the appellant's pleader cited a case reported in Volume I., Weekly Reporter, p. 73.

We are of opinion that the appeal must be dismissed.

In the first place, it is by no means clear to us that on the 16th of June, when the Deputy Collector made his order for re-opening the case, it had been fully and finally decided and the judgment completed so as to preclude the collector from re-opening and making a further enquiry. The record has not been sent up, and therefore we are unable to pronounce a decision on that point with any confidence. But we wish to guard ourselves from being understood to suppose that it is not competent to a Deputy Collector, or other judicial officer, before the judgment is signed, and the decree prepared and signed—before, in fact, he has completed his final judgment in the case—to re-open and complete the hearing on any point which may have been overlooked. But we do not rest our decision on that point.

The Deputy Collector had jurisdiction over the subject-matter of the suit, and where a Court of justice had jurisdiction over the subject-matter of the suit but proceeds erroneously, it cannot be said that a judgment or decree of such a Court is *null* and *void*. Irregular it may be—illegal it may be—but while it stands, the judgment of a Court having jurisdiction over the subject-matter of the cause is never wholly inoperative. Its decision must be obeyed. It is a justification to any officer who acts under it; and any party who seeks to be free from its operation must cause it to be avoided either by an appeal, or by application to the Court which pronounced the judgment to vacate it. *It is not a nullity.* The rule of law on the subject is clearly stated in the case of the Marshalsea, 10 Coke's Reports, 76 A, and in Gold *versus* Strode, Carthew's Reports, 148, and the principle is recognized and embodied in the rules laid down in Section 58 of Act X., and Section 13 of Act VI. of 1862 (B. C.).

It follows, then that there being a decree of the Deputy Collector in a suit for rent of an appealable amount, an appeal lay to the Judge to get rid of the illegal or irregular judgment.

Suppose the plaintiff in his appeal to the Judge had objected that the decision of the Deputy Collector on the merits was one passed without jurisdiction, because the Deputy Collector had no authority to admit a review, it would at any rate have been brought to the notice of the Judge that there were facts in the case essential to a right determination of the suit on the merits, and that the evidence on the record, legally taken, was not sufficient to enable the Appel-

late Court to determine the question of fact on the merits. The Appellate Court would, therefore, under Section 354, Act VIII. of 1859, have probably framed an issue such as would be necessary to enable it to determine such question of fact, and might have referred that issue for trial to the Lower Court in order to enable it to determine the matter in dispute between the parties in the cause according to right and justice.

The plaintiff not having taken that objection, the Judge proceeded and tried the case on the merits, upon evidence which, if not legally taken—because taken before the Deputy Collector on an application in the nature of a review which, if the plaintiff's view of the facts be correct, he had no jurisdiction to admit—was, at any rate, not objected to by either party.

The result has been that, in determining the cause on the evidence so taken, there may have been, and in fact was, some error; but that error is not one which affected the merits of the case, or the jurisdiction of the Judge to try and decide the case between these parties on appeal upon the merits. Under Section 350, Act VIII. of 1859, we are therefore precluded from reversing or modifying the order of the Judge in consequence of what, in our opinion, is at best a mere technical objection, and we, therefore, dismiss this appeal with costs.

The 4th December 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Attachment—Alienation—Sections 239 and 240, Act VIII., 1859.

Case No. 1209 of 1869.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 18th February 1869, modifying a decision of the Subordinate Judge of that District, dated the 23rd July 1868.

Rutnessur Singh (Plaintiff), *Appellant,*

versus

Ram Tanoo Ghose and another (Defendants), *Respondents.*

Baboo Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboos Gopal Lall Mitter and *Issur Chunder Chuckerbutty* for Respondents.

A decree-holder (*W*) obtained an order for the attachment of an estate belonging to his judgment-debtor (*A*); but the attachment was not made known in the manner required by Section 239, Act VIII. of 1859. Three days before the day advertized for sale, the judgment-debtor put in a petition reciting that the decree-holder had agreed to give him time on condition that the attachment would remain good, and agreeing not to alienate the property till the decree was satisfied. Shortly after this, A mortgaged a village in the estate to *R*.

HELD that there was nothing in the order of attachment to prevent *R* from acquiring a valid title under his mortgage, and that *A's* petition did not constitute a charge on the property.

Norman, J.—THE facts of this case are very simple. Messrs. Watson and Company, under a decree against one Amanoollah Mollah, obtained an order for the attachment of the estate belonging to Amanoollah Mollah, *viz.*, Pergunnah Kalligram Kallisuffa. The prohibitory order was not served on Amanoollah, nor was notice of the attachment fixed in the Revenue Court of the district or in any conspicuous part of the estate. The attachment was, therefore, an attachment not made known in the manner required by Section 239 of Act VIII. of 1859.

On the 24th of November 1864, the property was advertized for sale. On the 20th of November, three days before the day advertized for the sale of the property, Amanoollah put in a petition reciting that the decree-holder had agreed to give him time on the condition that the attachment would remain good. The petition goes on in these terms: "I will not in any way alienate the attached property until the whole of the decree is satisfied," &c. The petitioner then states that "the decree-holder had consented to all the above terms." On the 26th of the same month, Amanoollah mortgaged by a deed of kut-kobalah a certain village of the said pergunnah to the respondent in this case, Ram Tanoo Ghose, for a sum of 700 rupees. Subsequently to the date of that mortgage, Messrs. Watson and Company from time to time allowed the sale to be postponed, and ultimately sold their decree to one Luchmun Chunder Ghose. The execution-case was then struck off the file. On the 18th of February 1866, fresh proceedings in execution were taken by Luchmun Chunder Ghose, the assignee of Messrs. Watson and Company. The property was again attached and ultimately

sold to the present appellant. Ram Tanoo having taken steps to foreclose the mortgage, the present appellants, to prevent the foreclosure, paid into Court the amount of the mortgage, and now sue to recover back that amount with interest from him—and the question in the present special appeal is whether they were entitled to recover back that amount.

It appears to us that the position of the parties when Ram Tanoo Ghose acquired his title as mortgagee in November 1864 was simply this. Amanoollah was the full owner of the property, and consequently was capable of conferring a title to the property on Ram Tanoo Ghose as mortgagee. A written order for the attachment of the property had been issued. But under Section 240, Act VIII. of 1859, it is only after the written order is duly intimated and made known in the manner provided by that Act that a private alienation of the property is null and void. There was nothing in the order for attachment, as it existed in December 1864, to prevent Ram Tanoo Ghose from acquiring a valid title under his mortgage. An attaching creditor has full power to protect his own interests by reviving the attachment in the manner prescribed by the Act. If he fails to notify the attachment, it is his own fault. But it is contended by the appellants that the petition of 21st November constituted a charge on the property. It appears to us that it is a complete mistake to suppose that it is anything of the sort. The petition does not create or affect to create any new rights as between Messrs. Watson and Amanoollah Mollah. It merely recites and states what the parties believed and assumed to be their legal rights under the existing circumstances. If it had been intended as a mortgage or charge, it would probably have been stamped and registered as such. We think it would be most mischievous to give to a petition of this sort an effect which it was never intended by the parties to have. It would be most prejudicial to the rights of third parties if we were to hold that rights and obligations which are clearly defined by such an Act as Act VIII. can be extended by loose expressions contained in some petition put into Court in the course of the proceedings.

A case has been cited from Volume XII. of the Weekly Reporter, page 362, in which an analogous petition was treated as creating a lien; and if, on the face of the petition, it appeared that the parties intended to create a new right, and that it was the intention of the debtor to pledge, and he did in terms pledge, property not comprised in the attaching order in respect of the newly created right, it may well be that the petition may have had some such effect. We understand from the statement of the pleader that such was the effect of the petition before Justices Glover and Dwarkanath Mitter. There are other facts necessary which it would be necessary to consider before we could give plaintiff a decree; *first*, if the petition created any lien, whether the present plaintiff is in a position to set it up; *secondly*, whether the payment was not voluntary. We should have to consider what was the effect of striking off the case, and whether any sale could have taken place under the attachment as it subsisted in December 1864. We do not consider it necessary to go into these points. It is plain that the plaintiff had no right or title whatever as against the mortgage of Ram Tanoo Ghose, and that is sufficient for the dismissal of the special appeal. We dismiss the appeal with costs.

The 4th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges,*

Sale—Irregularity—Section 256, Act VIII., 1859.

Case No. 258 of 1869.

Miscellaneous Regular Appeal from an order passed by the Officiating Subordinate Judge of Tirhoot, dated the 20th March 1869.

Alexander Shaw Urquhart (Judgment-debtor), *Appellant,*

versus

Nundeeput Mahaputtur (Decree-holder), *Respondent.*

Messrs. H. Cowell and *A. F. Lingham* for Appellant.

Messrs. G. C. Paul and *R. E. Twidale* for Respondent.

Where certain properties (factories and lands) were numbered separately in the lotbundee of sale, an irregularity was held to have been committed by their being sold in a lump.

HELD (Glover, J., *dissentient*) that such irregularity had caused damage to the judgment-debtor.

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Kemp, J.—THIS is a regular appeal on the part of the judgment-debtor. Our decision in this case will turn upon Section 256 of Act VIII. of 1859. That Section appears to me to have been enacted to protect judgment-debtors from irregularities in the publishing or conducting of sales which may have been productive of substantial injury to them. We have, therefore, to decide in this case, *first*, whether there has been any irregularity in publishing or conducting the sale; and, *secondly*, whether the judgment-debtor has proved to our satisfaction that he has sustained substantial injury by reason of such irregularities. In the Court below, it appears that the parties were also at issue on the question as to whether what passed under the sale was the whole of the concern of Poopree or merely the subordinate Factory of Poopree, but that contention has been abandoned in this Court by the learned Counsel for the respondent, who admits, and very properly so, that all that passed under the sale was what was attached and sold. Now, what was attached is very clear. Eleven properties were attached; they are numbered separately. Some of the properties are described "Muttaluke," or appertaining to the Factory of Poopree, and some are independent of that factory. There has, in my opinion, been a material irregularity in conducting this sale. In the lotbundee of sale the properties are numbered separately, and consequently they ought to have been sold separately. This point has been ruled in a case published in the 12th Volume of the Weekly Reporter, page 282, decided by Justices Glover and Dwarkanath Mitter. In that case, three estates were advertised to be sold, and those estates were not sold in consecutive order, but without the consent of the judgment-debtor they were sold out of the order as per lotbundee. The learned Judges in that case held that that was a substantial irregularity in the conduct of the sale.

The next question is whether that irregularity has in this case been productive of substantial injury to the judgment-debtor, for under Section 256 of Act VIII. an irregularity in conducting the sale will not vitiate such sale unless the judgment-debtor can prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

In deciding the question whether the judgment-debtor has, in this case, been substantially injured by this irregularity, it is but fair to take into consideration that the opposite party who has purchased this property is the decree-holder. If the decree-holder has purchased the property at too low a price, as strenuously contended by the judgment-debtor, and the property if sold in separate lots instead of in a lump lot would have commanded a much higher price, the decree-holder, and the decree-holder alone, will be benefited by a re-sale of the property. In the case of a re-sale the decree-holder will, under the rules of our Courts, be at liberty to bid himself. He can bid up to the amount that he had already purchased the estate at, and if any offer is made beyond Rupees 37,000, his decree, which is for more than that sum, will be nearer complete satisfaction than it is at present, so that on the score of any injury accruing to the decree-holder by a re-sale of the property, there can be, I think, no question. But then it has been said that if the properties had not been sold in a lump, the lands being required for indigo purposes and the buildings being simply for the purpose of manufacturing indigo, that without the lands attached thereto no person would have purchased the lot which comprised the buildings separately, or, in other words, no person would purchase the factory unless he also purchased the land appertaining thereto. There is, I admit, some force in the argument, but I observe that amongst the eleven lots advertised for sale, all the different parcels do not appertain to the Factory of Poopree. There is a separate factory with its separate lands, and it is impossible to say that if the two factories had been sold separately, it may not have been that purchasers would have been found for each lot.

In this case, it appears to me that the formalities which the law requires to insure a fair sale as far as possible, have not been gone through, and I think it but just and equitable that a re-sale should take place. I, therefore, reverse the decision of the Subordinate Judge, and direct a re-sale strictly according to the terms of the lotbundee, unless the judgment-debtor consents to have some or the whole of the lots sold in a lump, or consents to have one lot sold before the other. Of course, if the decree be not satisfied without exhausting the whole list of properties, the Subordinate Judge will be at liberty to sell consecutively the whole of the properties attached.

The costs of this appeal will be paid by the respondents.

Glover, J.—I concur in what has fallen from Mr. Justice Kemp with regard to the property sold, and I also concur in thinking that the selling of this property in a lump, instead of selling it in separate lots as advertised for sale in the notification, was an irregularity in the conduct of the sale; but I am not prepared to assent to that part of his judgment which makes the irregularity one which has been productive of consequent damage to the judgment-debtor. It appears to me that a property of this description, consisting of one principal and several outlying factories, would be under ordinary circumstances more valuable, and fetch a better price when sold in a lump than it would have fetched had it been split up into a number of separate lots. An Indigo Planter, for instance, wishing to invest his money in a factory and attending such a sale, would certainly so far as my experience goes, hesitate to bid if he had to obtain his property bit by bit by bidding for and purchasing 11 separate lots of land, inasmuch as he could not be certain of being able to secure the whole at a price which he might consider advantageous, and without buying the whole it would be useless for him to buy any. If, on the other hand, the parties wishing to purchase were some of the neighbouring zemindars or wealthy ryots, it is quite clear that their bids would only be given for those lots which included the mokurruree and jote lands, and that they would not have bid for those lots which contained the houses and other factory buildings, as these would have been useless to them; and so if, as it has been argued, the land-lots would have sold better if the zemindars and wealthy ryots of the neighbourhood had been induced to compete for them, it is clear that the houses and buildings either would not have sold at all, or would have been sold for a mere nominal sum, and I do not, therefore, see how it can be said that from the fact of these eleven lots having been sold as one property, the judgment-debtor has been in any way damaged. On the contrary, it seems to me that this was in all probability the most advantageous way in which a sale could be effected, and that the sum which has been realized by it was all that could reasonably be expected for such a property at an auction-sale. There is only one witness who has given any direct evidence on the point of valuation, and he has not put that value above Rupees 50,000. Now, as the property was actually sold for Rupees 37,000, it appears to me, considering that the sale was an auction-sale, and the purchaser got no documentary title, and might very possibly with his purchase be saddled with a subsequent law-suit, that it cannot be said that that property was sold at such an inadequate price as the learned Counsel for the appellant has endeavoured to make out.

It appears to me, therefore, that there has been no sufficient reason shown for interfering with the judgment of the Lower Court, and that this appeal should be dismissed with costs.

The 11th December 1869.

Present:

The Hon'ble Dwarkanath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

Hindoo or Jain Law — Support of adult son.

Case No. 1923 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Moorshedabad, dated the 31st May 1869, affirming a decision of the Moonsiff of that District, dated the 22nd February 1869.

Prem Chand Pepara (Defendant), *Appellant,*

versus

Hoolas Chand Pepara (Plaintiff), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A father is not obliged by Hindoo or Jain Law, to support a grown-up son even if the son is laboring under a temporary disorder.

Mitter, J.—We are of opinion that the decisions of the Lower Courts ought to be reversed. We find no authority either in the Hindoo Law or in the Jain shasters to support the position that a father is obliged to support a grown-up son.

It is alleged that the plaintiff was laboring under illness, and he is, therefore, entitled in justice and in equity to receive maintenance from his father, notwithstanding that he has arrived at majority. But illness was never made the ground of the plaintiff's action, and even if it had been, we do not see any reason why a temporary disorder

of the stomach should render it obligatory on the defendant to support the plaintiff, when no such obligation exists in law.

The decisions of both the Courts below are therefore reversed, but under the circumstances of this case, without costs either in the Lower Courts or in this Court.

The 29th November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Decree calling for accounts—Execution.

Case No. 373 of 1869.

Miscellaneous Appeal from an order passed by the Second Subordinate Judge of Hooghly, dated the 15th January 1869.

Bidhoo Mookhee Dossee ((Judgment-debtor), *Appellant,*

versus

Rajah Beejoy Keshul Roy (Decree-holder), *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Mohendro Lall Seal for Respondent.

Where a decree ordered a defendant to give in certain accounts within a specified period, and the defendant survived the period without any proceeding being ever taken against him; it was held that the decree was binding upon him personally, and could not, after his death, be executed against his widow and representative.

Jackson, J.—It appears to me that the order of the Lower Court is clearly erroneous.

Baboo Mohendro Lall Seal seems to confound two very different things. The representative of a deceased defendant, a party to a suit, is no doubt answerable to the extent of any assets which has come into his or her hands, for any claim which may have been substantiated against the estate of the deceased. But to inherit the property of a deceased person is one thing, and to inherit his capacity to give an account is another thing. Without, therefore, discussing any question as to the liability of the estate of Pran Kishen Mitter in the hands of his widow, for any debt which may turn out to be due to the estate of the plaintiff, it seems to me quite clear that the decree made in the suit in which Pran Kishen Mitter was defendant was a decree personal to him, and capable of execution, if at all, against him. It is not very obvious in what manner execution could have been had even against Pran Kishen himself, because the decree contains no alternative in the event of Pran Kishen refusing to give the accounts ordered within three months. At any rate, it is clear that Pran Kishen Mitter survived the period during which the account was to have been given, that no proceeding was taken against him either within those three months or afterwards during his lifetime, and that the decree thus made was binding upon him personally, and was not a decree fit to be executed against his widow and representative. I think, therefore, that the order of the Court below directing his widow to furnish the accounts which her husband could have furnished, and was ordered to furnish, was improper, and ought to be set aside with costs.

Markby, J.—I am of the same opinion.

The 7th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Tacit acquiescence by landlord — Tenure for building — Transferable tenures.

Case No. 4 of 1869.

*Appeal under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against the judgment of the Hon'ble F. B. Kemp and F. A. Glover, two of the Judges of the said Court, dated the 13th April 1869, in Special Appeal No. 2862 of 1868, from a decree of the Judge of Hooghly, dated the 26th June 1868, the said Judges having been divided in opinion.**

Banee Madhub Banerjee (Plaintiff), *Appellant,*

versus

Joy Kishen Mookerjee and others (Defendants), *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboos Mohendro Lall Shome and *Pearee Mohun Mookerjee* for Respondents.

Where a landlord stands by and allows his tenants without any objection whatever to erect pucka buildings upon his land notwithstanding a stipulation in the kubooleut restraining them from so doing, he is precluded by his conduct from turning them out of possession.

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* 11 W. R. 354.

According to the custom of the Hooghly district, a tenure granted for building purposes is transferable.

Peacock, C. J.—THE Judge has found that the defendants' witnesses proved that tenures such as those held by defendants' vendors are transferable by the custom of the country, and he says further that "these tenures appear to have been created for building purposes." The witness whose evidence has been read to us says that the defendants built houses on the land. The Judge also says, "and as the long-continued "possession of defendants' vendors and "their fathers before them is proved, I think "that the Lower Court was right in holding "that the tenancy of the lands of plots "Nos. 1 and 2 was saleable." The evidence showed that pucka buildings had been erected, and that the lands had, in fact, been held for upwards of 35 years, and had descended from father to son, and the kubooleut showed that the tenures were not merely of a temporary nature. The tenure was, therefore, a *primâ facie* one for building purposes, and, as such, assignable as well as inheritable according to the custom of the country.

Mr. Justice Glover thought that the finding of the Judge was without evidence, upon the ground that the defendants were restrained by the terms of the kubooleut from building pucka houses; but there were witnesses who proved the custom of the country, and who spoke as to the defendants having erected buildings upon the land. It appears to me, therefore, that there was evidence from which the Judge was justified in finding that tenures such as those under which the defendants held were saleable and transferable. Mr. Justice Kemp came to the same conclusion. He said that, although there was evidence, it was not very strong. But, putting that out of the question, he thought that in equity plaintiff was not entitled to turn the defendants out of the land, because he stood by and saw them erecting pucka buildings on the land without any objection whatever. If he allowed the defendants to erect pucka buildings upon the land without objecting, it appears to me that he was bound in the same way in equity as if he had granted them a pottah with the privilege of building pucka houses on the land; and I think that Mr. Justice Kemp is right in holding that the plaintiff was precluded by his conduct from turning the defendants out of possession.

Independently of this, speaking for myself, I should say that, if one man grants a tenure to another for the purpose of living upon the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved. A tenant who assigns his interest does not, in my opinion, commit such a forfeiture of his rights as to entitle the lessor to treat such rights as altogether non-existent, and to turn him out of possession. It appears to me that the decision of Mr. Justice Kemp ought to be affirmed with costs.

Jackson, J.—I am of the same opinion. It seems to me that there certainly was evidence of the existence of a custom under which such tenures as those held by the defendants were transferable in Zillah Hooghly.

As to the stipulation in the kubooleut which restrained the tenant from erecting *pucka* houses upon the land in question, it is very clear from the oral evidence that that restriction, imposed some 40 years ago, had been tacitly abandoned by the landlord. The parties in occupation of this land, which confessedly was let for building purposes, had been allowed gradually to pull down the temporary buildings first erected and substitute in their place more permanent ones. I think, where this is sanctioned, there must be implied a right on the part of the tenant to convey his interest to other persons.

Then I am very much inclined to agree with Mr. Justice Kemp in the latter part of his judgment, where he says that the conduct of the landlord in standing by and allowing the defendants to erect those buildings 8 years previously, and remaining silent at that time, leads to the conclusion that he had permitted them to erect buildings of that kind, and did thus admit the tenure to be of a kind which, according to the custom of the country, was transferable. I am, therefore, also of opinion that the decision of the Division Bench ought to be affirmed.

Macpherson, J.—I also think that the decision of Mr. Justice Kemp ought to be affirmed, because I think that there is some evidence that the tenure under which the defendants held was, according to the custom of the district, transferable.

The 8th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges*.

Mahomedan Law—Acknowledgment—Son.

Cases Nos. 5 and 6 of 1869.

*Appeal under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against the judgment of the Hon'ble F. B. Kemp and F. A. Glover, two of the Judges of the said Court, dated the 3rd May 1869, in Miscellaneous Appeals Nos. 12 and 13 of 1869, from an order of the Judge of Tirhoot, dated the 4th December 1868, the said Judges having been divided in opinion.**

Mussamut Jaibun and another (Objectors), *Appellants*,

versus

Mussamut Bibee Nujeeboonissa (Petitioner), *Respondent*.

Mr. R. T. Allan for Appellants.

Messrs. A. T. T. Peterson, *R. E. Twidale*, and *C. Gregory*, and *Baboo Unnoda Pershad Banerjee* and *Moonshee Mahomed Yusuff* for Respondent.

According to Mahomedan Law, where an acknowledgment is binding, it does not amount merely to *primâ-facie* evidence but establishes the fact acknowledged.

The acknowledgment of a child as being the son of the acknowledger is valid when the ages of the parties admit of the alleged relationship, and where the descent from another of the person acknowledged has not been already established.

Peacock, C. J.—It appears to me that the judgment of Mr. Justice Kemp is the correct one. Putting out of the question the evidence of the *nika* marriage between Reasut Ali and Torabun, there was an acknowledgment by Reasut that Nowazish Ali was his son. An acknowledgment according to Mahomedan Law in these cases in which acknowledgment is binding does not amount merely to *primâ-facie* evidence which may be rebutted, but it establishes the fact acknowledged. The acknowledgment of a child as being the son of the acknowledger is valid when the ages of the parties admit of the party acknowledged being the son of the acknowledger, and where the descent of the person acknowledged has not been already established from another.

In the present case, as I understand the evidence, when Reasut Ali acknowledged Nowazish Ali to be his son, the latter was not known, and had not been established, to be the son of another person. If Mr. Allan's contention is correct, that an acknowledgment in Mahomedan Law in cases in which acknowledgment is allowed has merely the effect of *primâ-facie* evidence, then the rule which is laid down as to the acknowledgment of a son must also be applicable to an acknowledgment of any other relationship, because if a man says that another man is his brother, it is *primâ-facie* evidence that the person so acknowledged is the brother of the person acknowledging him; but the Mahomedan Law says that the acknowledgment of a man as being another's brother has not, under the Mahomedan Law, the same effect as the acknowledgment by a person that another is his son. It appears to me that, according to Mahomedan Law, a certain effect, subject to certain conditions, is given to certain acknowledgments which is not given to other acknowledgments—*see* Baillie's Digest of Mahomedan Law, page 403. In this case, there was the acknowledgment by Reasut Ali that Nowazish Ali was his son, and there was nothing at the time which, according to the conditions of Mahomedan Law, would prevent that acknowledgment from being binding on Reasut Ali.

The judgment of Mr. Justice Kemp is affirmed with costs.

Jackson, J.—I am of the same opinion.

Macpherson, J.—I concur.

* 11 W. R. 426.

The 8th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Malikana—Limitation.

Case No. 7 of 1869.

*Appeal under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against the judgment of the Hon'ble F. B. Kemp and F. A. Glover, two of the Judges of the said Court, dated the 14th June 1869, in Special Appeal No. 701 of 1869, from a decree of the Judge of Gya, dated the 7th January 1869, the said Judges having been divided in opinion.**

Bhoalee Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Neemoo Behoo (Defendant), *Respondent.*

Baboo Nil Madhub Sein for Appellants.

Mr. C. Gregory, Moulvie Syud Murhumut Hossein, and *Baboo Mohesh Chunder Chowdhry* for Respondent.

Malikana is not rent, nor has it the elements of rent. It is an interest in immoveable property, and is consequently governed in the matter of limitation by Section 12, Act XIV., 1859.

Peacock, C. J.—THIS is a very clear case. Malikana is not rent, nor has it the elements of rent. It is a right to receive a portion of the profits of the estate for which the Government have made a settlement with another person, the real proprietor having neglected to come in and make a settlement. It being a right to receive something out of the collections of the estate, it is an interest in immoveable property, and consequently Section 12 of Act XIV. of 1859 applies to this case. The decision of Mr. Justice Kemp is in conformity with all the previous decisions on the subject which have held that the right to collect malikana is barred if the malikana has not been received for a period of 12 years. It appears to me, therefore, that that decision ought to be affirmed with costs.

* *Ante*, p. 46.

It may be a question whether under Section 46, Regulation VIII. of 1793, a suit will lie at all. Upon that point I express no opinion.

Jackson, J.—I am entirely of the same opinion.

Macpherson, J.—I am of the same opinion.

The 9th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Appeal under Section 15, Letters Patent—Mahomedan Law—Endowment—Mortgage.

Case No. 8 of 1869.

*Appeal under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against the judgment of the Hon'ble F. B. Kemp and W. Markby, two of the Judges of this Court, dated the 25th August 1869, in Regular Appeal No. 60 of 1869, from a decree of the Subordinate Judge of East Burdwan, dated the 8th March 1869, the said Judges having been divided in opinion.**

Shahazadee Hazara Begum (Plaintiff), *Appellant,*

versus

Khaja Hossein Ali Khan and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondents.

Where the contention before a Division Bench has reference to a single point only, and the Judges differing, an appeal is laid under Section XV. of the Letters Patent, it is not open to the parties to raise before the Appellate Court points not raised before the Division Bench.

The existence of a mortgage at the time at which an endowment is made does not render the endowment invalid under the Mahomedan Law. If the endower dies leaving sufficient assets, the heirs are bound to apply those assets to the redemption of the mortgage; but if he does not leave sufficient assets, the mortgagee will have power to sell the land if necessary, and the endowment will be rendered void as against the purchaser, but not as against the heirs of the endower who will consequently be entitled to surplus proceeds.

* *Ante*, p. 344.

Peacock, C. J.—It appears to me that the decision of Mr. Justice Kemp ought to be affirmed. The Judges appear to agree that the contention before them had reference to the first point only, which, Mr. Justice Kemp says, "was the main point on which the "decision of the Lower Court turned, *viz.*, "whether the subsistence of a mortgage at "the time the endowment was made rendered "such an endowment wholly invalid under "the Mahomedan Law or not." Mr. Justice Markby says: "The respondents have "thought fit to support only the first of the "grounds on which the Subordinate Judge "held the gift to be invalid. We are, there-"fore, relieved from the necessity of consider-"ing the other ground or grounds taken by "the Lower Appellate Court." In deciding upon the point which the two Judges considered to be the only one before them for decision, there was a difference of opinion. The judgment of the senior Judge, that of Mr. Justice Kemp, therefore prevailed. An appeal lies to us because the Judges have differed, and I think that on this appeal it is not now open to the parties to go into the whole of the case, and to raise before us points which were not raised before the Judges of the Division Bench.

The question, then, which we have to determine is whether the existence of a mortgage at the time at which the endowment was made rendered the endowment invalid under the Mahomedan Law. I am of opinion that it did not. The authority which is referred to by Mr. Justice Kemp at page 6 of his judgment appears to support his view of the case; for it contemplates the case of an endowment after the land has been mortgaged, and before the redemption of the mortgage. It is from the Futwa Alumgeeree, page 458, and runs thus: "If a man "mortgages land, and then makes an endow-"ment of it previous to redemption of the "mortgage, the endowment shall be binding, "and this shall not cancel the mortgage," that is, the endowment is binding, the mortgage remains, and consequently the endowment is an endowment subject to the rights of the mortgage.

The quotation proceeds: "If the land "after remaining some years in the hands of "the mortgagee, the mortgage be redeemed, "it shall revert to the purpose to which it "was appropriated. Should he" (that is, the endower) "die and have sufficient assets with "which to redeem the land, the redemption "shall be effected, and the endowment shall "be rendered effectual."

As I understand this passage, it is intended to point out that, if after a mortgage the mortgagor endows the land, and dies previously to redemption, leaving sufficient assets, the heirs are bound to apply those assets to the redemption of the mortgage, so that the endowment may take effect free from the mortgage by the application of other assets of the endower.

Then comes the passage: "Should he not leave sufficient assets, the land will be sold, and the endowment shall be rendered void." The meaning of that, as I understand it, is that the land will be liable to be sold by the mortgagee and the endowment rendered void, that is, that the mortgagee will have power to enforce the mortgage by the sale of the land, if necessary, and the endowment will be rendered void as against the purchaser under the mortgage. It does not, as I understand, mean that the endowment will be rendered void as against the heirs of the endower.

The authority quoted by Mr. Justice Markby, Mr. Perron's translation of Khalil-ibn-Ishak's work, does not appear to be binding in this country. Mr. Justice Markby himself remarks that "the author belongs to a sect of Sunies said not to be known in India." But even if the authority of that work is to be admitted as binding in India, it does not appear to support the position for which it was cited, *viz.*, that, if there be a mortgage prior to endowment, and no assets are left by the endower to pay off that mortgage, the endowment is absolutely void as against every one. I am of opinion, therefore, that the endowment was valid as against the heirs of the endower, and consequently that, by virtue of the endowment, the Mutwalee is entitled to the surplus proceeds of the sale, the mortgage having been satisfied.

For the above reasons, I am of opinion that the decision of Mr. Justice Kemp, by which the decision of the Subordinate Judge was reversed, and the plaintiff's suit dismissed, ought to be affirmed with costs.

Jackson, J.—I am of the same opinion. I take it that we must be guided by the statement of the two learned Judges that the only question argued before them was whether the appropriation made by the father of the plaintiff was invalid by reason of a previously existing mortgage. Mr. Justice Kemp in his judgment states: "The contention on both sides

"is with reference to one point, namely, "whether the subsistence of a mortgage "at the time the endowment was made "renders such an endowment wholly invalid "under the Mahomedan Law, or not." Mr. Justice Markby similarly says: "The "respondents have thought fit to support "only the first of the grounds on which the "Subordinate Judge held the gift to be "invalid." This being so, I apprehend that the appellants who were respondents before those learned Judges are not at liberty to come here and appeal against the decision of those Judges upon a ground which they did not think fit to maintain below.

As to the decision upon the point before us, I concur with the Chief Justice, and think that the decision of Mr. Justice Kemp should be upheld.

Macpherson, J.—I am of the same opinion.

The 9th December 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Sections 36 and 84, Act XX., 1866—Jurisdiction—Construction of the word "appeal."

Case No. 9 of 1869.

*Appeal under Section 15 of the Letters Patent of the High Court of the 28th December 1865, against a judgment of the Hon'ble F. B. Kemp and W. Markby, two of the Judges of this Court, dated the 9th September 1869, in a motion against an order of the Judge of Cuttack, dated the 29th March 1869, the said Judges being divided in opinion.**

Obhoy Churn Mohapattur (Opposite Party), *Appellant,*

versus

Shunker Dobey (Petitioner), *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Baboo Romanath Bose for Respondent.

When registration of a document has been refused because the execution of it is denied by one of those who are said to have executed it, and when a petition under Section 84 of Act XX. of 1866 is presented to the District Court by the party claiming under the document, in order to establish his right to have such document registered as having, in fact, been executed, the Judge must himself try the question whether the document was really executed or not, and has no power to remand the case to the Sub-Registrar for the purpose of examining witnesses. Such petition is not an appeal from the decision of the Sub-Registrar or Registrar-General, but is a mode of bringing the question before the Judge as a Court of original jurisdiction in order to determine whether an order ought to be made for the registration of the document. The words "appealed against" in Section 84 mean "complained of" or "objected to."

Peacock, C. J.—It appears to me that the decision of Mr. Justice Kemp is the right one, and that the Judge has declined jurisdiction in a case in which he ought to have exercised it.

Section 36 of Act XX. of 1866 enacts that "no document shall be registered unless "the persons executing such document or "their representatives, assigns, or agents "authorized as aforesaid shall appear before "the registering officer. He shall there-"upon enquire whether or not such docu-"ment was executed by the persons by "whom it purports to have been executed, "and in case of any person appearing as a "representative, assign, or agent, satisfy "himself of the right of such person so to "appear.

"If all the persons executing the docu-"ment appear personally before the register-"ing officer, and are personally known to "him, or if he be otherwise satisfied that "they are the persons they represent them-"selves to be, and if they all admit the exe-"cution of the document, the registering "officer shall register the document as "directed in Section 68."

An allusion is made by Mr. Justice Phear in the case of Brojonath Pyne and Armala Dossee,* III. Bengal Law Reports, page 65, to a case in which I made use of the following words: "The defendant did "not deny the execution, but he merely "denied that the deed was intended to "operate as a bill of sale. If the defend-"ant admitted, as I understand he did, the "execution of the deed, the Registrar ought "to have registered the document, and left "the parties to contest their rights in a "Civil Court."

It appears to me that that opinion is correct. Section 36 directs that, if the parties admit the execution of a document, it is to be registered. The registering officer is not to refuse to register a document

* *Ante,* p. 385.

* *See* Foot-note at page 386, *ante.*

because one of the parties refuses to admit that he intended it to operate in a particular manner. The Registrar has nothing to do with the construction of a document, but merely to inquire whether it was executed.

When the document is registered, if any question arise as to how it was intended to operate, it will be for a Court of justice to determine that question. But if the Registrar refuse to register it, it cannot be given in evidence.

Another case which arises under Section 36 is where a person appears by a representative, assign, or agent, and such representative, assign, or agent admits the execution, the registering officer is required to register the document; and a third case is where the person who executed the document is dead, and his representative, assign, or agent fail to appear before the registering officer or refuse to admit the fact of execution, in which case the registering officer may register the document, if he is nevertheless satisfied of the fact of its execution. The Section is silent as to what the registering officer ought to do if the parties themselves appear before him, and do not admit the execution of the document.

Mr. Justice Kemp says: "If a person executing a document shall (as in this instance) refuse to admit the fact of execution, but the registering officer shall nevertheless be satisfied of the fact of execution, the Registrar shall register the document."

Mr. Justice Kemp, I think, is not quite correct as to the direction of the Act in that respect. The direction of the Act is where the representatives, assigns, or agents of the person who executed the document appear and admit its execution, or where the person who executed it is dead, and the representatives, assigns, or agents of such person fail to appear, or appearing do not admit its execution: in these cases, the registering officer is to enquire as to the execution, and register the document if he is satisfied of the fact of execution. It is, however, wholly immaterial for the present purpose to decide whether, when a person alleged to have executed himself appears, and does not admit or denies the execution, the registering officer is authorized to call witnesses, and try whether the document was executed or not.

Section 83 enacts that "an appeal shall "lie" (and it is important to remark that the word "appeal" is used in this Section) "against an order of a Sub-Registrar refus- "ing to admit a document to registration "(whether the registration of such docu- "ment is compulsory or optional) to the "Registrar to whom such Sub-Registrar is "subordinate, if presented to such Registrar "within 30 days from the date of the order, "and the Registrar may reverse or alter "such order."

Section 82 enacts that "every registering "officer who shall refuse to register a "document, except one which he has a "discretion to refuse to accept for registra- "tion, or except one which he has refused "to register solely because the property to "which it relates is not situate within his "district or sub-district, shall make an order "of refusal, and record his reasons for such "order in his Book No. 2, and endorse the "words 'registration refused' on the docu- "ment; and on application made by any "person executing or claiming under the "document, and, on his furnishing a stamped "paper of the value of eight annas, shall, "without unnecessary delay, give him a "copy of the reasons so recorded. No "registering officer shall accept for registra- "tion a document so endorsed unless and "until an appeal shall have been presented "under the provisions herein contained and "decided in favor of the appellant."

Such, then, are the provisions as regards an appeal. In addition to the appeal, comes Section 84, which enacts that, "if a Registrar "or Registrar-General shall, under Section 82, "make an order of refusal to register any "document referred to in Section 29, or if "a refusal to register shall have been made "under Section 15 of Act XVI. of 1864, or "if he shall, under Section 83, on appeal, "make an order of refusal to direct the "registration of such document, it shall be "lawful for any person claiming thereunder, "his representative, assign, or agent author- "ized as aforesaid, within 30 days after "the making of such order of refusal, to "apply by petition to the District Court, "in order to establish his right to have "such document registered."

It then states what the petition shall contain, and directs the Court to fix a day for the hearing of the petition (not for the hearing of the appeal). The form of the petition is given in the schedule to the Act. It is directed to the Judge of the District Court, and is stated to be the petition of the particular individual who applies. It states that an instrument was executed, and then

in Clause 4, that on a certain day, the petitioner presented the said instrument for registration under the Act in the office of the Sub-Registrar, "and on such presentation the party said to have executed it "appeared personally before the Sub-Registrar, and admitted the execution of the said "instrument (*or* and falsely denied the "execution of the said instrument)."

In the present case, the petition would be that the person falsely denied the execution of the deed, the petitioner alleging that he did execute it.

There are some other allegations in the form of petition given in the schedule, and it concludes by praying that "your Honour" (that is, the Judge) "will order the Sub-Registrar to register the said instrument."

By Section 84, as I have already shown, the Court is to fix a day for the hearing of the petition. Now, when the Legislature directs a day to be fixed for the hearing of the petition, it impliedly directs that the Judge shall hear the petition, and also that he shall determine it. How is the Judge to determine upon a petition in which it is stated that the conveying party has falsely denied the execution of the instrument, unless he tries whether the instrument was really executed or not. The petition is not merely that the conveying party denied the execution, but that he *falsely* denied that he had executed it. The Judge must, then, try the question whether the denial was false or not, which involves the question whether the document was really executed or not.

Section 84 goes on: "On the day so "fixed as aforesaid, the Court may, if it "shall think proper, and if the requirements "of the law for the time being in force "have been complied with on the part of "the petitioner so as to entitle the document to registration, order such Registrar "or Registrar-General to register the document, or to direct its registration in the "proper manner, and he shall thereupon "obey such order, and shall, so far as may "be practicable, follow the procedure prescribed in Sections 66, 67, and 68."

Now, how can the Judge say whether he thinks proper to order the document to be registered of which the conveying party has denied the execution, and when the petitioner alleges that that is a false denial, unless he tries the question whether the conveying party did execute or not? If he is to try that question, there is only one mode of trying it. It appears to me to be clear that, whether the Sub-Registrar or Registrar-General has power to examine witnesses or not as to the fact of execution, the petition to the Judge is not an appeal to him from the decision of the Sub-Registrar or Registrar-General, but is a mode of bringing the question before the Judge as a Court of original jurisdiction in order to determine whether an order ought to be made for the registration of the document.

It is urged that the petition is an appeal to the Judge; and in corroboration of that position, the last Clause of Section 84 is quoted. It runs thus: "Provided that, when "the officer presiding over the District Court "shall himself, as registering officer, have "made any order appealed against under "this Section, the petition shall, within "60 days after the making of such order, "be presented to the High Court, and the "provisions contained in the former part "of this Section shall, *mutatis mutandis*, "apply to such petition and the order (if any) "thereon."

It appears to me that the words "appealed against" mean the order which is objected to, and are not used strictly in the sense of an appeal from the Judge to himself. The petition is described in Section 84, not as a petition of appeal, but as a petition to establish his right to have the document registered. Moreover, the petition does not pray that the Judge will reverse the order of the Sub-Registrar, but that he will order the Sub-Registrar to register the instrument. The Sub-Registrar or the Registrar-General could not make an order on himself to register. He may refuse to register, and the Judge may order him to register. If an officer refuse to do an act which he is bound to do, and another officer has power to order him to do it, the application for such an order is not an appeal from the officer who refuses, but an original application for an order upon him to do it.

But even if the petition to the Judge is an appeal, there is nothing to show that he cannot examine witnesses and try the issue upon which his decision is to depend.

Looking, then, to the whole of this Act, it appears to me that the Judge has power to examine witnesses, and to determine

whether there has been a false denial of the execution of the document.

Mr. Justice Markby says: "Moreover, if the proceeding under Section 84 be only an appeal, I can understand why that simple and cheaper proceeding was substituted for the regular suit provided for in Section 15 of the Act of 1864; whereas, if it was intended that there should be, under Section 84, a judicial determination of the fact of execution, I think that the regular suit would have been retained."

It seems to me that the regular suit was got rid of and the simple form of a petition substituted in order to get rid of a further appeal from the Judge to the High Court. If a regular suit in a Civil Court were to be necessary for the purpose of establishing the right to have a document registered, a regular appeal would lie from the decision of the Judge in that suit to the High Court; but the object being that the Judge should merely decide whether the document should be put on the registry or not, and not to determine the rights of the parties, the Section directs that the Court may, if it thinks proper, order the Registrar or Registrar-General to register the document or to order its registration in the proper manner, and that the Registrar or Registrar-General shall obey such order.

The Judge, then, if he decides that the execution of the document has been falsely denied, and that the document was, in fact, executed, may make an order that the document is to be registered, and the Registrar is bound to obey that order.

The mere registration of a document does not affect the title of the parties. It is still only a document which has been registered, and if the party wishes to enforce the document by suit, the mere fact of registration does not preclude the Civil Court from trying whether the document was executed or not. But if a regular suit were necessary to enforce registration, it would be subject to all the rules applicable to appeals in such suits, and then another regular suit with further appeals might become necessary to enforce performance of the document.

It appears to me that Mr. Justice Kemp was right so far as he would reverse the order of the Judge refusing to accept jurisdiction, and direct the Judge to proceed to try the petition. I think, however, that the Judge has no power to remand the case to the Sub-Registrar for the purpose of examining witnesses. The determination of the petition was, in my opinion, a matter of original jurisdiction in the Judge, and he ought not to remand the case to the Sub-Registrar for trial. Subject to that modification of the order proposed to be passed by Mr. Justice Kemp, I would affirm his decision.

Considering that the Judges of the Division Bench differed in opinion, and that this Bench is not quite unanimous, we think that there should be no costs on either side.

Jackson, J.—I am of the same opinion. It appears to me that the confusion that has arisen in this matter results very mainly from the use, I may say the unfortunate use, of the words "order appealed against" contained in the last Clause of Section 84 of the Registration Act. And it is, I suppose, with reference to that expression that Mr. Justice Markby observes in his judgment that the petition is by the Act itself called an appeal. Now, the Act itself does not speak precisely of the petition as an appeal, although it does in that Section refer to the order which is to be questioned as an order "appealed against." And I entirely concur with the Chief Justice, where he says that the words "appealed against" used in that Section only mean "complained of" or "objected to."

In point of fact, not only does that Section not speak of the petition as an appeal, but the whole tenor of the Section, as well as the form of petition, appears to me entirely to contravene the notion of the petition being in the nature of an appeal. The matter which it is proposed that the Judge should try in that petition contains, amongst other things, a subject of which the Sub-Registrar could not take cognizance, namely, the false denial of the vendor that he executed the deed.

The petition also is one which requires to be verified, that is to say, that the petitioner has to make affirmation to the truth of the facts which he alleges, in the same manner as the Code of Civil Procedure prescribes for verification of a plaint—a procedure which would not be applicable to the case if it were an appeal from the order of the registering officer.

Mr. Justice Markby also observes: "The "only judgment which the Judge can give is, "that the requirements of the law have "been complied with by the parties seeking

"registration, and if he is satisfied of that, "then it is still discretionary with the "Judge whether or no he will direct regis-"tration." I do not understand in that way the words of the last Clause but one of the Section. The words are: "On the day "so fixed as aforesaid, the Court may, if it "think proper, and if the requirements of "the law for the time being in force have "been complied with on the part of the "petitioner so as to entitle the document to "registration, order such Registrar or "Registrar-General to register the docu-"ment, or to direct the registration in the "proper manner," and so on. Now, the matter which the Court has to determine upon that petition is the right of the petitioner to have the document registered. Then the words "if it shall think proper" I understand to mean, if the right of the petitioner shall be established to the satisfaction of the Court; and then the words which follow relating to the requirements of the law, I understand to be a limitation upon the authority of the Court; that is to say, whatever the rights of the petitioner may be, the Court is not to make the order unless the requirements of the registration law have been complied with.

That is all that I think it necessary to add to the judgment delivered by the Chief Justice. In other respects, I entirely concur in that judgment.

I only wish further to observe that the same reasons which lead me to the conclusion that the petition referred to in Section 84 is a petition of original jurisdiction, and not an appeal, compel me also to assent to the modification which the learned Chief Justice proposes to make to the decision of Mr Justice Kemp.

Macpherson, J.—In this case, the tendency of my opinion has been in favor of the view which has been taken by Mr. Justice Markby; and I may say that the only thing which has very substantially shaken my opinion is the schedule to the Act, which schedule gives a form of the petition which is to be presented under Section 84 to the Judge. It is impossible to deny that the words made use of in that form do lead to the conclusion that it was intended that evidence should be taken by the Judge. As, however, the majority of the Court would affirm the judgment of Mr. Justice Kemp, it is unnecessary for me to say more than that I still entertain doubts on the subject.

The 11th December 1869.

Present:

The Hon'ble Dwarkanath Mitter and Sir Charles Hobhouse, *Bart., Judges.*

Misjoinder of parties—Special appeal—Arrears of rent—Execution-sale—Widow's life-interest.

Case No. 1812 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Backergunge, dated the 10th May 1869, reversing a decision of the Sudder Ameen of that District, dated the 19th March 1869.

Tiluck Chunder Chuckerbutty (Defendant), *Appellant,*

versus

Muddun Mohun Joogee and others (Plaintiffs), *Respondents.*

Baboos Ashootosh Chatterjee, Umurendronath Chatterjee, and *Jadub Chunder Seal* for Appellant.

No one for Respondents.

Misjoinder of parties is not an objection which can be allowed to be taken in special appeal.

Where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death.

Mitter, J.—On the first point taken by the pleader for the special appellant, we are of opinion that misjoinder of parties is not an objection which can in this case be allowed to be taken at this late stage of the proceedings.

As to the second point, we think the contention of the special appellant is right. The zemindar obtained a decree for arrears of rent against the maternal aunt of the plaintiff, special respondent, who was then in possession of the estate as the legal heir and representative of her husband Mohesh Chunder, and in execution of that decree the properties which form the subject-matter of this special appeal, namely, a 7-annas share of plot No. 17 and plot No. 25, and a 3 annas and 15 gundas share of plot No. 22, were put up to sale under the provisions of Act X. of 1859, and purchased by the vendor of the special appellant. The Lower Appellate Court seems to be of opinion that the effect

of this sale was merely to transfer to the special appellant's vendor the life-interest which the widow possessed in the tenure. We think that this opinion is erroneous. The rent due to the zemindar cannot under any circumstances be treated as a personal debt of the widow; and if the zemindar thought it proper to put up the properties now in dispute for sale for the realization of that rent, after having obtained a decree for it in due course of law, the reversionary heir can have no right to come in after the death of the widow, and take back those properties from the hands of the purchaser. If the widow had contracted a debt to meet the zemindar's demand for rent and then alienated a part of her husband's estate for the satisfaction of that debt, the alienation would have been good and valid in law; and we do not see reason why less effect is to be given to a decree passed by a Court of competent jurisdiction, in execution of which decree certain properties belonging to the estate of the widow's husband were brought to sale and purchased by the special appellant's vendor.

Holding this view of the case, we are of opinion that the decision of the Lower Appellate Court, so far as it relates to the properties mentioned above, must be reversed and that of the first Court restored, with costs of this appeal and the costs of the Lower Appellate Court.

The 13th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Deposit in Court.

Case No. 191 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 20th March 1869.

Bissessur Singh (Decree-holder), *Appellant*,

versus

Nim Chand Bose and others (Judgment-debtors), *Respondents*.

Baboo Chunder Madhub Ghose for Appellant.

Baboos Romesh Chunder Mitter and *Anund Chunder Ghossal* for Respondents.

Where a decree treats an estate as primarily liable to discharge a debt with interest, the proprietor (or his heirs) has a right to pay the money into Court to protect himself from being made responsible to indemnify the sureties; and if the money is deposited for the purpose of satisfying the decree, it is unnecessary for the Court to inquire whether it was deposited under authority from the proprietor or his heirs.

Peacock, C. J.—We do not think it necessary to interfere with the order in this case. The decree treats Ashrufoonissa's estate as primarily liable to discharge the debt, with interest at 12 per cent. per annum. Such being the case, the principal Ashrufoonissa or her heirs would have a right to come into Court, and to satisfy the decree by paying the principal sum and 12 per cent. interest, in order to protect herself from being made responsible to indemnify the sureties if they should have to pay the principal and interest at 1 per cent. per diem. Some one has brought the principal and interest at 12 per cent. per annum into Court for the purpose of protecting Ashrufoonissa or her heirs, and there the money is ready to be taken out by the execution-creditor. It appears to us to be unnecessary to enquire whether the person who deposited the money in Court for the benefit of Ashrufoonissa or her heirs had authority from her or them to do so, inasmuch as the money is in Court for the purpose of satisfying the decree of the execution-creditor.

The order of the Judge is affirmed with costs.

The 13th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Application under Act XXVII., 1860.

Case No. 333 of 1869.

Miscellaneous Appeal from an order passed by the Officiating Judge of Moorshedabad, dated the 7th July 1869.

Fuzl Moula (Petitioner), *Appellant*,

versus

Gholam Shurruff and others (Opposite Party), *Respondents*.

Baboo Motee Lall Mookerjee for Appellant.

Baboo Rash Beharee Ghose for Respondents.

Where application is made for a certificate under Act XXVII. of 1860 on the allegation that there are debts due to the estate of the deceased, and the allegation is not denied, the Court is bound to hear the petition.

Peacock, C. J.—We think that this case ought to be remanded to the Judge to try whether the petitioner, appellant, is entitled to a certificate.

Section 2 of Act XXVII. of 1860 says that no debtor to an estate shall be liable to pay the debt except on the production of a certificate. The allegation in the petition in this case was that there were debts due to the estate of the deceased, and that the applicant required a certificate to enable him to collect those debts. There was not any denial that such debts existed, and under Section 3 the Court was bound, in our opinion, to hear the petition. The Judge has decided against the alleged widow who is a respondent and was also a claimant for a certificate. The case must, therefore, be remanded to the Lower Court to try whether Fuzl Moula, the petitioner, appellant, is entitled to a certificate; and if the Judge finds him to be entitled, he will grant the same accordingly.

The 13th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Section 17, Act X., 1859—Notice of enhancement.

Case No. 1101 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Backergunge, dated the 24th February 1869, reversing a decision of the Deputy Collector of Dukhin Shabaspore, dated the 25th September 1867.

Kaleenath Chowdhry (Plaintiff), *Appellant*,

versus

Humee Bibee and others (Defendants), *Respondents*.

Baboos Sreenath Doss, Kalee Mohun Doss, and *Kasheekant Sein* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondents.

The inaccuracy of a notice in consequence of its not specifying properly the grounds on which enhancement is claimed is a substantial objection to the maintenance of a suit for enhanced rent under that notice.

Section 17, Act X. of 1859, does not mean that every under-tenant to whom notice is given may be enhanced, but only that, in those cases in which his rent can be enhanced, it is not to be enhanced unless notice is given.

A notice of enhancement to a neem-howaladar was held to be insufficient, because in stating that the rate sought to be enhanced was less than that paid for neighbouring lands, it left it uncertain whether the latter rate was paid by similar neem-howaladars or by ryots; Clause 1, Section 17, applying to ryots and not to middlemen.

Peacock, C. J.—It appears to me that in this case the Judge was right, and that the notice was insufficient.

It has been contended on behalf of the appellant that Section 17 of Act X. of 1859 extends only to ryots and not to neem-howaladars or intermediate holders, and that consequently the grounds of enhancement specified in that Section do not apply to neem-howaladars. If that contention is correct, I know of no law which says that a neem-howaladar may have his rent enhanced upon the ground that the value of the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot. The words used in the Section are "*by the agency or at the expense of the ryot.*"

It is contended also that, although Section 17 does not apply to neem-howaladars, Section 13 does. The substance of that Section is that no under-tenant or ryot is to have his rent enhanced without having previous notice served on him specifying the grounds of enhancement. But although that Section says that no under-tenant is to be assessed without notice, it does not say that every under-tenant to whom notice is given may be enhanced. The only meaning of the Section is that in those cases in which he can be enhanced, he is not to be enhanced unless notice is given. The under-tenants to whom that Section extends are those who hold or cultivate lands without any written engagement, or under a written engagement not specifying the period of such engagement, or whose engagement has expired, and these under-tenants are not to be enhanced unless a written notice is served on them, on or before the month of Chyet, specifying the rent to which they will be subject for the ensuing year and the grounds upon which enhancement is claimed.

In Dyaram's cases, to which reference is made by the Privy Council in the

case of Dhunput Singh *versus* Gooman Singh, 9 Weekly Reporter, Privy Council, page 3, and which has also been cited before us, it was held by the late Sudder Court that upon proof of the right to hold the lands as a mowrosee ijarah, or hereditary leasehold, at the customary rent of the pergunnah, the tenant would be liable to be turned out of his tenure if he should refuse to pay the customary rent of the pergunnah. It was not decided in that case that if the tenant should be unwilling to pay the enhanced rent claimed, he would be liable to have his rent enhanced compulsorily without his consent. There is a great distinction between ejecting a tenant who holds for an uncertain term or for a term which has expired, or whose lease has been cancelled, if he refuse to pay an enhanced rent, and compelling him to pay an enhanced rent without his consent.

In this case, it does not appear whether the engagement was a written one or not, or whether it was for a fixed period or not, as no evidence was given on that point.

Having guarded myself against being supposed to express any opinion that in this case the neem-howaladar could have had his rent enhanced provided sufficient notice had been given to him, it appears to me that the notice in this case was insufficient. The Section requires the notice to specify the rent which the tenant shall be liable to pay during the ensuing year, and the ground on which any enhancement of rent is claimed. Now, in this case the tenant had notice that "according to the rate which "prevailed in the village and in the ad-"jacent villages, and without his labor or "expense, the productive powers of the "lands having increased, a jumma of 442 "rupees 14 annas was fixed according to "the several descriptions of lands." It also states "that the land is held without settle-"ment at 47 rupees, the admitted jumma, "at a *nirick* (or rate) less than that paid "for neighbouring lands." The plaint also speaks of the rate paid by adjoining lands; but whether the rate referred to by the notice was the rate paid by similar neem-howaladars in the neighbouring lands, or the rate paid by ryots of the neighbouring lands, was wholly uncertain. It appears to me that upon that ground the notice was insufficient.

But, further, the appellant has shown what he meant by the rate paid by neighbouring lands, because when the first Court enhanced his rent to the rate which that Court found to be the rate payable for similar tenures in the neighbouring lands, he added a ground of appeal to the Judge under Section 348, Act VIII. of 1859, in which he objected that he had a decree merely for the rate paid for similar tenures, whereas he ought to have got the rate paid by ryots of similar lands; and we therefore have his own construction of his own notice similar to that which I have put upon it.

The plaintiff was clearly not entitled to make his neem-howaladar pay the same rates as the neem-howaladar received from the ryots, otherwise the neem-howaladar would have no benefit from his holding. Several neem-howaladars might hold tenures of a similar description, but it would be unjust to make them all pay similar rates unless their ryots held of them upon similar terms. The 1st Clause of Section 17 applies to ryots, and not, as it appears to me, to middlemen.

In Dhunput Singh's case, 9 Weekly Reporter, Privy Council, page 3, the Judicial Committee say: "There is another ground "upon which though it does not seem to "have occurred to the Court below, their "Lordships cannot but think that the "present suit ought to have been dismissed. "It has been seen that the respondents were "sued as occupying ryots liable for the "rent assessed upon them in that character; "that the High Court held that, considered "as ryots, they were protected by the 3rd "and 4th Sections of the Act; and that "thereupon the appellant, shifting his "ground, and treating the respondents, not "as ryots, but as tenants intermediate "between him and the ryots, obtained an "order for review. But if the respondents "were tenants intermediate between the "proprietor and the ryot, that fact seems "to raise objections both of form and sub-"stance fatal to the maintenance of the "present suit. The notice on which it was "founded did not, in that case, accurately "specify the ground on which enhance-"ment of rent was desired, and the assess-"ment on which the sum sued for was "calculated was improperly made.

That case appears to me to show that the inaccuracy in a notice in consequence of its not specifying properly the grounds on which enhancement is claimed is a substantial objection to the maintenance of a

suit for rent enhanced under that notice, and I think that the plaintiff's suit in this case was properly dismissed. I would, therefore, affirm the decision of the Judge in that respect with costs.

Macpherson, J.--I also think that the notice was bad, and therefore that the decision of the Judge ought to be affirmed.

The 13th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Sale in execution—Payment of purchase-money.

Case No. 1823 of 1869.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 12th July 1869, reversing a decision of the Sudder Moonsiff of that District, dated the 19th August 1868.

Fyazooddeen Bhooya (Defendant), *Appellant,*

versus

Shumsunnissa Beebee (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboo Sreenath Doss* for Appellant.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondent.

Where a tenure is sold in execution of a decree for arrears of rent, and a certificate of sale is granted by the Collector, it must be presumed that all the ordinary proceedings relating to the payment of the purchase-money have been fulfilled.

A sale to a *bonâ fide* purchaser for valuable consideration in execution of a decree outstanding and in force at the time, is a good and valid sale.

Hobhouse, J.—THE material facts of this case, as stated by the pleader of the special appellant, are these :—

On the 26th March 1866, the surburakar of the estate of one Dewan Anwar Alli sued the defendant in this case for arrears of rent, and, on the 16th April 1866, obtained an *ex-parte* decree. Execution was taken out on the 20th April 1866. The tenure of the defendant was sold on the 18th May 1866, and the plaintiff became the purchaser.

On the 20th May 1866, the defendant asked for a review. The review was admitted on the ground that notice had not been served upon the defendant, and the eventual result of the litigation was a decree in full against the defendant, given by the Judge on the 21st September 1866.

Meantime, the present plaintiff asked the Collector to grant him the usual certificate of sale. This was at first refused, then granted, then again refused, then again granted, and at last finally refused by the Board of Revenue, the Chief Revenue Authority.

The plaintiff now sues to obtain possession of the tenure in question on the strength of his purchase of the 18th May 1866. The grounds, I may mention, of the refusal on the part of certain of the Revenue Authorities to grant the certificate, were that there appeared to have been some fraud on the part, not of the plaintiff, but of certain other persons, under which the sale had been arrived at in execution of the *ex-parte* decree.

The defendant in this case, in answer to the plaintiff's suit for possession, stated that the plaintiff was the relative of two certain persons who were the 14 annas proprietors of the tenure in question; that these proprietors again were persons who had under their control the surburakar who had brought the Act X. suit; and that all these persons together had colluded to institute the said suit, and had fraudulently sold his tenure without any summons or sale-proclamation and without his (defendant's) knowledge.

The issue, then, that was framed upon this particular allegation on the part of the defendant was this: "Is it proved that "the *ex-parte decree* and the proceedings "held in connection with the auction-sale "are fraudulent?" that is to say, was it proved on the part of the defendant that the sale had been brought about by fraud on the part of the plaintiff in the manner set forth by the defendant?

It is now admitted by Baboo Sreenath Doss, the pleader on the part of the defendant, special appellant before us, that there is not on the record evidence of such fraud on the part of the plaintiff as he alleged to exist. We must, therefore, take it to be, in the absence of the fraud which the defendant specifically set up against the plaintiff, that the plaintiff was a *bonâ fide* purchaser of the tenure for a valuable consideration. Being such a person, the Lower

Appellate Court has held that the sale of the tenure is a good sale, and that plaintiff is, therefore, entitled to possession by virtue of that sale. It is this question which is now and substantially the only question before us. It is contended that, when the decree of the 16th April 1866, in execution of which the plaintiff purchased, was set aside, then the said purchase became void.

There is a further contention that, when, in accordance with the provisions of Section 2, Act VIII. of 1865, the plaintiff had not deposited the amount required for the full payment of his purchase, then the sale was not a complete one, and could not, on that account stand; and, under these circumstances, the Revenue Authorities were right in refusing to grant the plaintiff her certificate.

The answer to the *second* objection is that the certificate was actually granted, and that, therefore, until something is shown to us to the contrary, we must presume (and we may further observe that this point was not contested in the Courts below) that all the ordinary proceedings relating to the payment of the purchase-money had been fulfilled; and as evidence that they were so fulfilled in this case, we find that the certificate was refused by one of the Revenue Authorities, not by reason of any such non-payment as was set up, but by reason of some supposed fraud in the conduct of the sale such as the defendant in this case cannot admittedly bring home to the plaintiff.

The answer to the *first* objection is a very short one, because, in the matter of that objection, there are already two decisions of two Division Benches of this Court, which we are quite prepared to follow—the one is to be found at page 154, Volume X., Weekly Reporter, and the other at page 312, Volume VII., Weekly Reporter. The ruling in those cases substantially is that a sale to a *bond-fide* purchaser for a valuable consideration in execution of a decree outstanding and in force at the time of the sale is a good and valid sale.

Following these decisions, we think that the judgment of the Lower Appellate Court is right, and we, therefore, dismiss this appeal with costs.

The 13th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Possessory suit—Section 269, Civil Procedure Code.

Case No. 1853 of 1869.

Special Appeal from a decision passed by the Officiating Additional Judge of Chittagong, dated the 20th May 1869, affirming a decision of the Moonsiff of Raojan, dated the 29th October 1868.

Sudaram Majee (one of the Defendants), *Appellant,*

versus

Mirtunjoy Dey (Plaintiff) and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Rajendro Nath Misser* for Appellant.

Baboo Okhil Chunder Sein for Respondents.

As auction-purchaser of the right, title, and interest of his judgment-debtor, plaintiff got an award under Section 269, Code of Civil Procedure, but in attempting to get actual possession was successfully resisted by defendant, who claimed to have purchased the property *previous* to plaintiff's purchase. Upon this, the plaintiff sued to obtain possession.

HELD that, as there was no dispossession, the terms of Section 269 would not apply to this case.

Bayley, J.—WE think this case must be remanded to the Lower Appellate Court for trial of the question whether the property of which the plaintiff seeks to recover possession is the property of Ishan Chunder or not.

The plaintiff sued as purchaser at auction of the right, title, and interest of Ishan Chunder, the judgment-debtor, in the 16 annas or whole property.

The defendant's case was that he purchased the property now in suit, as the property of Ram Dyal, the judgment-debtor, *previous* to the plaintiff's purchase.

It appears that the plaintiff got an award under Section 269 of the Code of Civil Procedure, and although he obtained an order for possession under that award, the defendant, as a fact, successfully resisted his ever getting actual possession. The plaintiff, therefore, now sues to get possession of the whole property as the property of his judgment-debtor, Ishan Chunder.

The first Court gave the plaintiff a modified decree, but on appeal the Lower Appellate Court has held that, as the defendant was bound to sue within one year, and he did not do so, the *onus* of proving title was on the said defendant, special appellant. The Lower Appellate Court then goes on to say that, as the defendant was not entitled to set the Court's summary order under Section 269 at defiance, therefore plaintiff need not prove his title, but the defendant must yield possession to the plaintiff, defendant retaining his right to sue on the strength of his alleged title within 12 years.

It is urged on special appeal that this decision is erroneous in law, as plaintiff never got possession, and defendant was always in possession, and that consequently plaintiff had to prove his title before defendant's possession could be disturbed.

We think that the Lower Appellate Court has made a wrong application of the provisions of Section 269. That Section says: "If "in the delivery of possession to the purchaser "any person claiming a right to the pos-"session of the property sold *shall be dis-"possessed*, the Court, on the complaint of "the purchaser or of such other person, if "made within one month from the date of "such resistance or dispossession, shall en-"quire into the matter of the complaint, and "pass such order as may be proper under "the circumstances of the case. The order "shall not be subject to appeal, but the party "against whom it is given shall be at liberty "to bring a suit to establish his right at any "time within one year from the date there-"of."

Now, in this case, there was no dispossession. In fact, the plaintiff could never get possession, and therefore the Lower Appellate Court, under these facts of this case, was wrong in applying the terms of Section 269, which refer only to cases of dispossession, and holding that the defendant was bound to sue within one year in order to entitle him to the benefit of the summary order under which he was and is in actual possession.

We, therefore, remand the case to the Lower Appellate Court for trial of the question as to what was the right, title, and interest of Ishan Chunder which the plaintiff purchased. If the plaintiff succeeds in starting his case on this footing, it will be on the defendant to rebut that case by showing that the lands in suit were, in fact, the right, title, and interest of the judgment-debtor whose property, he alleges, he purchased, *viz.*, of Ram Dyal.

The costs will follow the result.

The 13th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo family—Separation.

Case No. 313 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 1st May 1869.

Debee Pershad (Objector), *Appellant,*

versus

Phool Koeree *alias* Gheena Koeree (Petitioner), *Respondent.*

Mr. C. Piffard and *Baboos Mohesh Chunder Chowdhry* and *Boodh Sein Singh* for Appellant.

Mr. R. T. Allan and *Baboos Qnookool Chunder Mookerjee, Unnoda Pershad Banerjee,* and *Kalee Kishen Sein* for Respondent.

Though actual partition by metes and bounds is not necessary to a separation between the members of a joint Hindoo family, yet there must be some unequivocal act or declaration, on the part of the family, of their intention to separate. A suit by one member for a declaration of his right was held not to be a sufficient indication of such intention.

Glover, J.—THIS was an application under Act XXVII. of 1860 by Phool Koeree, widow of Luchmun Pershad, for a certificate to collect the debts due to the estate of her deceased husband.

The application was opposed by Debee Pershad, nephew of the deceased, on the ground that the estate being joint and undivided, he was the sole heir of his uncle, and that the widow had no claim to anything beyond maintenance.

It appears that uncle and nephew had been litigating for a long time regarding the family-property, the nephew claiming a share, the uncle alleging that, inasmuch as Banee Pershad, Debee Pershad's father,

predeceased his father, Deendyal, the son had no share in the succession.

A suit was brought by Debee Pershad which resulted in his favor in the District Courts, and this suit is now the subject of an appeal to Her Majesty in Council.

In the case now before us, the Judge has held that the acts of the objector Debee Pershad have sufficiently established the fact that the property was divided, and that the widow, therefore, is the rightful heir of her husband according to the law of Mitakshara.

It appears to me that, under the circumstances stated, there is no sufficient presumption that the family separated before Luchman Pershad's death. No doubt, the Privy Council decision in the case of Appoovier *versus* Ramasubba Aiyan and others, 8 Weekly Reporter I., establishes the principle that actual partition by metes and bounds is not necessary to a separation, but it is still necessary that there should be some unequivocal act or declaration on the part of the family of their intention to separate, and I fail to see any such act or declaration in this case.

The Judge has gone exclusively on the fact that Debee Pershad sued Luchmun for his share of the family property, but this alone would not, as it seems to me, be sufficient to indicate an intention of separating from his uncle on the part of Debee Pershad. If the suit had been brought for a declaration of Debee Pershad's right, and for a subsequent demarcation of his share, it might then have been fairly presumed that Debee Pershad's intention was to be separate from his kinsman, but all that he sues for is a declaration of his right in the estate, and there is nothing to show that if he got a decree in his favor, he intended to keep that share separate and distinct from that of Luchmun Pershad. The mere fact of his bringing a suit would not be a sufficient indication of his intentions. There must be some unequivocal notice of his wish to live separate in estate before the ordinary presumption of Hindoo Law can be ignored.

In the present case, the family was admittedly joint. No separation in direct form is alleged. The only thing in support of the petitioner's case is the fact that the objector Debee Pershad brought a suit against his uncle for his share in the family estate, and that in terms which at the most leave it undecided as to whether he asked for a divided or an undivided share.

I think that the widow Phool Koeree has not made out any sufficient case for the grant of a certificate under Act XXVII. of 1860, and that her application ought to have been refused. I would, therefore, allow this appeal with costs.

Kemp, J.—I concur in this judgment. There has been no definition of shares or enjoyment of possession according to such definition. The suit of Debee Pershad was for a declaration of his right to a share in the estate of his grandfather Deendyal. It was not a suit for partition, nor can I find any unequivocal act on the part of Debee Pershad whereby it can be said that he has declared his intention to separate in estate from his uncle, the late Luchmun Pershad. I, therefore, think that the certificate under Act XXVII. of 1860 should have been granted to the appellant Debee Pershad, and not the respondent, the widow of Luchmun Pershad.

The appeal will be decreed with costs payable by the respondent.

The 13th December 1869.

Present :

The Hon'ble L S. Jackson and W. Markby, *Judges.*

Execution-sale—Irregularity.

Case No. 372 of 1869.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 12th June 1869.

Khodeja Bibee, *Appellant,*

versus

Ram Narain Dan, *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

Where the fact of an execution-sale having taken place about two hours earlier than the hour announced, was alleged to be a material irregularity seriously prejudicial to the interests of the judgment-debtor, it was held to be the bounden duty of the Court to take evidence, and determine whether bidders had been prevented from attending, and whether an irregularity of a material kind had occurred.

Jackson, J.—I THINK it is clearly necessary to set aside the order of the Subor-

dinate Judge, and to send back the proceedings to him in order that he may re-consider the questions before him.

The point on which the special appellant relies before us, is that a material irregularity in the conduct of the sale took place by reason of the sale having been held at an hour, namely, about 10 o'clock in the day, whereas the announcement of sale fixed the hour at 12 o'clock. He contends that, by reason of such irregularity, the judgment-debtor was seriously prejudiced, the property having been sold for a sum considerably below what it ought to have fetched.

The Subordinate Judge states: "It has "been satisfactorily proved by the evidence "of witnesses that the sale in question "commenced after 10 o'clock, and that "the sale was notified. Under these cir-"cumstances, the sale in question is not "liable to be set aside by reason of the "irregularity alluded to above. Moreover, "how can the presence of the agents of the "judgment-debtor at the time of the sale "be accounted for, when the judgment-"debtor knew that the sale was to take "place at 12 o'clock in the morning."

The question, however, is not whether the judgment-debtor knew or believed the sale was to take place at 12 o'clock in the morning, but whether the public who would have bid for the property was misled by the announcement, so that a smaller number of bidders attended by reason of the earlier hour.

The Subordinate Judge having thus summarily disposed of the question of irregularity, goes on to say: "It is contended by the "vakeel for the judgment-debtor that of "the large number of witnesses who were "cited, many have appeared before the "Court, and that it will be proved by their "testimony that the property was of great-"er value than what it was sold for; but "the Court observes that if two or five of the "witnesses would depose to the value of the "property being greater than what it was "sold for, that would not vitiate the sale, for "when a property is sold at auction by re-"gular bids, inadequacy of price is no valid "ground for setting aside the sale."

Of course, if there were no material irregularity, the question of inadequacy of price would not have to be gone into; but then it was alleged that a very serious irregularity had taken place, so that the question being whether bidders were misled and prevented from attending at the sale by reason of its having taken place two hours earlier than announced, it would, it appears to me, bear very materially on that question to ascertain whether the property had been sold for a very inadequate price, and whether, in fact, the bidders were few. It was, therefore, the bounden duty of the Court to take evidence upon that point, and having taken that evidence and considered the whole case, to determine whether, in fact, bidders had been prevented from attending, and whether, consequently, an irregularity of a material kind had occurred. If, upon that evidence, it were established that the irregular departure from the terms of the notice had misled purchasers, and also if it appeared that the price was inadequate, I think the sale ought to be set aside.

It is contended, and with some show of reason, that the circumstances of the purchaser, who was himself the mortgagee, having advanced upon the mortgage a sum considerably larger than what he had now paid for the property, does seem to indicate that the price for which the property was sold was inadequate. At any rate, the case must go back to the Court below.

Markby, J.—I concur.

The 13th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 139, Act VIII., 1859—Issues—Mahomedan Law — Circumcision — Illegitimacy—Inheritance—Nusub—Acknowledgment.

Case No. 17 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 14th September 1868.

Sahebzadee Begum (Defendant), *Appellant,*

versus

Mirza Himmut Bahadoor (Plaintiff), and another (Defendant), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* and *Moonshee Mahomed Yusuff* for Appellant.

Baboo Bhyrub Chunder Banerjee and *Syed Ameer Ali* for Respondents.

Under Section 139, Act VIII. of 1859, the Court may frame the issues from the oral examination of the parties or their pleaders notwithstanding any difference between the allegations of fact contained in those examinations and the allegations contained in the written statement.

A Mahomedan plaintiff who had not undergone circumcision, was allowed to conduct his case on the ground of his having been the illegitimate son of a Mahomedan woman, on a construction of the Imameea Code found at p. 265 of Baillie's Digest of Mahomedan Law.

A child of fornication or adultery (which is the literal meaning of wuhud-ooz-zina), has no nusub or parentage at all, and therefore, under the Mahomedan Law, has no right to inherit the estate of an illegitimate brother, inasmuch as there is no nusub between the two.

An acknowledgment made by one party in favor of another where the nusub of the two parties has not been established, is not to be credited under the Mahomedan Law when the acknowledger has a known heir.

Kemp, J.—THIS is a suit on the part of Mirza Himmut Bahadoor, claiming in right of inheritance two out of three shares in the estate of the late Mirza Ekbal Bahadoor whom the plaintiff states to have been his full brother. The suit is valued at Rupees 4,43,445-15 annas 2 pie, which includes a large sum on account of moveables which have not been decreed to the plaintiff, and with reference to which there is a cross-appeal.

The allegation of the plaintiff is that Ekbal Bahadoor died on the 15th of August 1867, leaving the plaintiff him surviving and the defendant No. 2, namely, Bismollah Begum, his sister; that the family are of the Sheah sect; and that according to the law of inheritance amongst the Sheahs, two shares of the estate of the deceased belong to the plaintiff, and one share to his sister.

The defendant No. 1 in the case is the widow of the late Ekbal Bahadoor. The plaint further states that the widow and the sister are colluding together, and that the cause of action arose on the date of the death of Ekbal Bahadoor when the defendants opposed the plaintiff's possession over the estate of Ekbal, deceased. A schedule is attached to the plaint which describes the properties in suit, including the moveables, in great detail. The sister, Bismollah Begum, appears to have disclaimed all acts of opposition to the plaintiff. She states that Sahebzadee Begum, the widow of Ekbal, alone is in possession of her husband's estate, and that she, Bismollah Begum, intends to sue in her own behalf for her share of the said estate. She, therefore, prays to be released from the claim of the plaintiff and to get her costs. With reference to her costs, we shall remark further in the close of our judgment.

It appears that Sahebzadee Begum, the principal defendant, put in two written statements: the first written statement is dated the 21st December 1867, and the second written statement is dated the 31st March 1868.

It appears that certain questions of Mahomedan Law were not raised in the first written statement, and this is accounted for by the defendant by the absence of books on the Imameea Law which she or her vakeels could consult; but be that as it may, after examination of the plaintiff the Subordinate Judge thought proper to amend the issues originally framed on the first written statement, and to add certain issues which tended to elucidate the facts in dispute between the parties and to enable him to do substantial justice. As this question of the amendment of the issues has been very hotly contested before us by the respondent, we think it proper to decide this point before entering upon the rest of the case.

Under Section 139 of Act VIII. of 1859, the Court may frame the issues from the oral examination of the parties or their pleaders, notwithstanding any difference between such allegations of facts as are contained in those examinations and those contained in the written statements. In this case, it cannot be said that the plaintiff has set up one case, and having put in proof of another case has required the issues to be amended to suit that proof. Moreover, the amended issues, which arose on the second written statement of the defendant and the examination of the plaintiff, did not come by surprise on the plaintiff. He was allowed ample time to meet these issues, and he neglected to do so, that is to say, although called upon to do so, he put in no written statement in refutation or explanation of the second written statement put in by the defendant.

This question was also contested in the Lower Court before the Subordinate Judge, who, in page 36 of the printed book, has given the arguments before him in detail, and his reasons for amending the issues. Considering, therefore, that the amendment did promote the trial of the substantial question between the parties, and upon which question the whole case hinges and turns, we think that this objection with reference to the amendment of the issues on the part of the plaintiff, respondent, must be overruled.

The Court of first instance finds on the evidence, that there is no proof whatever of the marriage of Rajah Mode Narain Singh with Burratee Begum, the mother of the plaintiff. The Subordinate Judge examined the Rajahs of Benares and Betyah, and it appears also that the Ranees of the late Rajah Mode Narain were examined, as also the family priest and other Hindoos of high position and respectability. They all depose to the fact that Rajah Mode Narain was a Hindoo, and that they, the Rajah's equals in caste, associated with him and ate with him. It is also clear that after the death of the Rajah, when his estate was claimed by the Ranees, neither the plaintiff, nor his brother who was then alive, nor his sister claimed any right to the inheritance. On this question, therefore, it will be sufficient to say that the whole of the evidence proves that the Rajah did not marry this lady, that she was his kept mistress, and that the Subordinate Judge has come to a proper finding on this point. We may here say that this point was not raised in argument by the pleader for the respondent in his cross-appeal until after the question of whether the Court would permit the amended issues to stand was given against him; but be that as it may, as the case may go further, we have thought proper to record our opinion that the Subordinate Judge has come to a right finding on the evidence, and that all the probabilities of the case support his view on this point, namely, that no legal marriage took place between the late Rajah Mode Narain Singh and Burratee Begum.

It is very difficult for us to conceive how the plaintiff can come into Court styling himself to be a Mahomedan, when in his examination before the Subordinate Judge, he deposes that neither he nor his brother has been circumcised. The plaintiff can scarcely be called a Mahomedan not having undergone that ceremony, but as his mother was admittedly a Mahomedan, and as at page 265 of Baillie's Digest of Mahomedan Law, Part II., which contains the doctrines of the Imameea Code of Jurisprudence, it is stated that "if one of the "parents of an infant be a believer, the con-"struction of the law is in favor of the "Islam of the infant," we give the plaintiff the benefit of this construction of law, and permit him to carry on his case as the illegitimate son of Burratee Begum.

Before leaving the question of whether Rajah Mode Narain abandoned the Hindoo faith and became a Mahomedan, we find that the Subordinate Judge on the evidence of the Rajahs of Benares, Betyah, and of Dawoo, and of the Ranees and high priests of Ticcaree, of the Dewans, Amlahs, and other independent witnesses found it proved that the Rajah was all along a Hindoo and died in that persuasion; that he worshipped idols, visited on pilgrimage places considered sacred by the Hindoos, and performed daily poojahs; that the birth of his daughter by one of the Ranees was celebrated in the Hindoo form. In short, there is nothing to show that he embraced the Mahomedan faith. The Subordinate Judge, having found on the evidence that Rajah Mode Narain did not contract a legal marriage with Burratee Begum, held that the children of the Rajah by the Begum were illegitimate children "who could claim "no parentage through their natural father "and mother in the eye of the law."

The Subordinate Judge, in support of his finding, quotes a passage from the Shurra-'l-Islam which is translated at page 305 of Baillie's Mahomedan Law, Part II., and which is to this effect, *viz.*, "the wulud-"ooz-zina, or illegitimate child, has no nusub "or parentage. Consequently, neither the "zanee, or he who has unlawfully begotten, "nor she who bore him, nor any of their "relations can be his heir, nor has he any "title to their succession." It may be here remarked, as stated by Mr. Baillie, that there is a remarkable difference between the Imameea and Hanifeea doctrines and codes on this point. An explanation of this difference is to be found in page 411 of Baillie's Digest, Part I.

The Subordinate Judge having found that the plaintiff was the illegitimate son of Burratee Begum by the Rajah, and that there was no nusub between him and the Rajah or his mother, proceeds to decide the case upon certain admissions which the Subordinate Judge says he can take judicial notice of, and which, in his opinion, tend to show that the late Ekbal Bahadoor as well as the plaintiff have publicly admitted themselves to be brothers and to have derived their birth from the same parents. The Subordinate Judge refers further to what he considers to be an admission in para. 11 of the first written statement put in by the defendant. These admissions, to use the words of the Subordinate Judge, are considered by him to be "clear as day-light." The Subordinate Judge proceeds to say "that the deceased Ekbal Bahadoor had no other heirs

left save his widow and a natural brother and sister; that the wife, in the absence of male issue, under the chapter on distribution of inheritance, is entitled to one-fourth only, and on no account can she obtain beyond 4 annas, and that the remainder would descend or ascend to the distant kindred, but in default of such he has a right to succeed whom the deceased ancestor acknowledged conditionally or unconditionally as his kinsman," and in support of this opinion the Subordinate Judge quotes from Macnaghten, Chapter I., Section 55. Referring to this question of admission, the Subordinate Judge proceeds to quote a passage from the Shurra-'l-Islam to be found in the margin of pages 43, 44, and 45 of the printed book. The Subordinate Judge candidly admits that these pages were, to use his own words, "Greek to him," and he therefore called in the assistance of three Moulvies, versed in Mahomedan Law. Two of these Moulvies said that they were ignorant of the text quoted, and the third, a Deputy Collector, Moulvie Ali Hossein, who appears to be of the Imameea sect, gave an opinion that "brother and sister can succeed on the "strength of acknowledgment of the de-"ceased, in spite of their illegitimacy of "birth." The Subordinate Judge observes of this opinion "that it is not satisfactory, inasmuch as no reasons are given for it," but he finds the opinion supported in Macnaghten's rule, No. 55, and he further quotes in support of it a Sudder Dewanny decision, dated the 28th April 1814, in the case of Mohur Ali *versus* Kureemunnissa.

He therefore gives the plaintiff a decree for a portion of his claim, setting aside his claim to the moveable property as not proved, and holding that the property decreed was encumbered by a mokurruree tenure granted by Ekbal Bahadoor to his widow. He also found that the dower of the widow was a charge upon the estate for which the estate was liable.

On the question of the marriage between Ekbal Bahadoor and Sahebzadee Begum, which was contested in the Court below, but was not raised before us in appeal, the Subordinate Judge found that marriage to have been satisfactorily proved, and amongst other reasons for holding the marriage to be proved, the Subordinate Judge gives a very good one, namely, that the lady accompanied Ekbal on a pilgrimage to Mecca, which it is not at all probable she would have done had she been his kept mistress, and not his lawful wife.

Having disposed of the first question taken before us in appeal as to the amendment of issues in the Court below, we proceed, although the question was not pressed before us in argument, to notice the total absence of any proof of the marriage of Rajah Mode Narain with Burratee Begum. We also remark that no argument was raised before us with reference to the question of the marriage of Ekbal Bahadoor and Sahebzadee Begum, the defendant No. 1. The case turns upon the main issue between the parties, namely, whether the late Ekbal and Himmut Bahadoor, the plaintiff, being admittedly the illegitimate sons of the late Rajah Mode Narain Singh by his kept mistress Burratee Begum, the plaintiff Himmut Bahadoor can succeed to the estate of his late brother Ekbal Bahadoor under the Mahomedan Law which governs the parties before us; and, secondly, whether any such admissions have been made by Ekbal Bahadoor during his lifetime by which the plaintiff is entitled to succeed to the estate of his late brother.

On the first question which turns upon the Mahomedan Law, we would observe that the right of inheritance is founded on nusub or consanguinity; that under the head of nusub are comprehended, *first*, the parents and the children, how low soever; *second*, the brethren and their children, how low soever, and the grand parents, how high soever; and, *third*, the paternal and maternal uncles and aunts.

Now, if the right of inheritance founded on nusub existed between the late Ekbal Bahadoor and his brother, the present plaintiff, Himmut Bahadoor, Himmut would come under the second class enumerated above; but Himmut being the child of fornication or adultery, which is the literal meaning of wulud-ooz-zina, he has no nusub or parentage at all, and therefore, under the Mahomedan Law, the plaintiff has no right to inherit the estate of his illegitimate brother, the late Ekbal Bahadoor, inasmuch as there is no nusub between the two, and his claim under that law to succeed to the estate of his brother must fail. The passages from Macnaghten quoted by the Subordinate Judge refer to the Soonee, and not to the Sheeah sect, and the decision of the late Sudder Court is not in point.

We now come to the question of admission, and upon this point there was considerable argument, but the only admission that has been brought to our notice on the

If the Judge had said no more, we should doubtless be bound to remand these proceedings in order that the Judge might determine, as a matter of fact, whether the decree-holder in making this application had acted *bonâ fide*. But when we read further on, we observe that the Judge has considered that point, and has come to the conclusion that he did not proceed *bonâ fide*. Under these circumstances, I think it would be quite useless that we should remand the case to the Lower Court in order that it might express an opinion on a point upon which it has already decided.

I confess, speaking for myself, that I should feel the utmost difficulty in coming to a conclusion in the circumstances of this case, that the proceedings taken in the year 1862 had been otherwise than colorable proceedings taken with a view of keeping the decree alive in form, and not of actually executing and enforcing it.

I think, therefore, that the special appeal must be dismissed with costs.

Markby, J.—I also think that the Judge, in laying down that these proceedings against the heirs were illegal, and that, therefore, they cannot be called a proceeding within the terms of the Section, has laid down too wide a proposition; but even assuming that to be so, I also agree with Mr. Justice Jackson in thinking that that could only lead to a remand in order that the Judge should try whether or no these proceedings were *bonâ fide* taken with the intention of executing this decree, and that the Judge having already expressed his opinion upon that point, such a remand becomes unnecessary.

The 13th December 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Lunatic—Jurisdiction—Act XXXV., 1858.

Case No. 403 of 1869.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 27th August 1869.

Nitamburree Chowdhrain (Opposite Party), *Appellant,*

versus

Shushee Mookhee Chowdhrain (Petitioner), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

A Zillah Judge in making an order under Act XXXV. of 1858 for the care of the estate of a lunatic, was held to have gone beyond the purview of the Act in specifying of what that estate consisted.

Jackson, J.—An application was made to the Zillah Judge under Act XXXV. of 1858, to make an order for the care of the estate of a lunatic, one Goluck Monee Chowdhrain upon which application the Judge has directed the Collector of the district, under Section 9 of the Act, to take charge of the estate.

This appeal is on the part of one Nitamburree Chowdhrain. She, at first sight, appears to have no interest whatever in the subject-matter of the application, inasmuch as she makes no claim to the guardianship of the lunatic in question or to the charge of his estate. She, in short, denies that the lunatic has any estate whatever.

It appears that this appellant came in to oppose the petition under Act XXXV., upon the ground that a schedule to the petition specified certain immoveable property as belonging to the lunatic, which property Nitamburree declared to be at the time in her possession and enjoyment in succession to her deceased husband. That husband, it seems, claimed to be the adopted son of the late husband of Goluck Monee. A suit had been instituted by Shushee Mookhee, the petitioner in this case, and in that suit she had succeeded in having it declared that the adoption was invalid.

The person described as being the adopted son has since died; but it appears that notwithstanding the decision as to his adoption, the property of the husband of Goluck Monee is still in the hands of Nitamburree. Nitamburree, therefore, called upon the Judge to decide whether the immoveable property specified was part of the estate of the alleged lunatic or no, and he decided that fact against her; and having so decided it, he made an order that the Collector should take possession of the property, and intimated that in case of necessity the Court would give its aid to enforce the order for possession thereof; and taking this in connection with the petition as to the immoveable property in question, it seems there is reason to suppose he intended to give possession of that immoveable property as the property of the lunatic.

This, no doubt, was going beyond the purview of the Act, and the appellant seems to be entitled to have that portion of the order set aside. At the same time, it seems to me that the Judge would never have entered into this question at all if it had not been for the step taken by the appellant herself, and that, consequently, although she is entitled to have the Judge's order so far set right, it must be done at her cost, and she must pay her own costs of this appeal as well as in the Judge's Court. The Judge's order will be cut down to the appointment of the Collector to take charge of the estate of the lunatic, without specification of what that estate consists.

Markby, J.—I am of the same opinion.

The 14th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

User—Abandonment of right.

Case No. 2173 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 11th June 1869, affirming a decision of the Moonsiff of Bohur, dated the 26th November 1868.

Jugutbundhoo Chuckerbutty (Plaintiff), *Appellant,*

versus

Jugut Chunder Chowdhry and others (Defendants), *Respondents.*

Baboos Huree Mohun Chuckerbutty, Nuleet Chunder Sein, and *Okhil Chunder Sein* for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

Where a party suing for the use of a water-way was found to have allowed it to be filled up without objection, and another of the same description to be constructed which he had used for a year or two, he was held to have abandoned his right of user to the former water-way.

Hobhouse, J.—THE plaintiff in this case, who is the special appellant before us, sued for the use of a certain water-way, of which he said he had a right of user as one of the public, and which he said the defendants had shut up, thereby depriving him of the user.

The defendants apparently did not admit that the plaintiff had any prescriptive right of user of the water-way in question, but they certainly admitted that they had, for the convenience of certain persons, shut up the said water-way, and they averred at the same time that they had opened another water-way for the convenience of the public.

The Lower Appellate Court admittedly laid down the right issue in the case, so far at least as the contention of the special appellant before us goes, and the issue was to the effect as to whether the plaintiff was entitled to his right of user when, in fact, he had abandoned the said right. That was not, in so many terms, the words of the issue, but that was, in truth, the substance of it.

The Lower Appellate Court comes to a finding on this point in these words: "I see "no reason to interfere with the order of "the Moonsiff, as (*i. e.*, because), when the "appellant allowed the water-way to be "closed without objecting, he must be sup-"posed to have acquiesced in it; and instead "of this passage, another was opened out, "which, according to his own admission, he "has used for two years." The Court, therefore, does substantially find that the plaintiff is not entitled to his right of user, if he had any, because he allowed the object of his alleged right, *viz.*, the water-way, to be closed up without objection, and because for two years he used the other water-way which the defendants admittedly prepared in lieu of the one which they filled up.

In special appeal it is contended—that is, I understand that it is contended, for it is a little difficult to follow the pleader for the special appellant as to what his real contention is, but I understand that he contends —that, when he had once acquired a right of user, that right could not be held to have been lost to him, unless it was held barred by the application of the Statute of Limitation, and on this point the pleader for the special appellant refers to a judgment of a Division Bench of this Court, which is to be found at page 506 and the following pages of Marshall's Reports. No doubt, there the learned Judges do lay it down that, as a general rule, to use their own words, "a prescriptive right, when once acquired, is liable to be lost only by the operation of the Law of Limitation." This is the general rule they lay down, but

If the Judge had said no more, we should doubtless be bound to remand these proceedings in order that the Judge might determine, as a matter of fact, whether the decree-holder in making this application had acted *bonâ fide*. But when we read further on, we observe that the Judge has considered that point, and has come to the conclusion that he did not proceed *bonâ fide*. Under these circumstances, I think it would be quite useless that we should remand the case to the Lower Court in order that it might express an opinion on a point upon which it has already decided.

I confess, speaking for myself, that I should feel the utmost difficulty in coming to a conclusion in the circumstances of this case, that the proceedings taken in the year 1862 had been otherwise than colorable proceedings taken with a view of keeping the decree alive in form, and not of actually executing and enforcing it.

I think, therefore, that the special appeal must be dismissed with costs.

Markby, J.—I also think that the Judge, in laying down that these proceedings against the heirs were illegal, and that, therefore, they cannot be called a proceeding within the terms of the Section, has laid down too wide a proposition; but even assuming that to be so, I also agree with Mr. Justice Jackson in thinking that that could only lead to a remand in order that the Judge should try whether or no these proceedings were *bonâ fide* taken with the intention of executing this decree, and that the Judge having already expressed his opinion upon that point, such a remand becomes unnecessary.

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This appeal is on the part of one Nitamburree Chowdhrain. She, at first sight, appears to have no interest whatever in the subject-matter of the application, inasmuch as she makes no claim to the guardianship of the lunatic in question or to the charge of his estate. She, in short, denies that the lunatic has any estate whatever.

It appears that this appellant came in to oppose the petition under Act XXXV., upon the ground that a schedule to the petition specified certain immoveable property as belonging to the lunatic, which property Nitamburree declared to be at the time in her possession and enjoyment in succession to her deceased husband. That husband, it seems, claimed to be the adopted son of the late husband of Goluck Monee. A suit had been instituted by Shushee Mookhee, the petitioner in this case, and in that suit she had succeeded in having it declared that the adoption was invalid.

The person described as being the adopted son has since died; but it appears that notwithstanding the decision as to his adoption, the property of the husband of Goluck Monee is still in the hands of Nitamburree. Nitamburree, therefore, called upon the Judge to decide whether the immoveable property specified was part of the estate of the alleged lunatic or no, and he decided that fact against her; and having so decided it, he made an order that the Collector should take possession of the property, and intimated that in case of necessity the Court would give its aid to enforce the order for possession thereof; and taking this in connection with the petition as to the immoveable property in question, it seems there is reason to suppose he intended to give possession of that immoveable property as the property of the lunatic.

This, no doubt, was going beyond the purview of the Act, and the appellant seems to be entitled to have that portion of the order set aside. At the same time, it seems to me that the Judge would never have entered into this question at all if it had not been for the step taken by the appellant herself, and that, consequently, although she is entitled to have the Judge's order so far set right, it must be done at her cost, and she must pay her own costs of this appeal as well as in the Judge's Court. The Judge's order will be cut down to the appointment of the Collector to take charge of the estate of the lunatic, without specification of what that estate consists.

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Hobhouse, J.—THE plaintiff in this case, who is the special appellant before us, sued for the use of a certain water-way, of which he said he had a right of user as one of the public, and which he said the defendants had shut up, thereby depriving him of the user.

The defendants apparently did not admit that the plaintiff had any prescriptive right of user of the water-way in question, but they certainly admitted that they had, for the convenience of certain persons, shut up the said water-way, and they averred at the same time that they had opened another water-way for the convenience of the public.

The Lower Appellate Court admittedly laid down the right issue in the case, so far at least as the contention of the special appellant before us goes, and the issue was to the effect as to whether the plaintiff was entitled to his right of user when, in fact, he had abandoned the said right. That was not, in so many terms, the words of the issue, but that was, in truth, the substance of it.

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Jackson, J.—An application was made to the Zillah Judge under Act XXXV. of 1858, to make an order for the care of the estate of a lunatic, one Goluck Monee Chowdhrain upon which application the Judge has directed the Collector of the district, under Section 9 of the Act, to take charge of the estate.

This appeal is on the part of one Nitamburree Chowdhrain. She, at first sight, appears to have no interest whatever in the subject-matter of the application, inasmuch as she makes no claim to the guardianship of the lunatic in question or to the charge of his estate. She, in short, denies that the lunatic has any estate whatever.

It appears that this appellant came in to oppose the petition under Act XXXV., upon the ground that a schedule to the petition specified certain immoveable property as belonging to the lunatic, which property Nitamburree declared to be at the time in her possession and enjoyment in succession to her deceased husband. That husband, it seems, claimed to be the adopted son of the late husband of Goluck Monee. A suit had been instituted by Shushee Mookhee, the petitioner in this case, and in that suit she had succeeded in having it declared that the adoption was invalid.

The person described as being the adopted son has since died; but it appears that notwithstanding the decision as to his adoption, the property of the husband of Goluck Monee is still in the hands of Nitamburree. Nitamburree, therefore, called upon the Judge to decide whether the immoveable property specified was part of the estate of the alleged lunatic or no, and he decided that fact against her; and having so decided it, he made an order that the Collector should take possession of the property, and intimated that in case of necessity the Court would give its aid to enforce the order for possession thereof; and taking this in connection with the petition as to the immoveable property in question, it seems there is reason to suppose he intended to give possession of that immoveable property as the property of the lunatic.

This, no doubt, was going beyond the purview of the Act, and the appellant seems to be entitled to have that portion of the order set aside. At the same time, it seems to me that the Judge would never have entered into this question at all if it had not been for the step taken by the appellant herself, and that, consequently, although she is entitled to have the Judge's order so far set right, it must be done at her cost, and she must pay her own costs of this appeal as well as in the Judge's Court. The Judge's order will be cut down to the appointment of the Collector to take charge of the estate of the lunatic, without specification of what that estate consists.

Markby, J.—I am of the same opinion.

The 14th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

User—Abandonment of right.

Case No. 2173 of 1869.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 11th June 1869, affirming a decision of the Moonsiff of Bohur, dated the 26th November 1868.

Jugutbundhoo Chuckerbutty (Plaintiff), *Appellant,*

versus

Jugut Chunder Chowdhry and others (Defendants), *Respondents.*

Baboos Huree Mohun Chuckerbutty, Nuleet Chunder Sein, and *Okhil Chunder Sein* for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

Where a party suing for the use of a water-way was found to have allowed it to be filled up without objection, and another of the same description to be constructed which he had used for a year or two, he was held to have abandoned his right of user to the former water-way.

Hobhouse, J.—THE plaintiff in this case, who is the special appellant before us, sued for the use of a certain water-way, of which he said he had a right of user as one of the public, and which he said the defendants had shut up, thereby depriving him of the user.

The defendants apparently did not admit that the plaintiff had any prescriptive right of user of the water-way in question, but they certainly admitted that they had, for the convenience of certain persons, shut up the said water-way, and they averred at the same time that they had opened another water-way for the convenience of the public.

The Lower Appellate Court admittedly laid down the right issue in the case, so far at least as the contention of the special appellant before us goes, and the issue was to the effect as to whether the plaintiff was entitled to his right of user when, in fact, he had abandoned the said right. That was not, in so many terms, the words of the issue, but that was, in truth, the substance of it.

The Lower Appellate Court comes to a finding on this point in these words: "I see "no reason to interfere with the order of "the Moonsiff, as (*i. e.*, because), when the "appellant allowed the water-way to be "closed without objecting, he must be sup-"posed to have acquiesced in it; and instead "of this passage, another was opened out, "which, according to his own admission, he "has used for two years." The Court, therefore, does substantially find that the plaintiff is not entitled to his right of user, if he had any, because he allowed the object of his alleged right, *viz.*, the water-way, to be closed up without objection, and because for two years he used the other water-way which the defendants admittedly prepared in lieu of the one which they filled up.

In special appeal it is contended—that is, I understand that it is contended, for it is a little difficult to follow the pleader for the special appellant as to what his real contention is, but I understand that he contends —that, when he had once acquired a right of user, that right could not be held to have been lost to him, unless it was held barred by the application of the Statute of Limitation, and on this point the pleader for the special appellant refers to a judgment of a Division Bench of this Court, which is to be found at page 506 and the following pages of Marshall's Reports. No doubt, there the learned Judges do lay it down that, as a general rule, to use their own words, "a prescriptive right, when once acquired, is liable to be lost only by the operation of the Law of Limitation." This is the general rule they lay down, but

then they go on to say that this rule is subject to an exception to which they shall presently advert, and that exception is, as they thereafter state, this, *viz.*, where the right in question may have been *abandoned*, which is exactly the case before us. It follows, therefore, that, however much one part of the decision of the learned Judges may be in favor of the special appellant, the other part is directly against his contention, for it contemplates that very exception to the general rule laid down which is the point before us.

The pleader for the special appellant then refers us to a case to be found at page 276, Volume VII., Weekly Reporter, from which he would seem to contend that the facts of the case before us do not bring it within the exception which the learned Judges in the case I have first quoted contemplated. In that case, that is, the one in Volume VII., Weekly Reporter, page 276, the learned Judge who delivered the Court's opinion said that no consent could be inferred from the fact that the plaintiff did not sue immediately after the commencement of the preparation of or the completion of the road which was then in dispute. But without at all stating whether or not we agree in this *dictum*, it is clear that the fact on which it is based is not on an equal footing with the facts found in the case before us. The facts here are in some respects the same, but in a very material point they differ. Here, upon the findings of the Lower Appellate Court, we must suppose *three* definite and very clear facts; *firstly*, that the plaintiff in this case allowed a khal deep enough to be used for boats carrying passengers, over which he had, as he alleges, a right of way, to be filled up by the defendants without any objection raised by him; *secondly*, that he not only did this, but that he allowed another khal of the same description to be dug by the defendants without any objection raised by him; and, *thirdly*, that he not only did this, but actually used that other khal, he himself says, for a period of one year, and the Judge below has found for a period of two years. It is upon these findings of facts that the Judge has held substantially that the plaintiff abandoned whatever right of user he might have had of the other khal, and we cannot say, sitting as a Court of special appeal, that the Lower Appellate Court was not justified in using these facts as evidence of the said abandonment. That facts of this nature may be used as evidence of abandonment, we find it very clearly stated in a judgment of a Division Bench of this Court to be found at page 316, Volume X., Weekly Reporter, and we find the same point to be inferred from another judgment of a Division Bench of this Court to be found at page 493, Volume VII., Weekly Reporter. In the first case I have quoted, the learned Judge, Mr. Justice Mitter, remarks that, in the absence of any legislative enactment directly applicable to rights of easement, our duty is to decide according to equity and good conscience; and then he goes on to state the facts of the case, and these facts are that the plaintiff allowed the defendant to shut up the pathway in question in that suit, and to build a house upon it seven years prior to the institution of the suit; and then, upon the analogy of another case which the learned Judge quotes, he shows how, in reality, the plaintiff had, by his conduct, abandoned whatever right he had. That other case is still stronger, and is stated to be where a person built upon lands jointly belonging to himself and his co-sharers, and those co-sharers stood by and allowed him to go on without objection. In that case, it was held that, as no objection was raised to the building, so the plaintiff could not in that case sue to have the building removed. The facts of the present case I think to be even stronger, and to show that this is so, I would only refer to the previous statements that I have made of those facts.

We think, therefore, that the facts found were sufficient to justify the Judge to come to the conclusion that the plaintiff had abandoned the rights that he had to the former khal; and this being so, we dismiss this special appeal with costs.

The 15th December 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Contracts (special or implied)—Landlord and tenant—Loss of kuboolent.

Case No. 1928 of 1869 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 5th May 1869, reversing a decision of the Deputy Collector of Jungeepore, dated the 30th November 1868.

Oomabutty Debia (Plaintiff), *Appellant*,

versus

Pureshnath Pandey and others (Defendants), *Respondents*.

Baboo Mohinee Mohun Roy for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where there is a special agreement between two parties, and that agreement has been performed, and one of them has had all the benefit to which he is entitled thereunder, the other may sue him either upon the special agreement or upon what has been called the implied contract which arises out of the receipt of the benefit.

Where two parties have mutually contracted as landlord and tenant, and the latter has occupied the land in pursuance of the contract, he cannot be allowed to maintain possession free from the payment of rent because the landlord has the misfortune to lose, or is unable to produce, the paper which contained the terms of the agreement.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court is insufficient, and that the proceedings must go back to that Court in order to a new trial.

This was a suit for arrears of rent, the plaintiff stating herself to be the putneedar of an 8-annas share of a certain mehal, and alleging the defendant to hold an izarah of some lands under her. The plaintiff's allegation further was that the written instrument by which the defendant had contracted to pay specified rent for the izarah in question had found its way into the hands of a certain person, who, for reasons stated, withheld it, and consequently that instrument could not be produced.

The defendant denied the holding under an izarah, and alleged that he himself, although the name of the plaintiff had been used, was the real putneedar.

Thereupon the Court of first instance framed issues, first, as to whether the defendant had executed a kubooleut or engagement to pay rent to the plaintiff; and, secondly, whether there was any proof of payment of rent by the defendant to the plaintiff down to the year 1270. The Deputy Collector who tried the suit considered that the plaintiff had made out good reason for not producing the original kubooleut, and therefore he allowed secondary evidence of the contents of that kubooleut to be put in. But he also found independently that there was proof of previous payment of rent to the plaintiff by the defendant. The second issue also was consequently determined in favor of the plaintiff, and she got a decree for her rent.

Upon appeal to the Zillah Judge, he considered that the only issue to be tried was, whether the plaintiff had given sufficient proof of the engagement set up; and finding that there was no sufficient reason made out for not producing the original kubooleut itself, he declined to receive any secondary evidence of the contents of that kubooleut, and therefore threw out the plaintiff's suit.

Now, this was a suit simply for rent. The plaintiff, no doubt, alleged that a kubooleut had been executed, but it appears to me to be evident from the issues framed that she based her right to recover rent, not merely upon the kubooleut, but also upon the relation of landlord and tenant as evidenced by the occupation of the land by the defendant. No reason is shown why the plaintiff should have been held to making out a case upon the kubooleut simply, and should have been debarred from availing herself of the circumstance that the defendant held under her; and therefore it seems to me that the Court was bound to allow the plaintiff to prove in whatever way she could the relation of landlord and tenant, and the consequent liability of the defendant to pay rent. It seems to me that, where parties have mutually contracted as landlord and tenant, and the defendant has occupied the land in pursuance of that contract, it is monstrous to say that he was to maintain possession of the land free from the payment of rent, because the landlord had the misfortune to lose, or was unable to produce the paper which contained the terms of his agreement. Under such circumstances, it became the duty of the Court to look to the relation which existed between the parties.

Looking to the finding of the Court of first instance, so far as it is unreversed upon that point, I think we are bound to assume that there was evidence on which the plaintiff could have recovered on the ground that the defendant held under her. Therefore, the case must go back to the Zillah Judge in order that he may come to a conclusion on

the second point, namely, whether the plaintiff has proved otherwise than by the kubooleut that the defendant held lands under the plaintiff as izaradar, and was therefore liable to pay rent.

Markby, J.—I am entirely of the same opinion. It seems to me that the question we have got to decide in this case is altogether clear of the rules upon which secondary evidence of written agreements between the parties may or may not be admitted. The decision of the Lower Appellate Court, which turns entirely upon this point, seems to me to be, in point of law, correct. That Court was not satisfied that the absence of the document which was alleged to have been executed between the parties was sufficiently accounted for, and therefore he rejected all secondary evidence of that document. But the principle of law which he seems to have overlooked appears to me to be this, that, where there is a special agreement between the parties, and that agreement has been performed, and one of them has had all the benefit to which he is entitled under the special agreement, the other may sue him, either upon the special agreement, or upon what has been called the implied contract which arises out of the receipt of the benefit. That principle of law was laid down in the case of Studdy *vs.* Sanders, reported in 5 Barnewall & Cresswell 628. It is taken there from Buller's *Nisi Prius*, a work of great authority in English Law, and is assented to by three of the most learned Judges who ever sat in Westminster Hall; and that principle of law, which is well established in English Courts of Justice, seems to me not to rest upon any special principles of English Law, but upon principles which are common to all mankind, namely, that, when a man has received a service which was not intended as a gift, he should pay the adequate price of it. Sometimes there is an advantage of suing on the special agreement, sometimes there is more advantage in suing upon the implied agreement; but it is open to the plaintiff, and in my opinion the wisest course for him to pursue is to sue on both, so that, if he fails in proving the special agreement, then he can fall back upon the implied agreement, provided the suit is properly framed for the purpose; and in this case it appears that the suit was properly framed for the purpose by the form of the second issue fixed in the Court below.

The 16th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage-bond—Money-decree—Waiver.

Case No. 1620 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 11th March 1868, affirming a decision of the Moonsiff of Pursa, dated the 29th April 1867.

Sawruth Singh and others (Defendants), *Appellants,*

versus

Bheenuck Sahoo (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Sreenath Banerjee* for Appellants.

Baboo Doorga Doss Dutt for Respondent.

G borrowed money on a mortgage-bond, on which the mortgagees sued for and obtained a money-decree which did not declare the mortgaged property liable to be sold in satisfaction. While the proceedings in the case were pending, *G* sold the property: *Held* that the property was virtually unburdened at the date of the sale; the mortgage-lien having been rendered infructuous by the action of the mortgagees in waiving their right of sale and receiving a money-decree.

Glover, J.—These cases were remanded by this Court on the 14th April 1869, with directions to the Subordinate Judge to decide upon the *bona fides* of the deed of sale preferred by the plaintiff. The reply of the Subordinate Judge is now before the Court in the shape of a report under Section 354 of the Code of Civil Procedure, and the result of the enquiry is that the deed of sale under which the plaintiff claims is a *bonâ-fide* transaction.

The points taken in special appeal are, first, that, under the circumstances of the case, the Subordinate Judge has not decided the question of *bona fides* with due regard to all the evidence, which is opposed to such supposition; but that he has gone simply on the evidence of plaintiff's witnesses without considering other points in the case, such as the respective position and relationship between the parties and the palpable object which the vendor had to get rid of this property in order to defraud his creditors. The second point is that the purchaser of the decree which had been obtained by the mortgagee Ishuree Singh against Gunesh

Sahoo still retains a lien over the property pledged in the mortgage-bond.

With regard to the first point, we think that no sufficient ground has been shown for our interference with the Lower Appellate Court's decision. The Subordinate Judge has not overlooked the fact of the relationship between the parties. He has gone at very considerable length into the circumstances of the case, and after taking these points into consideration and examining witnesses, he has come to a distinct finding of fact that the deed of sale is not collusive. He must have been aware then, and his judgment shows that he was aware that there were disputes between the parties; he was likewise aware that the purchaser was a relative of the vendor, and knowing all this, he still believed the evidence in favor of the kobalah. His decision cannot be said to be wrong in law, and we cannot interfere with the finding of fact come to by him on the whole of the evidence.

With regard to the second objection, it may be as well to state shortly the position of the parties. It appears that Gunesh Sahoo, on the 3rd of February 1865, borrowed a certain sum on a mortgage-bond from Ishuree Singh and Nunkoo Singh. A suit was brought upon this mortgage-bond by the mortgagees on the 13th of November 1865, who obtained a simple money-decree, and neither asked for nor received any decree declaring the mortgaged property liable to be sold in satisfaction of their bond. The present defendants bought the share of Gunesh Sahoo in the family property on the 14th September 1867. Whilst the proceedings in the case of Ishuree Singh and Nunkoo Singh were pending, Gunesh Sahoo sold the disputed property to the plaintiff Bheenuck on the 31st January 1866. Now, it appears to us that, at the date of this sale, the property of Gunesh was virtually unburthened. No doubt, there had been upon it originally a mortgage-lien in favor of Ishuree and Nunkoo Singh, but that lien, if it were not altogether done away with, was at all events rendered infructuous by the proceedings of the mortgagees in 1866, before the date of the sale to Bheenuck, when they chose to waive the right of selling the property pledged in satisfaction of their mortgage-bond, and to receive instead a simple money-decree. It was contended by Mr. Allan for the special appellant that the purchaser of a money-decree of this description still retains the lien which the original mortgagee had over the property, inasmuch as he bought the rights of these mortgagees, and these mortgagees could have brought a suit irrespective of their money-decree to have that decree satisfied out of the property pledged in the bond; and in support of this contention, we have been referred to a decision in the case of Proladh Misser and others *versus* Oodit Narain Singh, dated the 21st August 1868, published in Volume X. of the Weekly Reporter, p. 291. With regard to this precedent, it is enough to say that in that case the decree was obtained upon a mortgage-bond, and that it ordered the mortgaged property to be sold in satisfaction of the mortgage-debt. In this case the decree was a simple money-decree, and therefore the precedent quoted is in no way in point.

On the contrary, it appears to us that the principle laid down by the Full Bench in a decision, dated 14th December 1864, in the case of Gopeenath Singh *versus* Sheo Sahoy Singh, published in Volume I. of the Weekly Reporter, p. 315, applies to the matter now before us. In that decision, it is laid down that a party to whom property is pledged for a debt, if he contents himself with a simple money-decree against his debtor, cannot execute his decree against the property pledged to the prejudice of a subsequent *bonâ-fide* purchaser. He may enforce his lien by separate action against the party in possession of the property pledged to him, but he cannot execute his money-decree against the property in the hands of the subsequent purchaser. We do not say that such a remedy does not exist to the special appellant in this case, but it is quite clear that up to this time he has made no endeavour to follow it, and has never sued to have it declared that the property was liable to be sold in satisfaction of the mortgage-debt. It seems too much to say that a party who, having obtained a money-decree for a mortgage-debt, has still the power to sue to have that decree satisfied by declaring that the mortgaged property is liable to sale, can keep that right hanging over his judgment-debtor for an indefinite period of time, and if he does not choose to exercise that right himself, can sell that right to another years afterwards. But, however this may be, in the present case no attempt has ever been made to pursue such a right, and the point taken by the special appellant's pleader does not therefore arise.

It appears to us, therefore, that this special appeal must be dismissed with costs.

The Moonsiff who tried the suit originally dismissed it, finding apparently, though not explicitly, that the plaintiff's title by purchase had failed, and finding also that the land was the *mál* land of the defendant, and not lakheraj belonging to the plaintiff, and also finding that the plaintiff had never been in possession.

On appeal, the Subordinate Judge reversed the decision of the Moonsiff, and gave judgment for the plaintiff.

Against this decision of the Subordinate Judge, the defendant has appealed specially; and, out of eleven grounds of special appeal contained in his petition, he has relied chiefly upon five. It is not necessary, I think, to enter upon all these grounds of special appeal, because two of them are such that our decision upon them obliges us to remand the case to the Court below.

The defendant having denied the plaintiff's title by purchase, the Moonsiff in dismissing the suit, found on that question in such terms that the plaintiff considered himself obliged to appeal upon that question to the Zillah Court. I think, therefore, that the Zillah Court was bound to determine expressly the point whether the plaintiff had purchased or no. But, however that question might be determined, it is obvious that a still more important point remained behind, namely, whether the title which the plaintiff so acquired was a valid title, such as to enable him to recover.

On the parties going into proof on this point, the Subordinate Judge held that, by reason of a previous decision between these parties, the defendant was concluded, so as to be incompetent to raise any question as to the genuineness of the plaintiff's documents. The previous decision referred to was one passed in a suit between the same parties regarding the resumption of some lands in Mouzah Deepa.

I do not wish to be understood as expressing any opinion whether, if in that suit an express issue had been raised regarding the genuineness of the documents in question, the parties would have been bound by the decision on that issue in all future suits upon different causes of action; but as far as we can see, there was no such issue raised in that case, but merely, in general terms, the rights of the plaintiff in this suit which were based in some measure upon these documents appear to have been affirmed. It appears to me quite clear that such affirmation in regard to those documents is not such a decision between the parties as precludes the defendant from raising a question as to the genuineness of those documents in the present suit. Clearly, therefore, it was necessary for the Subordinate Judge to determine as to the amount of credit and weight due to all the evidence adduced by the parties on the question of title.

The special respondent before us, feeling himself unable to support the decision of the Court below upon this point, contended that the finding of that Court upon the question of possession was in itself sufficient to support the judgment, although it might be defective in other respects. Now, the finding of the Subordinate Judge as to possession, whether it be founded upon good reasons or not, I confess, appears to me not particularly valid, inasmuch as the finding is in general terms that the plaintiff was in possession until dispossessed by the defendant. He does not find how long that possession subsisted, when it begun or ended, or in what manner it terminated. It might be that if the plaintiff had been found to have occupied this land for 12 years in good faith, and to have been forcibly dispossessed by the defendant, that would in itself have afforded a sufficient indication of title to enable the plaintiff to recover possession. But the Subordinate Judge finds nothing of the sort.

I think, therefore, that the case must go back to the Lower Appellate Court in order that it may find whether the plaintiff has acquired a title by purchase as alleged in the plaint, and in the next place, whether the title so acquired is a valid one so as to enable him to recover possession; and in that enquiry it must, as I have already said, determine on the nature of the evidence as to whether it is sufficient for the purpose or no; and if in the course of the enquiry he should find that the plaintiff's documentary title is not made out, yet the Subordinate Judge must determine whether the plaintiff has such a title by possession as will enable him to recover.

Markby, J.—I also think that the case must go back. It seems to me incontestable, and it certainly was not contested, that the Lower Appellate Court is wrong in two points: first, in not having disposed of the question as to whether or not the plaintiff had established any title at all; and secondly, in having treated what took place upon

the former trial between these same parties as conclusively establishing that the sunnud and taidad were valid and genuine documents. It seems to me that the question which arises upon the validity of those documents is altogether apart from the question which would arise, and which has been adverted to, if a distinct issue had been raised in that case as to whether or no those documents were evidence. The impression on my mind at the present moment is, although it is unnecessary finally to decide upon it, that, if this point had been raised as a distinct issue, it would have been binding and conclusive between the same parties, even in a suit relating to another piece of land. But that does not appear to have been the case here. It has been very imperfectly stated to us how these documents were treated in the former case. It does not appear whether the genuineness of those documents was put in issue. In short, nothing has appeared which would justify the Court in saying that a conclusive finding has been come to upon them.

Then, the vakeel for the respondent contended that, putting that aside, there was, in the judgment of the Court below, a finding that the plaintiff had been in possession of this land for 12 years, or, at least, that he had been in possession for a sufficient time to justify an inference of title. If there had been a finding that he had been in possession for 12 years, that, according to the decision of the Privy Council which was referred to in the argument of this case, no doubt, would be something in the nature of a finding that he had a title. But it appears to me quite clear that no such finding, which must, of necessity, have been a clear and definite one, has been come to by the Court below. If he had been in peaceable possession for a less period than 12 years, that might have been evidence upon which the Court below might, if it had so thought fit, have inferred title; but that inference must be drawn by the Court below, which is a Judge of facts, and not by us. Clearly, that inference has not been drawn in this case by the Lower Appellate Court. Therefore, the grounds upon which the respondent asks us to say that this judgment, even with the defects which have been pointed out, was sufficiently in his favor to warrant this Court in affirming the decision, both fail; and the case must go back to the Court below on the grounds stated.

The 16th December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage—Lease—Redemption.

Case No. 124 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 20th May 1869.

Soorjun Chowdhry (Defendant), *Appellant,*

versus

Imambandee Begum (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Unnoda Pershad Banerjee* for Appellant.

Messrs. G. C. Paul and *G.* and *C. Gregory* for Respondent.

Defendant lent plaintiff a sum of money to be paid off on the expiry of a zur-i-peshgee lease which he took from plaintiff, it being stipulated that the lessee (the lender) was to clear off principal and interest from the assets of the property leased, and that, on the borrower paying a trifle expected to remain due after the period of the lease, the lender was to surrender possession without objection. Plaintiff came into Court with an allegation that he had tendered the money still due under the arrangement, and he asked for immediate possession, although the term of the lease has not expired.

HELD that he was not entitled to possession until that term expired.

Kemp, J.—THE defendant is the appellant before us. The plaintiff sues to recover possession of the entire 16 annas of certain properties by redemption of a mortgage, dated the 11th November 1862, corresponding with the 5th of Aghrun 1270 Fuslee, on deposit of a sum of Rupees 12,722-12¾, which the plaintiff alleges to be the balance of the zur-i-peshgee money, principal and interest, due to the defendant. There is also an allegation in the plaint that the plaintiff tendered the money to the defendant, who refused to receive the same. The date of the alleged tender and refusal are

not given in the plaint, although the cause of action is stated as dating from such refusal.

The facts of the case to be gathered from the written statements, and on which there is no dispute, are that the defendant, the appellant before us, who is a money-lender, a Mahajun or banker by profession, lent a sum of Rupees 19,300 to the plaintiff Imambandee Begum, and it was arranged between the parties that this principal sum of Rupees 19,300 was to be paid off in 1281. A lease was given to the appellant by the respondent, the term of which is from 1271 to 1281. At the foot of the deed of zur-i-peshgee, there is a calculation which shows that the assets of the properties leased were assumed to be 2,830 rupees; a small payment of Rupees 14 per annum was to be made by the lessee to the lessor, apparently to mark the tenancy; and it was stipulated that the lessee, the lender of the money, was to clear off both principal and interest of the amount advanced from the 2,830 rupees which were assumed to be the full assets of the properties leased. At the commencement of 1282, as per schedule at the foot of the deed, it was calculated that 1 rupee and 2 annas would be due, and it was stipulated that, on payment of this sum by the borrower, the lessee (the lender) would have to surrender possession without objection.

The main contention below was to the effect that, this being a lease granted after the promulgation of Act XXVIII. of 1855, and as it contains no stipulation for the re-delivery of possession within the term of the lease, and further as all the risk of the assets assumed by the borrower falling short, owing to bad seasons and other circumstances over which he could have no control, were on the lender, and as also there was a stipulation that whatever increase would be made in the jumma and produce owing to the good management or industry or labor of the lender was to be his right, the borrower is not entitled to demand re-delivery of possession within the time stipulated in the lease. The Subordinate Judge of Patna seems to have halted between two opinions, and to have doubted whether the decision passed by this Bench in the case of Kader Altaf Hossein,* or a decision passed by Justices Louis Jackson and Dwarkanath Mitter, in a case which is not published, but which has been submitted for our inspection by the pleader for the appellant, and dated the 19th May 1868,* was to prevail.

Since hearing the argument in this case, I have had an opportunity of consulting Mr. Justice Dwarkanath Mitter, by whom the judgment just referred to was delivered. That learned Judge informs me that judgment was delivered on the supposition and

* Khajah Lotf Ali *versus* Gujraj Thakoor—*see* 11 W. R., p. 408.

* The 19th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter. *Judges.*

Case No. 2533 of 1867.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 31st July 1867, affirming a decision of the Moonsiff of Behar, dated the 21st December 1866.

Deen Dyal Sahoo and another (Plaintiffs), *Appellants,*

versus

Gunesh Mahtoon and others (Defendants), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboo Romanath Bose for Respondents.

In this case two questions were raised. The first was whether the period for which the property had been let under the zur-i-peshgee lease was 5 years or 20 years as alleged by the defendants. On this point the Lower Appellate Court has found as a fact, agreeing with the Moonsiff, that the lease was for 20 years.

The second point was whether the plaintiff, who purchased from the mortgagor, was not at liberty to repay the principal amount, or as much of that amount as remained due, and thereupon to re-enter on the mortgaged premises. Upon the finding of the Lower Appellate Court, the plaintiff will not apparently be entitled to any deduction on account of the profits realized during the alleged holding over of the defendant after his lease expired. But he will be able, on payment of the amount due, to put an end to the zur-i-peshgee lease, which is in all its essentials a mortgage, and to recover the land.

It is contended on behalf of the special appellant that, under the terms of his lease, the mortgagee is entitled to remain in possession for the full period of 20 years. But, in our opinion, the contract is not open to such a construction. It only stipulates that the mortgagee may hold the land, instead of his money, for 20 years, and that, if at the expiration of that period the amount due is not paid off, he may proceed according to law; but it does not stipulate that the mortgagor shall not repay the mortgage-debt at any time before the 20 years are out. And our Courts, which are Courts of equity and good conscience, will be always ready to relieve the mortgagor in such a case, and to enable him to redeem his property.

The decision of the Lower Appellate Court must be modified, and it is declared that the plaintiff, on payment of the amount of the mortgage-debt remaining due, will be at liberty to re-enter on the land.

It is by no means clear to us that the plaintiff has not been made the victim of a fraud concerted between his vendor and the mortgagee, by which the incumbrance on the property sold has been made larger than at least it was at first represented to be; but as the plaintiff made an allegation which he was not able to support, we think that there should be no order as to costs.

assumption that the transaction in that case was one which took place previous to the passing of the new law of Usury—Act XXVIII. of 1855. I need not say that this assurance of the learned Judge has removed any hesitation which we might feel in delivering the present judgment.

Deciding, therefore, this case, as we did the case of Kader Altaf Hossein, on its own merits, we find that the transaction took place subsequent to the passing of Act XXVIII. of 1855; the lender took upon himself a considerable risk; the assets of the estate were just sufficient, and no more than sufficient, to pay off the debt, principal and interest, and that interest at the moderate rate of 9 per cent., within the term fixed by the parties. A succession of bad seasons, or even one bad season, might have rendered it impossible for the lender to recoup himself within the term of the lease, and it is very clear that, under the terms of that lease, whether he had satisfied his debt or not from the usufruct, he would have had to surrender possession on the expiry of the term of the lease.

The Subordinate Judge has been mainly influenced in coming to the decision he has done by the fact—evidence of which has not been read to us, but which we assume as proved—that there has been a rise in the price of grain, and that that rise has not been brought about by the good management and labor of the lessee. Now, in this case, we observe that the mortgagor does not ask for an account; he does not ask the Court to decide as between the parties whether the mortgagee has made more out of the estate than the fixed assets assumed by the parties when the lease was granted. He comes into Court with an allegation that he has tendered the money which he says is still due under the arrangement made between the parties, and asks the Court to give him immediate possession, although the term of the lease has not expired. We think that he is not entitled to ask for possession until that term expires. The transaction between the parties is not a simple usufructuary mortgage. The transaction appears to us to be a complicated one; a mortgage which is coupled with an engagement that bears all the characteristics of an ordinary lease. All the risk was with the mortgagee, the lessee; the interest charged was very moderate; and under the terms of the lease any profits that he may have been able to make over and above the assets fixed by the parties are to be enjoyed by him.

Taking this view of the case, we reverse the decision of the Subordinate Judge and decree the appeal, dismissing the plaintiff's suit with costs in both the Courts, bearing interest, payable by the respondent, plaintiff.

The 17th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Joinder of causes—Discretion—Identification—Evidence—Onus probandi.

Regular Appeals from a decision passed by the Subordinate Judge of Dacca, dated the 27th May 1869.

Case No. 191 of 1869 and the cross-appeal No. 219 of 1869.

Rutton Chand Bysack and another (Defendants), *Appellants,*

versus

Bocha Bibee and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Nuleet Chunder Sein* for Appellants.

Baboos Gopal Lall Mitter and *Chunder Mohun Sein* for Respondents.

In a suit to recover three sums of money, one on a general adjustment of account, another on account of deposit, and the third as the amount of a bond, the Court of first instance was held to have had a discretion to join the three causes of action in the same suit, and such joinder was held not to affect the jurisdiction of appeal.

Where witnesses questioned as to the identity of a bond put before them simply attest their own signatures, their evidence does not legally establish the bond.

Where a plaintiff sues for a specific sum of money due on a balance of account, it is for him to start his case, and show what sum is due on the account; and until he has done so, the defendant need not be called upon to rebut him.

Bayley, J.—THERE are two appeals before us in this case; one No. 191, on the part of the defendants, which relates to a sum of Rupees 7,000, the amount of a bond dated the 13th Joisto 1271; the second appeal is by the plaintiffs, No. 219, against the decision of the Judge of the Lower Court.

The plaintiff's suit was for three items, *viz.*, 11,115 rupees on a general adjust-

ment of account, 3,893 rupees on account of deposit, and 7,000 rupees on account of a bond.

The Lower Court dismissed the plaintiff's suit as to the two former items, and decreed it as to the last, the bond.

In Regular Appeal No. 191 of 1869, an objection was taken that three several and distinct causes of action should not have been joined in the same suit. I, however, think that the Lower Court had discretion to join them in this case, and that it in no way affects the jurisdiction of appeal.

On the merits, the defendant, appellant in No. 191, urges that there should not have been on the evidence a decree for plaintiff for the bond of the 13th Joisto 1271. The witnesses to it are Juggut Beharee Dhur, Jadub Chunder Burral, and Muddun Mohun Bysack. Their testimony appears to me not sufficient to prove the bond. In the first place, they do not say that the bond on the record is the specific bond which they saw executed by the defendant. In the next place, these witnesses are more or less dependants of plaintiff. For Juggut Beharee Dhur is called an *omedwar* for a tehsildaree under plaintiff; Jadub Chunder Burral is a broker, who gets a consideration from plaintiff for bringing customers to the plaintiff's timber stores; and Muddun Mohun Burral is a gomashtah of plaintiff. These facts to my mind, not necessarily of themselves, but taken together with other circumstances in the evidence, make me doubt the evidence and think it tutored. Each man specifies 1,000 rupees, more or less; 7,000 rupees were brought in so many bags for the special appellant. Each man attests his own signature at the same time; but there is evidently a great want of precision as to the time of payment of the money, *viz.*, whether before or after the execution of the bond. And on other points, on which precision might have been expected, it is wanting. It is pleaded as to the bond that there is an admission of Rupees 7,000 being due on the bond from the defendant to the plaintiff, and there is the evidence of Sonatun Doss, who states that the plaintiff had requested him to accommodate the defendant with a loan of Rupees 7,000, but that he did not agree to do so. The plaintiff then (Sonatun Doss goes to say) took Rupees 6,000 from him through Muddun Mohun Burral and Monohur Singh. This is the fullest extent to which Sonatun's evidence can be said to go. As to the evidence of Monohur Singh, his evidence is also evidently tutored. He knows exactly the sum of money and bags taken away by the defendant. He says, however, that he did not see Juggut Beharee Dhur in the plaintiff's house, while it is alleged by the plaintiff and Juggut Dhur that he was there. Muddun Mohun Bysack, through whom, says Sonatun, he sent the money, never sets forth this prominent fact.

As to the 11,115 rupees on the adjustment of accounts, and 3,893 rupees in deposit, no receipts, acceptances, or security seem to have been taken for the larger sum of Rupees 11,115, although a bond is taken for the smaller sum of Rupees 7,000. As to the accounts on which the plaintiff bases his claim, these are not properly attested. With reference to these accounts, Muddun Mohun Burral, the gomashtah, says that a man named Koylash Chunder made a kutcha khatta-book, and he (Muddun Mohun) compiled a new khatta-book from it, and entered the sum from the rough copy of another man into the new khatta-book, but he did not himself make out or make the entry in the alleged original now produced. There are certain letters relied on by the plaintiff as showing admissions of the debt due by the defendant and of the property taken charge of by the defendant in trust for plaintiff. But, really, these letters do not prove in any definite terms the specific claims and items now put forward by the plaintiff.

Upon the whole, I think that plaintiff has failed to prove the three items of his claim, and that his suit must be dismissed.

I would, therefore, decree defendant's appeal No. 191 of 1869 as to the bond for 7,000 rupees, and dismiss plaintiff's appeal No. 219 as to the items of 11,115 rupees on the general account, and the 3,893 rupees on the deposit account.

Hobhouse, J.—I agree with the judgment of Mr. Justice Bayley. The question before us in case No 191 is whether the plaintiffs have proved that the defendant executed a bond of Rupees 7,000, and is indebted to the plaintiff in that sum. In the first place, I am of opinion that the bond is not legally proved; and, secondly, I am of opinion that the evidence of the witnesses to the bond is not the evidence of truth. I think that the bond is not

legally proved. I observe that the three witnesses adduced to prove the bond, *viz*, Juggut Beharee Dhur, Jadub Chunder Burral, and Muddun Mohun Bysack in their examination-in-chief give, no doubt, a plausible account of the transaction. They say that the defendant had charge of the plaintiff's affairs, and that on a certain date in Joisto 1271, a sum of Rupees 7,000 was paid over to the defendant in their presence, and that the defendant executed a bond for that amount. They add that they saw the defendant sign the bond, and that they saw the money weighed in the plaintiff's house, and then saw it delivered. So far so good; but then comes the crucial test as to whether the bond before us was the very bond which the parties executed, and the identity of which must be shown before they can succeed in the suit. Now, it would have been expected, supposing that the witnesses were speaking of a bond and of its attestation and execution, that they would have clinched their testimony by saying that this was the document in question, the very bond. But upon this document being put before them, what do the witnesses here say? They say, not that this is the document which they had seen executed, not that this piece of paper was the bond which was executed by the other side, but simply "this is my signature." I think, therefore, that their evidence does not legally establish the bond. Neither do I think that the witnesses are trustworthy. Those who profess to speak to the bond and its execution stop exactly short as I have stated at the essential point regarding the bond, *viz.*, its identity.

And, further, each one of them, though he speaks with detail on the general story of the bond to which he had been adduced to swear, yet, when he is cross-examined as to other events attending the bond, which he might be presumed to know at least as well as those events to which he does speak, he is either altogether unable to answer, or else his answer is most unsatisfactory.

Then again, if the debt was, as was naturally enough averred, entered in the khatta-books kept in the course of the plaintiff's business, what was requisite was that the original khatta-books in which the entries were made should have been produced, and professedly they were produced, but on cross-examination it turned out that the khattas produced as if they were the originals were not the originals, but only fair copies made from the originals, and it further turned out that the originals were in existence, and could have been, but were not, produced.

Again, the most important witness, Muddun Mohun Bysack, is clearly a most untrustworthy person. He spoke of the khattas produced as if they were original account-books, and as if he had prepared them. He then admitted they were but copies, and was doubtful whether he or some one else named, but not produced, had prepared these originals. It was he, too, who, if plaintiff's story were true, brought the money from the bankers to pay to the defendants, but to this very material fact he does not venture to pledge his oath.

For these reasons, I do not think that the plaintiff's claim has been legally proved, and the regular appeal No. 191 must be decreed with costs. With regard to No. 219 of 1869, the contention by the pleader for the appellants is that from the evidence of the letters written by the defendant Rutton Chand, it was clear that he, Rutton Chand, took care of certain moneys for the plaintiff, and that, this being so, the onus of proof is shifted on the defendants to show that they had no such transaction. It is very obvious that this contention is unsound. Plaintiff sued for certain specific sums of money due on a balance of account; it was clearly, therefore, upon him to start his case, and show what it was that the defendant was indebted to him, what sum was due on the account; and until he had done so, it is very evident that there was no need of calling upon defendant to rebut him. I therefore think that this appeal No. 219 of 1869 must be dismissed with costs.

The 18th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Enhancement of rent—Notice.

Cases Nos. 1916 and 1918 of 1869 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 20th May 1869, affirming a decision of the Deputy Collector of that District, dated the 31st December 1868.

ment of account, 3,893 rupees on account of deposit, and 7,000 rupees on account of a bond.

The Lower Court dismissed the plaintiff's suit as to the two former items, and decre[illegible] it as to the last, the bond.

In Regular Appeal No. 191 [illegible] objection was taken that th[illegible] distinct causes of action [illegible] been joined in the sam[illegible] think that the Lower [illegible] to join them in th[illegible] way affects the i[illegible]

On the m[illegible] No. 191, [illegible] been on[illegible] for the [illegible] witne[illegible] Jady[illegible] Bys[illegible] no[illegible] fir[illegible] U[illegible]

[illegible] Respondent. [illegible] be prospective, [illegible] should be prepared to [illegible] at the time the [illegible] is no ground for this [illegible] special appeal. The notice was admittedly served in [illegible] Choitro 1274, and the cause of the alleged increase in the productiveness of the soil admittedly occurred by alluvial accretion in Bhadro 1275.

Now, the law on this point is clear, and requires the notice to state distinctly that "the value of the produce or the productive "powers of the land *have been* increased "otherwise than by the agency or at the "expense of the ryot." The law does not contemplate that the notice shall be prospective or future.

We quite agree with the Lower Appellate Court that the principle of the notice is that the ryot should be prepared to meet the claim on grounds *existing* when the *notice* might be received by such ryot.

In this view we dismiss both these appeals with costs.

The 18th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Small Cause Court—Parol evidence—Written agreement.

In the Matter of Mr. William Thomas Frewin, *Petitioner*,

versus

Mr. L. J. Paul, Principal officer and proprietor of the firm of J. Henry and Son, Undertakers, *Opposite Party*.

Petitioner in Person.

Baboo Poorno Chunder Shome for Opposite Party.

[illegible] Cause Court to enforce a written [illegible] defendant has a right to set up and [illegible] evidence to prove such a state of facts as [illegible] that the instrument did not correctly set [illegible] terms of the arrangement between the par[illegible] would justify the Court in its character of a [illegible] of equity in amending the agreement in a suit [illegible] that express purpose.

Peacock, C. J.—It appears to us that this case ought to be sent back to the Small Cause Court Judge with an order to receive the evidence on the part of the defendant and to try the defence which he has set up.

The order in this case is this: "Serampore, "29th August 1868. Please furnish a coffin "with the necessaries as required below for "the late Mr. John Scott: agreed for total "rupees two hundred and seven, payable on the "15th September 1868, 'by' Thomas Frewin." The word "by" is in very small letters and is printed. If this was a mere order for a funeral, and not an actual agreement to pay, it might, in the absence of evidence to rebut the implication, be implied against the person giving the order that he was the person to pay, and that he agreed to pay. But if it should turn out that, at the time Mr. Frewin gave the order, he informed the plaintiff that he was not the person to pay, that Mr. Scott had died in his house, that he wished him to be buried, but that plaintiff was to look for payment to the Administrator-General to whom all the assets of the deceased were to be handed over, the order given under such circumstances would not amount to an agreement to pay for the funeral, nor could an implication to pay be raised from it. If, after an order had been given on those express terms, a paper was signed for the purpose of expressing the terms of that order in words which through mistake amounted to an agreement to pay, a Court of equity would relieve against the mistake. It may be remarked that the agreement signed by Mr. Frewin does not in express terms say that the funeral was to be paid for by Mr. Frewin, but the signature after the printed word "by" answers the double purpose of a signature, and of expressing the person by whom the payment was to be made.

If the paper was signed by mistake, and at the time that Mr. Frewin signed it it was understood that it was an order which he had given with a distinct stipulation that he was not to pay, but that plaintiff was to look to the Administrator-General, it appears to me that, in point of equity, that agreement might be rectified for the purpose of carrying out what was the real arrangement between the parties. Now, a Small Cause Court in the Mofussil has to adminis-

, justice, and good conscience. It here Court of law as distinct and m a Court administering equity. , in my opinion, necessary for Mr. le a separate suit in the Small have the document rectified out the real arrangement be- s. He had a right in a suit upon that agreement to set up of defence such a state of facts as uld justify the Court in amending it in a suit for that express purpose.

In paragraph 1041 of Taylor on Evidence, it is said: "Courts of equity will also some-"times admit parol evidence to contradict or "vary a writing, where, by some *mistake in* "*fact*, it speaks a different language from "what the parties intended; and where, "consequently, it would be unconscientious "or unjust to enforce it against either party "according to its expressed terms."

In another part of that paragraph, it is said: "A plaintiff may seek a relief in equity "by filing a bill, either to *reform* the writ-"ing, in which event it will be necessary to "satisfy the Court that the mistake was "made on *both* sides; or to *rescind* the in-"strument, in which case, though conclusive "proof of error or surprise on the plaintiff's "part alone will suffice, it must appear that "the mistake was one of vital impor-"tance."

Again, in paragraph 1042, the same author says: "Defendant also, against whom "a specific performance of a written agree-"ment is sought, may insist, by way of an-"swer upon the mistake, and may establish "its existence by parol evidence, because "he may rely on any matter which shows "it to be inequitable to enforce the contract."

So that when a party goes into a Court of equity to enforce an agreement, the party against whom it is attempted to enforce it may set up that by some mistake the instrument produced did not correctly set forth the terms of the arrangement between the parties.

Mr. Frewin says: I gave the order because Mr. Scott died in my house, but I gave the plaintiff to understand that I was not to pay for the funeral, but that he would be paid by the Administrator-General.

It is not for us here to determine what the case may be when Mr. Frewin's defence has been heard and his evidence in support of that defence has been adduced, but it does appear that the plaintiff did submit his bill to the Administrator-General, and did ask him to pay for the funeral, and it was only when the Administrator-General refused to pay on the ground of its being exorbitant, offering to pay what was reasonable, that the plaintiff commenced the suit in the Small Cause Court against Mr. Frewin.

At the foot of the memorandum, it is stated that "interest at five rupees per cent. per mensem will be charged on failure of payment from the appointed day," that is, 60 per cent. a year. The words are printed with the exception of the word "five" which has been inserted in writing. The plaintiff sought to recover against Mr. Frewin interest upon this debt, but the Judge of the Small Cause Court was not satisfied that the word "five" was written in the agreement at the time it was signed, and he refused to allow interest, but gave a decree against defendant for the principal sum of Rupees 207, after having refused to receive the evidence which the defendant wished to adduce for the purpose of showing that both the parties understood that Mr. Frewin was not to pay but that the Administrator-General was the only person to be looked to.

The Judge of the Small Cause Court will try the case; he will hear and record the evidence which the defendant may adduce in support of his defence, and he will return it to this Court with his finding and judgment upon the whole case.

The 18th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Indigo-contracts—Damages.

Reference to the High Court by the Judge of the Small Cause Court at Kooshtea, dated the 8th June 1869.

Mr. A. Hills, *Plaintiff*,

versus

Badu Khan, *Defendant*.

Baboo Bhyrub Chunder Banerjee for Plaintiff.

Baboo Mohinee Mohun Roy for Defendant.

Byjnath Koonwar (Plaintiff), *Appellant*,

versus

Saheb Koonwar (Defendant), *Respondent*.

Baboo Sreenath Banerjee for Appellant.

Baboo Boodh Sein Singh for Respondent.

A notice of enhancement should not be prospective, the principle being that the ryot should be prepared to meet the claim on grounds *existing* at the time the notice is received.

Bayley, J.—There is no ground for this special appeal.

The notice was admittedly served in Choitro 1274, and the cause of the alleged increase in the productiveness of the soil admittedly occurred by alluvial accretion in Bhadro 1275.

Now, the law on this point is clear, and requires the notice to state distinctly that "the value of the produce or the productive "powers of the land *have been* increased "otherwise than by the agency or at the "expense of the ryot." The law does not contemplate that the notice shall be prospective or future.

We quite agree with the Lower Appellate Court that the principle of the notice is that the ryot should be prepared to meet the claim on grounds *existing* when the *notice* might be received by such ryot.

In this view we dismiss both these appeals with costs.

The 18th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Small Cause Court—Parol evidence—Written agreement.

In the Matter of Mr. William Thomas Frewin, *Petitioner*,

versus

Mr. L. J. Paul, Principal officer and proprietor of the firm of J. Henry and Son, Undertakers, *Opposite Party*.

Petitioner in Person.

Baboo Poorno Chunder Shome for Opposite Party.

In a suit in a Small Cause Court to enforce a written agreement, the defendant has a right to set up and adduce parol evidence to prove such a state of facts as would show that the instrument did not correctly set forth the terms of the arrangement between the parties, as would justify the Court in its character of a Court of equity in amending the agreement in a suit for that express purpose.

Peacock, C. J.—It appears to us that this case ought to be sent back to the Small Cause Court Judge with an order to receive the evidence on the part of the defendant and to try the defence which he has set up.

The order in this case is this: "Serampore, "29th August 1868. Please furnish a coffin "with the necessaries as required below for "the late Mr. John Scott: agreed for total "rupees two hundred and seven, payable on the "15th September 1868, 'by' Thomas Frewin." The word "by" is in very small letters and is printed. If this was a mere order for a funeral, and not an actual agreement to pay, it might, in the absence of evidence to rebut the implication, be implied against the person giving the order that he was the person to pay, and that he agreed to pay. But if it should turn out that, at the time Mr. Frewin gave the order, he informed the plaintiff that he was not the person to pay, that Mr. Scott had died in his house, that he wished him to be buried, but that plaintiff was to look for payment to the Administrator-General to whom all the assets of the deceased were to be handed over, the order given under such circumstances would not amount to an agreement to pay for the funeral, nor could an implication to pay be raised from it. If, after an order had been given on those express terms, a paper was signed for the purpose of expressing the terms of that order in words which through mistake amounted to an agreement to pay, a Court of equity would relieve against the mistake. It may be remarked that the agreement signed by Mr. Frewin does not in express terms say that the funeral was to be paid for by Mr. Frewin, but the signature after the printed word "by" answers the double purpose of a signature, and of expressing the person by whom the payment was to be made.

If the paper was signed by mistake, and at the time that Mr. Frewin signed it it was understood that it was an order which he had given with a distinct stipulation that he was not to pay, but that plaintiff was to look to the Administrator-General, it appears to me that, in point of equity, that agreement might be rectified for the purpose of carrying out what was the real arrangement between the parties. Now, a Small Cause Court in the Mofussil has to adminis-

ter equity, justice, and good conscience. It is not a mere Court of law as distinct and separate from a Court administering equity.

Nor was it, in my opinion, necessary for Mr. Frewin to file a separate suit in the Small Cause Court to have the document rectified so as to carry out the real arrangement between the parties. He had a right in a suit against him upon that agreement to set up by way of defence such a state of facts as would justify the Court in amending it in a suit for that express purpose.

In paragraph 1041 of Taylor on Evidence, it is said: "Courts of equity will also sometimes admit parol evidence to contradict or "vary a writing, where, by some *mistake in* "*fact*, it speaks a different language from "what the parties intended; and where, "consequently, it would be unconscientious "or unjust to enforce it against either party "according to its expressed terms."

In another part of that paragraph, it is said: "A plaintiff may seek a relief in equity "by filing a bill, either to *reform* the writing, in which event it will be necessary to "satisfy the Court that the mistake was "made on *both* sides; or to *rescind* the instrument, in which case, though conclusive "proof of error or surprise on the plaintiff's "part alone will suffice, it must appear that "the mistake was one of vital importance."

Again, in paragraph 1042, the same author says: "Defendant also, against whom "a specific performance of a written agreement is sought, may insist, by way of answer upon the mistake, and may establish "its existence by parol evidence, because "he may rely on any matter which shows "it to be inequitable to enforce the contract."

So that when a party goes into a Court of equity to enforce an agreement, the party against whom it is attempted to enforce it may set up that by some mistake the instrument produced did not correctly set forth the terms of the arrangement between the parties.

Mr. Frewin says: I gave the order because Mr. Scott died in my house, but I gave the plaintiff to understand that I was not to pay for the funeral, but that he would be paid by the Administrator-General.

It is not for us here to determine what the case may be when Mr. Frewin's defence has been heard and his evidence in support of that defence has been adduced, but it does appear that the plaintiff did submit his bill to the Administrator-General, and did ask him to pay for the funeral, and it was only when the Administrator-General refused to pay on the ground of its being exorbitant, offering to pay what was reasonable, that the plaintiff commenced the suit in the Small Cause Court against Mr. Frewin.

At the foot of the memorandum, it is stated that "interest at five rupees per cent. per mensem will be charged on failure of payment from the appointed day," that is, 60 per cent. a year. The words are printed with the exception of the word "five" which has been inserted in writing. The plaintiff sought to recover against Mr. Frewin interest upon this debt, but the Judge of the Small Cause Court was not satisfied that the word "five" was written in the agreement at the time it was signed, and he refused to allow interest, but gave a decree against defendant for the principal sum of Rupees 207, after having refused to receive the evidence which the defendant wished to adduce for the purpose of showing that both the parties understood that Mr. Frewin was not to pay but that the Administrator-General was the only person to be looked to.

The Judge of the Small Cause Court will try the case; he will hear and record the evidence which the defendant may adduce in support of his defence, and he will return it to this Court with his finding and judgment upon the whole case.

The 18th December 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Indigo-contracts—Damages.

Reference to the High Court by the Judge of the Small Cause Court at Kooshtea, dated the 8th June 1869.

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Baboo Bhyrub Chunder Banerjee for Plaintiff.

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Baboo Sreenath Banerjee for Appellant.

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A notice of enhancement should not be prospective, the principle being that the ryot should be prepared to meet the claim on grounds *existing* at the time the notice is received.

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Where a ryot took advances from a planter for the cultivation of indigo, stipulating to deliver a certain number of bundles of the plant, and further stipulating that if he failed to do so by neglecting to cultivate or cut, he would "pay as damages the price of manufactured indigo for the bundles ascertained to be due:"

HELD that if the ryot's failure to supply the bundles stipulated for arose through his neglect to cultivate, he was bound to pay as damages the profit which the planter would have derived from converting the indigo plant which ought to have been delivered into indigo and selling that indigo at a fair price: the risk of failure in the course of manufacture to be reckoned in estimating the damages.

Case.—THE plaintiff is an Indigo Planter and the defendant a ryot of Kalikanta Basu and others, zemindars of Sarupdaha. The plaintiff stated in his petition of plaint that "the defendant entered into a contract with "him to cultivate 3 beegahs of land ap-"pertaining to the plaintiff's Paradaha "factory for seven years from 1867 to 1873, "and in consideration of an advance of Ru-"pees 6, the defendant executed a kubooleut "on the 14th October 1866 and cultivated "indigo in 1867. But in 1868, the defend-"ant failed to cultivate indigo, and according "to the terms of the kubooleut, made him-"self liable to the plaintiff for the above-"mentioned amount as estimated below.

"The average growth of three beegahs of land in 1868, at 5¼ bundles per beegah, being 15¾ bundles, the manufactured indigo produce of which at 8 maunds 25 seers 1 chittack 1 kancha per 1,000 bundles, was 5 seers 6 chittacks and 3 kanchas, valuing at Rupees 277-15 annas per md. Rs. 35 2 9

Deduct value of 15¾ bundles of indigo leaves at 4 bundles per Rupee ...	Rs. 3	15	0
Deduct manufacturing expenses for 15¾ bundles at Rupees 19-4 per maund ...	2	9	6
Deduct sorting and forwarding expenses at 12 annas per maund	0	1	9
Total, Rupees ...	6	10	3
Balance ... Rs.	28	8	6
Add amount due by the defendant for 1867 ...	3	5	0
Total, Rupees ...	31	13	6"

The kubooleut on which the case is based runs thus:—

"I, Badu Khan of Sarupdaha, do hereby "execute this term kubooleut for indigo "advance. I have this day come voluntarily "to the Saheb's Paradaha factory, and in "consideration of an advance of Rupees 6 "received through Mr. George Smith, I do "deliver kubooleut to the effect that every "year for 7 years from 1867 to 1873, I will "sow 3 beegahs with indigo for supplying, "at 8 bundles per beegah, 24 bundles at "the rate of 4 bundles per rupee. Of the "land in my possession, 3 beegahs of the "best indigo producing land should be "selected by the gomashtah of the factory, "be measured with a chain of 55 yards, "of 29 inches a yard, and be sown with "seed taken from the factory, either at Kar-"tick or spring as the gomashtah will "direct. I will plough, harrow, weed, &c., "the land in due time without excuse. "When the plants are grown, I will cut "and take them to the Saheb's factory when "ordered, and take hatchitta after they are "measured with an iron chain of 6 feet in "length. If there be bundles in excess "of the 24 bundles stipulated for in the "kubooleut, I will deliver them also to "the Saheb's factory, and will take hatchitta "for them. When the indigo manufactur-"ing work is over, I will attend the fac-"tory with the hatchitta and settle my ac-"counts for all the bundles delivered, at the "rate of 4 bundles per rupee. If I do not "deliver to you the surplus indigo bundles "but sell them to others or spoil them, or "if the supply of bundles fall short of the "24 bundles mentioned in the kubooleut by "my neglect to cultivate or cut indigo "leaves at proper time, I will pay as dam-"ages the price of manufactured indigo for "the bundles ascertained to be due by me. "If I make no amicable settlement "of the damages, the Saheb is to realize "them by legal means, and any ex-"cuse I might make would be entitled to "no consideration. Under these conditions, "I will take advance and deliver indigo to "Saheb's factory until my term expires. If "my advance is not worked out by the end "of my term, I will make arrangements "in 1874, for liquidating the balance by "best cultivation according to the terms of "this kubooleut. If I fail to do so, I will "pay as damages the price of prepared in-"digo proportionate to the balance. The "advance cannot be allowed to be deposited "within the time the kubooleut runs. My "heirs and representatives are to abide by "the terms of this kubooleut. Under these

"conditions, I take the sum total stated "above and execute the kubooleut, dated the "14th October 1866."

On the face of this kubooleut, Mr. G. Smith makes the following note :—

"Paid cash in advance to Badu Khan of "Sarupdaha, six rupees for twenty-four "bundles, on contract for seven years."

The defendant pleads—

1st.—That the agreement was not made and advance was not paid.

2nd.—Kalikanta Basu on his and other ryots' part made a contract with the plaintiff, and that under that contract the plaintiff had no power to take such agreement from him.

3rd.—Damages claimed are excessive.

The issues raised in this case were—

1st.—Was the contract made and advance taken?

2nd.—Is the plaintiff's contract with Kalikanta Basu a bar to the plaintiff's taking the kubooleut from the defendant?

3rd.—Is the plaintiff entitled to recover damages from the defendant; if entitled, what amount may he recover?

The evidence adduced relating to the matter in question raised in the first issue proved beyond doubt that the agreement was made and advance taken.

To a right understanding of the second issue, it is necessary to observe that the village Sarupdaha, of which the defendant is a ryot, belongs to Kalikanta Basu and others. The ryots of this village had been under contract to supply indigo leaves to plaintiff's factory at Paradaha. To sever all connection between the ryots of Sarupdaha and the plaintiff, Kalikanta Basu and Bidoo Bhoosun Basu made an agreement with the plaintiff to cultivate indigo from 1864 to 1866, and bound the plaintiff not to enter into any indigo-engagements with their ryots for the time their contract ran. This agreement expired in 1866 (the indigo year ends in September of every year); consequently there was nothing to prevent the plaintiff from making engagements with the ryots—after the end of the indigo year 1866, from 1867 to 1873—a period of 7 years for which the kubooleut on which this case is based, was given. The second issue was, therefore, decided in favor of the plaintiff.

In disposing of the third issue, the terms of the kubooleut and the note made on the face of it by Mr. Smith were fully considered. The body of the kubooleut contains stipulations to the effect that the defendant is to pay the price of manufactured indigo as damages for as many bundles short of 24 bundles of indigo leaves as would remain undelivered at the end of every indigo season; but considering the whole tenor of the agreement and Mr. Smith's note, I am led to believe that the contract was for 24 bundles of indigo leaves, and the value of leaves not delivered would be the amount of damages against the defendant. The plaintiff gives up his claim to 8 bundles per beegah as stipulated in the kubooleut, and demands damages for 15¾ bundles at the rate of 5¼ bundles per beegah, which forms no part of the contract.

The terms of the contract with regard to selection, measurement, and ploughing of land, sowing, weeding, cutting, and delivering of leaves, and the fixed price to be given for the leaves, are not calculated to support a claim for special damages. Besides, the plaintiff took no pains to prove that the defendant was perfectly aware of the amount of damages to which he would be liable in case of total failure to perform the contract. To make a claim for special damages good at law, it is necessary to show that the parties to the contract came to a thorough understanding with regard to their respective liabilities. The plaintiff could lay no claim to such penalty as the price of prepared indigo of 3 beegahs of land, when the kubooleut and the note by way of addenda to it expressly and specially contracted for 24 bundles of indigo leaves at 4 bundles per rupee. Thus, the contract in terms and effect being one for 24 bundles of indigo leaves, the plaintiff is only entitled to the price of the leaves falling short of the stipulated quantity, and not to the price of prepared indigo obtainable from it. Under these circumstances, I could only award such limited damages as may appear to be a fair compensation to the plaintiff for the loss he sustained. The case was accordingly decreed and general damages were allowed to the plaintiff who withdrew his claim for the amount found due to him by the defendant upon adjustment of accounts at the end of 1867.

Not satisfied with this award, the plaintiff prayed for a review of judgment and

stated in his application for review—

1st—That the decretal order was based on mere supposition, and was opposed to the express terms of the contract made by the defendant with the plaintiff;

2nd.—That the manner at which damages were assessed was opposed to law and practice.

The point urged by the petitioner's pleader was nothing but a reiteration of the question that the plaintiff was entitled to special damages by the terms of the kubooleut given by the defendant, and nothing worthy of note was said with regard to the assessment of damages being opposed to law and practice. I have carefully perused the contract again, and do not see any thing there to change my opinion that the plaintiff is not entitled to more than general damages for the imaginary loss said to be sustained by him. As the indigo leaves are not sold in the market, there is no means of ascertaining the difference which would be the actual measure of damages in the price of the leaves between that fixed by the plaintiff and that obtained in the market.

Holding, therefore, that the plaintiff is not entitled to more than the price of the leaves which he could have under the contract made with the defendant to that effect, I have rejected the petitioner's application for a new trial. But at the request of the petitioner, the order of rejection has been made contingent upon the opinion of the Honorable Judges of the High Court on the point whether the plaintiff, petitioner, is entitled to recover special or general damages under the contract with the note made on it by the plaintiff's assistant.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that if the supply of the bundles of indigo stipulated for arose through the neglect of the defendant to cultivate, he was bound to pay as damages according to the price of manufactured indigo; that is to say, he was to pay to the plaintiff the profit which he would have derived from converting the indigo plant, which ought to have been delivered, into indigo, and selling that indigo at a fair price. What those damages are is a question of fact which must be determined by the Judge of the Small Cause Court.

In the estimate which the plaintiff makes of his loss, he has not taken into consideration, nor suggested, any risk of failure in the course of manufacture. I believe it is frequently the case that indigo is spoiled in the process of manufacture; and that is a risk which must be taken into consideration, but what the value of that risk is is for the Judge to take into consideration in estimating the damages, and is not a question for us.

The 20th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Review — New evidence.

Case No. 310 of 1869.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and Sir Charles Hobhouse, Bart., on the 4th August 1869, in Special Appeal No. 475 of 1869.

Ram Dhun Chuckerbutty (Plaintiff), *Petitioner,*

versus

Joy Narain Panjah and others (Defendants), *Opposite Party.*

Baboos Chunder Madhub Ghose and *Kheller Mohun Mookerjee* for Petitioner.

Baboos Sreenath Dass and *Kalee Kishen Sein* for Opposite Party.

Where a review is applied for on the ground of the discovery of new evidence, the applicant must satisfy the Court that the evidence tendered was not within the knowledge of the applicant, or could not be adduced by him at the time when the decree was passed, and that it is *primâ facie* evidence in the cause.

Hobhouse, J.—THE petitioner applies for a review in this instance on the ground of the discovery of new evidence. He supports that application by an affidavit on the part of his client, the purport of which goes no further than this, *viz.*, that there is a decision of the 18th December 1838 and a kobalah of the 11th Assin 1221 the existence of which he did not discover until after the disposal of the special appeal by this Court.

I consider that this affidavit is insufficient on two grounds. It does not sufficiently disclose to my mind the truth of the fact that the applicant was not aware of the existence of the documents until after the date of our judgment in special appeal, nor does it at all disclose that those documents are or can possibly be evidence in

the cause. When, after a prolonged litigation, and, as the applicant states in this case, after diligent search for evidence in support of his cause, the applicant does not find certain documents until after a certain specified date, *viz.*, until after the final decision of his case, what we should expect and require in an affidavit would be that the person making it should satisfy us by declaring in detail how it was that he acquired the knowledge which he had not before.

Now, in this case we have no such detailed statement, but a simple bare affirmation with which it is impossible that we should be satisfied. The law, moreover, seems to me to require that we should be satisfied that the documents here before us are *primâ-facie* "evidence" in the cause, and here what we should have expected in a true affidavit would have been a statement to the effect that the person making it had ascertained that those particular documents were evidence in the cause; for instance, that in this case the lands were identified with the documents, but here there is no such statement. I think, therefore, that the affidavit does not make out a ground for review, and I would, therefore, reject this application with costs.

Bayley, J.—I concur. Section 376, Act VIII. of 1859, seems to me to require that the evidence alleged to have been newly discovered was not within the knowledge of the applicant or could not be adduced by him at the time when the decree was passed, or some other good and sufficient reason. I do not think that there has been a compliance with any of these conditions in the present application. There is a simple statement that a copy of the decision of 1838 and a copy of the kobalah of the 11th Assin 1229, upon which that decision was passed, wherein Sreemunt Panjah was a witness, are the documents on which the review is asked for. It does not appear that the evidence of Sreemunt Panjah separately is tendered to us. There is no affidavit that there was no means of knowing that the documents were available before. There is nothing to show why the documents relied upon on the previous occasion were easily available, and those which are now relied upon were not so. They are of the same character, coming also from the same official records. In addition to that, there is neither in the affidavit nor in the petition of review a clear and distinct statement that, on review of those records, the Court can be satisfied of the identity of the lands. The petition is rather more of the character of a request that the documents previously put in not being sufficient, more of the same character may be taken into consideration.

I agree, therefore, in rejecting this application with costs.

The 20th December 1869.

Present:

The Hon'ble H. V. Bayley and Sir Charles Hobhouse, *Bart., Judges.*

Notice of enhancement—Clause 2, Section 17, Act X., 1859.

Application from review of judgment passed by the Hon'ble Justices H. V. Bayley and Sir Charles Hobhouse, Bart., on the 26th July 1869, in Special Appeal No. 286 of 1869.

Radha Bullub Ghose (Defendant), *Petitioner,*

versus

Beharee Lall Mookerjee (Plaintiff), *Opposite Party.*

Baboo Kedarnath Chatterjee for Petitioner.

Baboos Ashootosh Chatterjee and *Mohinee Mohun Roy* for Opposite Party.

It is sufficient if a notice makes a ryot aware of the legal grounds on which enhancement is sought, although it is not in the exact words of the law.

Hobhouse, J.—The point taken in review is that, whereas this Court held a particular notice to be a sufficient notice of enhancement, it is shown by a ruling to be found at page 515, Volume XI., Weekly Reporter, that that notice was not sufficient, because it did not contain every one of the words to be found in Clause 2, Section 17, Act X. of 1859.

We considered, relying on a judgment which was before us, and which is to be found at page 330, Volume VIII., Weekly Reporter, that the question before us was whether in this particular case the defendant-ryot was aware of that provision in the Act to which he was pleading when, having been served with the notice, he was at issue in the Courts below with the plaintiff. We thought that, if the ryot knew to what provision in the law of enhancement he was pleading, then, although the notice was not in

the exact words of the law, yet it was sufficient because the object of the notice, *viz.*, that the ryot might know the exact grounds on which enhancement was sought, had been attained. We were shown that the ryot in this case knew and pleaded to the legal grounds on which enhancement was sought, and this being so, we adhere to our former opinion that the notice was sufficient.

We, accordingly, reject this application with costs.

The 21st December 1869.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Terminable leases—Re-entry by landlord.

Case No. 2252 of 1869.

Special Appeal from a decision passed by the Officiating Judge of the 24-Pergunnahs, dated the 15th July 1869, reversing a decision of the Additional Moonsiff of that District, dated the 31st December 1868.

Fukeeroonissa Begum (Plaintiff), *Appellant,*

versus

Chunder Monee Dossee and another (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Where a kubooleut stipulates that *A*, the tenant, shall not, on the expiry of his lease, be liable to pay a rent higher than that reserved in the lease, and that the landlord shall not then let the land to any other tenant, but that *A* shall not be entitled to erect any permanent building or to excavate a tank—it was HELD that, under these stipulations, the landlord was not bound to re-let the land to *A* at the close of the term of the lease.

HELD, also, that the fact of his allowing the tenant to hold over did not affect the landlord's right to resume possession after due notice.

Macpherson, J.—IT appears to me that the judgment of the Lower Appellate Court is wrong, and that it ought to be reversed. The lease is, in fact, a lease to Shama Churn in the name of his wife. His wife was made a party to the suit, and did not raise any question as to Shama Churn not being her agent, nor did she appeal against the judgment of the Moonsiff. That being so, no question as to whether Shama Churn had authority to act for his wife properly arose before the Judge.

As to the merits of the case, it seems to me that, as the Judge was of opinion that the kubooleut was well proved, he ought to have held upon the true construction of that kubooleut that the plaintiff was entitled to re-enter. The kubooleut is for a period of five years, from 1266 to 1271; and it says "that, on the expiration of the term of the "lease, at the time of taking a new pottah, "I will not pay anything in excess of "Rupees 19 mentioned above; and you shall "have no right to let the land to any other "tenant; I shall not erect any permanent "building, nor excavate any tank." These provisions, I think, mean that, although the landlord, after the expiry of the five years for which the lease then given was to run, was not to be entitled to let the land to a stranger—but if he re-let it at all must re-let it to Shama Churn at the same rent of 19 rupees as was reserved in the lease then given for the five years—yet the landlord was not absolutely bound to re-let the land at all, but if he wished to re-enter himself was at liberty to do so. It is not expressly said that the landlord was bound, on the expiry of the five years, to re-let the land to Shama Churn; and if, as is now contended, it was intended that the lease should, in fact, be a permanent lease at a fixed rent of 19 rupees, it is difficult to see any reason why it should have been granted merely for five years. I have no doubt myself, judging from the terms of the lease, that it was not intended that the lease should be a permanent one, and I think the landlord is now entitled to re-enter. While I say this, I must add that the landlord is not at liberty to re-let the land to any person except the present respondent.

It has been argued that, because the respondent was allowed to hold over and remain in possession for four years after the expiry of the term mentioned in the lease, the landlord is now debarred from re-entering. But there is nothing in this argument, as the landlord's having allowed the tenant to hold over cannot affect his right to resume possession after due notice.

The judgment of the Lower Appellate Court is reversed, with costs of this Court and of the Lower Appellate Court, and the decree of the first Court is restored and affirmed.

Mitter, J.—I entirely concur.

b

FULL BENCH RULINGS.

The 30th July 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Mitakshara — Hindoo widow — Joint family — Liability of property for personal debt of deceased member—Sale by one member of his own share.

Case No. 165 of 1866 (and analogous cases).

Regular Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 9th April 1866.

Sudaburt Pershad Sahoo (one of the Defendants), *Appellant*,

versus

Foolbash Koer, mother and guardian of Hurreenath Pershad, minor (Plaintiff), and others (Defendants), *Respondents*.

Messrs. R. V. Doyne and *R. T. Allan*, and *Baboos Debendro Narain Bose* and *Nil Madhub Sein*, for Appellant.

Baboos Unnoda Pershad Banerjee, *Chunder Madhub Ghose* and *Mohesh Chunder Chowdhry* for Respondents.

A member of a Hindoo family, living under the Mitakshara Law and having joint family property, died entitled to an undivided share in such property, and leaving two widows surviving him. After his death, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity. In execution of one or more of these decrees, an interest in certain portions of the joint family property to the extent of the share to which the deceased was entitled in his lifetime was sold by auction, and the purchasers were put into possession.

HELD that the purchaser took only the rights and interests of the widows; that as the property seized did not belong to the widows or to the heirs of the deceased, but under the Hindoo Law passed to the survivors, it could not be made available under a decree against the widows in their representative character, but could be made liable only in a suit properly laid against the survivors.

HELD that a member of a joint Hindoo family governed by the Mitakshara Law, has no authority to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account and not for the benefit of the family.

These cases were referred to the Full Bench under the following remarks recorded by the Hon'ble Justices Kemp and Markby:

Markby, J.—IN this case, having regard to the difference of opinion expressed in the cases of Damodhur Bethal Khava *versus* Damodhur Hari Somana, Dunbar's Bombay Reports, Volume I., page 182; Goondoo Mohadeo *versus* Rambhut Bin Baboobhut, Dunbar's Bombay Reports, Volume I., page 39; and Palainvelappa Kanudan *versus* Momiam Naikan and another, Madras High Court Reports, 1864-65, page 416, on the one hand, and that of Cosserat *versus* Sudaburt Pershad Sahoo, Sutherland's Weekly Reporter, Volume III., page 210, on the other—we refer the following questions to the consideration of the Full Bench :—

I. Bhugwan Lall, a member of a Hindoo family living under the Mitakshara Law and having joint family property, died entitled to an undivided share in such property, and leaving two widows Mohessee Koer and Parbuttee Koer him surviving.

After the death of Bhugwan Lall, his widows were sued in their representative capacity in respect of debts incurred by him in his lifetime on his own account, and not for the benefit of the joint family, and decrees were obtained against the widows in that capacity.

In execution of one or more of these decrees, an interest in certain portions of the joint family property to the extent of the share to which Bhugwan Lall was entitled in his lifetime has been sold by auction and the purchasers have taken possession.

Can the nephew of Bhugwan Lall, who is one of the surviving members of the joint family, recover from the purchasers possession of the interests which they have purchased, or any part of them ?

II. Bhugwan Lall, in his lifetime, executed an ordinary zur-i-peshgee mortgage in respect of his undivided share in a portion of the joint family property in order to raise money on his own account, and not for the benefit of the family.

Can the nephew of Bhugwan Lall recover from the mortgagee, without redeeming the same, possession of the mortgaged share or any portion of it ?

Judgments of the Full Bench on the first question—(Case No. 165).

Peacock, C. J.—The parties to this suit not having consented that this Bench should decide the whole of the case upon regular appeal, it is necessary for us to decide the question which has been referred to us by the Division Bench. I do not mean to say that the Full Bench cannot decide this regular appeal, but all that we can properly do under the circumstances is to decide the case upon the facts as stated to us, and answer the question which was propounded by the Division Bench.

The question is: "A member of a "Hindoo family living under the Mitak-"shara Law and having joint family pro-"perty, died entitled to an undivided share "in such property, leaving two widows him "surviving. After his death, his widows "were sued in their representative capacity "in respect of debts incurred by him during "his lifetime on his own account, and de-"crees were obtained against the widows. "In execution, an interest in certain por-"tions of the joint family property, to the "extent of the share to which the deceased "was entitled in his lifetime, was sold and "the auction-purchasers obtained possession "of it. Can the nephew of the deceased, "who is one of the surviving members of "the joint family, recover possession of such "interests or any portion thereof from the "auction-purchasers ?"

That I think is the only question which is raised in this case. The second question, as I understand it, refers to other cases to which we shall presently come.

It is stated that the widows were sued in their representative capacity, and that the sale took place under a decree against them in their representative capacity. We must assume that the sale took place under a decree in that suit. The certificate of sale simply says that the rights and interests of the widows were sold; but assuming that the widows were sued in their representative capacity, the certificate must be considered to apply to such property of the deceased as they took in their representative character. It is contended that, under Section 203 of the Code of Civil Procedure, the execution-creditor was entitled to seize Bhugwan's share of the undivided joint estate, and to sell it. The Section is as follows: "If the decree be against a party "as the representative of a deceased person, "and such decree be for money to be paid "out of the property of the deceased person, "it may be executed by the attachment and "sale of any such property." But I apprehend that the meaning of this is, where the decree is against a representative of a deceased person, and the decree is for money to be paid out of the property of the deceased, it must be paid out of such of the property of the deceased person as passed to the representative. If, for instance, under the English Law, an executor should be sued for a debt and a decree obtained against him, I apprehend that as a general rule, you could not under that decree seize property which passed to the heir, and not to the executor.

Whatever may be the construction of Section 263, the property which was seized in execution and sold was not the property of the deceased person at the time it was seized. It was his neither legally nor equitably, nor had his heirs any legal or equitable interest whatever in it.

According to the Mitakshara Law, if a member of a joint undivided family dies without a son and leaving a brother, his widow does not take his share by descent. If he leaves a son, the son takes by descent; but if he leaves only a widow, the survivors take by survivorship, and they hold the property which they take by survivorship, legally and equitably for themselves, and not in trust for the heirs of the deceased. The deceased's heir have no interest either legally or equitably in the share which passes by survivorship to the surviving co-sharers. That will be made very clear if you suppose the case of a joint family consisting of a father and two sons and two uncles, the brothers of the father taking property by descent from the father of the father and of the two uncles. The father and the two sons take one-third, and the two uncles each take one-third, that is, they take that which upon partition would be allotted. Then suppose that one of the sons dies without issue, leaving

a widow, his widow according to the Mitakshara Law, would not take his share in the estate. Then the question is, would it go to the person who would be heir if the widow was dead or had not existed? It clearly does not go to the heir, because the heir would be the surviving brother, and not the father. If it would go to the heir, the surviving brother would take the whole of the interest of the deceased brother, but the law is that it goes by survivorship, and the survivors take legally and equitably for themselves and not in trust for the brother of the deceased. Neither the widow of the deceased, nor his brother would take any interest by inheritance from the deceased in the joint family estate. Then if the estate of the deceased goes over by survivorship, how can it be said, when you seize the share of the deceased after his death, that you are seizing the property of the deceased or the property of his heirs or representatives? You are seizing the interest which has passed to the survivors by survivorship. That the estate survives and does not pass to the widow by inheritance, has been held by the Privy Council to be the law. They held that in the absence of a son, the share of a deceased member of a joint family under the Mitakshara Law does not go to the widow or to the person who would be the next heir of the deceased if the widow were not in existence. It appears to me to be clear that the property seized was not property of the deceased in the hands of his widows as his representatives, nor was it property over which the widows had any power whatever, or with regard to which they had any legal or equitable right; it was property which belonged wholly, both legally and equitably, to the survivors. If the deceased had left a son, his interest would have gone to the son as his heir, and then his interest, no doubt, would have been assets in the hands of the son for the purpose of paying the father's debts.

It may be that the law does not make any difference as to the liability of the property to satisfy the debts of the deceased whether it passes to heirs by inheritance or to survivors by survivorship, and that the survivors take it charged with the debts of the deceased in the event of his having no other assets. I express no opinion upon that point.

It is stated in the treatise of Yajnavalkaya —(I am not reading now from the Law of Inheritance, but from that part of the work of the author which treats of the payment of debts, published by Dr. Roer and Mr. Montriou)—in text No. 51, he says: "He who takes the property of one who "leaves no (capable) son shall pay the "debts," that is, the debts of the deceased; "so he who takes" or marries "the widow; "also that son whose personal estate no other "has appropriated (and who in such case "shall always be deemed) fit to inherit the "property," that is to say, he who marries the widow is also liable to pay the debts out of the assets which would have been available if he had not married her. Also he says, "if one die without any son, then whosoever succeeds to the property."

According to this doctrine, whosoever succeeds to the property is liable to the extent of that property to pay the debts.

I express no opinion upon the subject because the case has not been argued and does not arise in the present suit. If the survivors who take the property by survivorship are liable to pay the debts, they can only be made liable by a suit against them, and not in a suit against the widows. If survivors are liable to payment of debts out of the property taken by survivorship, it is only just and reasonable that they should have an opportunity of showing that no debts were due. If they were sued for the debts in consequence of their taking the interest of the deceased by survivorship, they might show that the deceased left no debts.

In this case, the interest of the deceased was seized and sold in execution of a decree against the widows. But if the property is to be seized in execution of such a decree, the persons who took by survivorship and whose property is to be seized cannot come in in the execution-case, and show that there was no debt due. When execution issues and property is rightly seized under a decree, the person whose property is liable to be seized and sold under the decree cannot dispute the validity of the decree; therefore if this property could be seized under the decree against the widows, the survivors to whom the property passed would be liable to have their property sold for the payment of a debt without having an opportunity of showing that the debt claimed was not due.

It is unnecessary for us to decide whether under a decree against Bhugwan in his lifetime, his share of the property might have been seized, for that case has not arisen.

According to a decision in Stokes's Reports, it might have been seized, but the case as against Bhugwan and that against the survivors is very different. So long as Bhugwan lived, he had an interest in this property, which entitled him, if he had pleased, to have demanded a partition, and to have had his share of the joint estate converted into a separate estate.

The case of Ishan Chunder Mitter *versus* Buksh Ali Sowdagur, in Marshall's Reports 614, was quoted as an authority, but that appears to me to be a very different case. There the widow was sued. The plaintiff alleged that the husband had died, and that he had left a widow and a minor son. In that suit, the son being a minor, the question was whether the decree was not in substance a decree against him represented by his mother as his guardian.

Great injustice might be done by holding parties too strictly to their statements, and it might fairly be contended that when a man sued a widow as guardian of her minor son, the suit was in substance against the son. If that suit had been brought against the son, and the widow had come in as guardian to defend it, there would have been no doubt that the property inherited by the son was liable.

The same argument applied indirectly, but substantially, to the case which was decided in the High Court, and is reported in Hay's Reports, page 8.

I think, therefore, that this property not being the property of the widow, and not being the property of the heirs of the deceased, could not be made available under the decree against the widow; that if it could be made available at all for payment of the debts of the deceased, it must be in a suit against the survivors to charge the share of the deceased in the joint estate with the payment of the decree, or by suing the survivors, for the debt, and asking to have the deceased's share of the estate made available in the hands of the survivors to the same extent as that to which it would have been made available if the deceased had left a son, and the estate had gone to him by inheritance instead of to the survivors by survivorship.

I think, then, that the question must be answered in the affirmative; that plaintiff has a right to sue the purchaser under that decree, to recover back the estate, inasmuch as the property belongs to him, and the title of the defendant as a purchaser under the decree against the widows is an invalid title.

Kemp, J.—I never entertained any doubt that the plaintiff took the estate of Bhugwan Lall in right of survivorship. My doubt was whether he took the estate of Bhugwan *cum onere*, that is to say, burdened with the payment of Bhugwan's debts or not. Unfortunately, our reference has been so worded that this point, which is of the utmost importance, has not been decided. The judgment of His Lordship the Chief Justice, though it approaches the question very closely, does not solve it. For the rest, I concur in the judgment which has been delivered by the learned Chief Justice.

Jackson, J.—I also concur in the answer which it is proposed to give to the first of the two questions referred to the Full Bench.

I think that the right, title, and interest of the widows alone was sold to the plaintiff, and that we cannot supply the inference that the right and interest, whatever that may have been, of the deceased husband, passed by that sale. I come to this conclusion for several reasons: firstly, because that interest, whatever it was, had passed to the survivors of the joint family; because that interest was not assets in the hands of the widows who were defendants in that suit; and because that interest, if chargeable with the separate debt of Bhugwan in the hands of the survivors, could only be so charged in a suit properly framed to which those survivors were parties.

I think, therefore, that the defendant in this case acquired no title, and that the plaintiff was entitled to judgment.

I also think that the case in Marshall's Reports is clearly distinguishable from the present case. Every thing in the report of that case, as I read it, points to the supposition that the widow was sued as guardian of the minor; in other words, it is as if the suit had been against the minor son who appeared by his mother as guardian. The mother was not in the position of a widow who had taken a separate estate or assets of any kind, and therefore she could not have been made personally liable for the debts for which she was sued in her character of guardian.

I, therefore, concur in making this answer to the question referred to the Full Bench.

Macpherson, J.—I concur.

Glover, J.—I am of the same opinion.

Judgment of the Full Bench on the second question.

Peacock, C. J. (*the other Judges concurring*).—The first question has already been answered. The second question raises the point whether a member of a joint Hindoo family governed by the Mitakshara Law, can mortgage his undivided share in a portion of the joint family property in order to raise money on his own account, and not for the benefit of the family. There are conflicting decisions upon the subject, as pointed out by the Division Bench by which the question was referred. The cases referred to from Dunbar's Bombay Reports and that from the reports of the High Court at Madras, are in support of the affirmative. The case cited from Sutherland's Weekly Reporter, Volume III., page 210, is an authority in support of the negative.

This case has been very ably argued by the pleaders on both sides, and in addition to the Mitakshara on Inheritance translated by Mr. Colebrooke, numerous passages have been cited from the Sanscrit of other parts of the *Dhurma-Sastra* of Yajnavalkya, together with several cases in addition to those referred to by the Division Bench. Amongst others, the pleaders in support of the affirmative have referred to the case of Virasvaim Gramini *versus* Ayyasvami Gramini, I. Stocke's Madras High Court Reports, page 471.

In that case, it was held that according to the Hindoo Law as it prevails in Southern India, one member of a joint Hindoo family may sell his undivided share of joint property, and that such share is liable to be seized and sold in execution for the separate debts of the sharer.

The decisions founded on the doctrine of the Schools of Southern India and of Bombay, though entitled to great weight, are not sufficient to justify this Court in a case governed by the Mitakshara Law in overruling a long series of decisions expressly founded upon that law.

In Appoovier *versus* Ramasubha Aiyan and others, decided in the Privy Council in 1866, and reported in 8 Weekly Reporter, Privy Council Cases, page 1, and in 11 Moore's Indian Appeals, page 75, it was held that an actual partition by metes and bounds was not necessary to render a division of undivided property complete; but that when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property is taken away from the subject-matter so agreed to be dealt with, and each member thenceforth has in the estate a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

In that case, however, their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think, be guided by the same principle.

Now, the case referred to in support of the negative of the question, namely, Regular Appeal No. 153 of 1865, reported in 3 Weekly Reporter, page 210, was not the first case in which it was held that, according to the Mitakshara Law, one member of a joint family cannot alienate his own share of joint family property without the consent of all the other members. That decision was founded upon a current of authorities supported by the Vyavastas of Pundits, which it is too late now for this Court to over-rule, if it were disinclined to agree in the principle established by them.

In Anund Ram and others, decided in 1823, nearly half a century ago, 3 Macnaghten's Select Reports, page 232, the question was put to the Hindoo Law Officers of the Courts whether it was lawful, according to the law current in Tirhoot, for any one of several co-parceners to transfer his share either by sale or gift; to which the Pundits replied that a gift of joint undivided property, whether real or personal, was not valid even to the extent of the donor's share, and that the property cannot be sold or given away until it is defined and ascertained, which cannot be done without a division; and they referred to the Mitakshara, by which it was said that "partition is the act of ascertaining several individual rights." The Court, acting upon that opinion, affirmed the decision of the Lower Court.

Afterwards, a review having been applied for, upon suspicion that the Pundit who had delivered the Vyavasta had been bribed, a fresh Vyavasta was called for from other Pundits of the Court, who answered that property being held in joint tenancy by several sharers, whether it be real or personal,

no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share and to give it away; and they cited as authorities, first, *Vyasa* in Mitakshara, "In "immoveable property, whether divided or "undivided, all the sharers share alike: "among them one person cannot sell, mort-"gage, or give it away;" secondly, Narada in the *Dattaka Mimansa*, "Property held in com-"mon among many sons cannot, under any "circumstances, be alienated." Upon considering the above Vyavasta, the Court ultimately upheld upon review the first decision.

The Vyavasta given in the original case is quoted as an authority in Macnaghten's Hindoo Law, page 224, Case XVII.

The principle of the above case was adopted in the case of Sheo Surn Misser *versus* Sheo Sahoy, decided in 1826, upwards of 40 years ago, IV. Select Reports, page 158. In that case, the Judges of the Sudder Dewanny Adawlut recorded their opinion as follows: "The Hindoo Law, as laid down in Vya-"vastas delivered in former cases" (referring to the cases above cited), "does not "permit alienation of lands held jointly by "several putteedars or owners to be made "by one without the assent of the others; "nor indeed does such alienation hold good "even for the aliening partners' individual "share, without the assent of the rest."

In a note to the last case it is said: "The "same doctrine was also maintained in a "Tirhoot case, wherein Rajah Bedeanund "was appellant against Joy Dutt Jha and "others, respondents. The Pundits then also "held the sale of joint undivided property "to be invalid without the consent of all "the sharers, and not valid even for the "seller's own share while undivided."

A Vyavasta similar in effect, and a decision founded upon a similar principle were given in 1832 in the case of Jivan Law Singh *versus* Ram Gobind Singh and others, 5 Select Cases, page 163.

The above principle was again acted upon in Sheo Churn Lall and another *versus* Jumun Lall, decided in 1837, and reported in 6 Select Cases, page 176, and in Mussamut Roopna and others *versus* Roy Reotee Rumun and others—Sudder Decisions for 1853, page 344.

A similar rule was followed and acted upon in the late Sudder Court of the North-Western Provinces in the case of Joy Narain Singh and others *versus* Roshun Singh and others, decided in 1860, Sudder Decisions, Agra, Volume II., page 162; and in the case of Byjnath Singth *versus* Ramessur Dyal and others, decided in 1864, the same Court held that in provinces where succession among Hindoos is governed by the Benares Shastras, alienation of joint property, even to the extent of the alienor's own share, is invalid; but that if the property be partitioned, the transfer is legal.

In the *Vivada Chintamoni*, by Prosunno Coomar Tagore, page 77, it is laid down that "what belongs to many may be given with their assent." "Joint ancestral immoveable property may be given with the assent of all the heirs." "The assent of all the heirs is required for a gift of joint ancestral property, whether moveable or immoveable"—*ib.*, page 78. "When the whole property is actually divided, the individual action of the shareholders is valid." —*ib.*, page 79.

In the Mitakshara on Inheritance, it is said, Chapter I, Section 1, Verse 30—"Among "unseparated kinsmen, the consent of all "is indispensably requisite, because no one "is fully empowered to make an alienation, "since the estate is in common."

I was at one time disposed to think that as one of several members of a joint family can compel partition of ancestral property against the will of the others (*see* Mitakshara, Chapter I, Section 5, Verse 8), so he might, without the will of the others, alienate that share to which he would be entitled upon partition; but upon reflection I feel that that opinion cannot be maintained according to the true principles of the Mitakshara Law. In the case of Appoovier *versus* Ramasubha Aiyan, to which I have already referred, and which was a case governed by the Mitakshara, the Lords of the Judicial Committee say: "According to the true "notion of an undivided family in Hindoo "Law, no individual member of that family, "whilst it remains undivided, can predicate "of the joint and undivided property that "he, that particular member, *has a certain* "*definite share*. No individual of an un-"divided family could go to the place of "the receipt of rent, and claim to take "from the Collector or Bailiff of the rents "a certain definite share. The proceeds "of undivided property must be brought, "according to the theory of an undivided "family, to the common chest or purse, "and then dealt with according to the

"modes of enjoyment of the members of an "undivided family. But when the mem-"bers of an undivided family agree among "themselves with regard to particular "property, that it shall thenceforth be the "subject of ownership in certain defined "shares, then the character of undivided "property and joint enjoyment is taken away "from the subject-matter so agreed to "be dealt with; and in the estate each mem-"ber has henceforth a definite and certain "share which he may claim a right to re-"ceive and to enjoy in severalty, although "the property itself has not been actually "severed and divided."

According to the law of England, if there be two joint tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition; but joint tenants under the English Law are in a very different position from members of a joint Hindoo family under the Mitakshara Law: for instance, if a Hindoo family consist of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property; but upon partition during the life of the father, his wives are entitled to shares; and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate—(Mitakshara, Chapter 7). If partition be made during the life of the father, and another brother is afterwards born, that brother alone will be entitled to succeed to the share allotted to the father upon partition—(Mitakshara, Chapter 1, Section 6); but so long as the family remains joint, and separation has not been effected either by partition or by agreement such as that recognized in the case above cited from the Privy Council, every son who is born becomes upon his birth entitled to an interest in the undivided ancestral property. In such a case, neither the father nor any of the sons can at any particular moment say what share he will be entitled to when partition takes place.

The shares to which the members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, &c., and the principle of the Mitakshara Law seems to be that no sharer before partition can, without the assent of all the co-sharers, determine the joint character of the property, by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for that purpose, to exclude from participation in the portion conveyed away those who by subsequent birth would become members of the joint family, and entitled to shares upon partition. "They who are born, and they who "are yet unbegotten, and they who are still "in the womb, require the means of support: "no gift or sale should, therefore, be made." Mitakshara, Chapter 1, Section 1, Verse 27.

The Court has very carefully referred to the passages quoted from the Sanscrit of the *Dharma-Shastra* of Yajnavalkya; and in addition to the translation which was handed in, they have had a translation made by Baboo Shama Churn Sircar, the Chief Sworn Interpreter of the Court, as suggested at the time of the argument. The Court sees nothing in those extracts at variance with the opinions above expressed.

We are called upon to decide this case according to the Mitakshara Law as we find it, and not according to our own views of policy. Whatever our opinions might be in the absence of the decided cases to which I have referred, I am of opinion that we should not be justified in unsettling the law by overruling that current of authorities by which for nearly half a century the law appears to have been settled, and in accord-

ance with the principles of which it appears to have been generally understood and acted upon.

I am of opinion that, upon the simple fact stated in the second question, Bhugwan Lall had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint-family property in order to raise money on his own account, and not for the benefit of the family.

The facts are not sufficiently stated to enable this Bench to say whether the nephew of Bhugwan Lall can recover from the mortgagee, without redeeming the same, possession of the mortgaged share, or any portion of it.

The 2nd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges*.

Auction-sale—Recovery of purchase-money—Regulation VII. of 1825—Section 257, Act VIII. of 1859.

Case No. 117 of 1868 (and analogous cases).

Regular Appeals from a decision passed by the Subordinate Judge of Dacca, dated the 11th March 1868.

Sowdaminee Chowdhrain (one of the Defendants), *Appellant*,

versus

Kishen Kishore Poddar (Plaintiff), *Respondent*.

Baboo Bama Churn Banerjee for Appellant.

Mr. G. C. Paul and *Baboo Kalee Churn Dass* for Respondent.

HELD that a purchaser at an auction-sale in execution of a decree under Regulation VII. of 1825 or Act VIII. of 1859 can recover back his purchase-money from the decree-holder only when the sale is set aside summarily for irregularity or the like, under Clauses 3 and 4, Section 4 of the former law, or Sections 257 and 258 of Act VIII., but not when a third party succeeds in establishing his title to the property on the ground that the sale did not affect the property, and when there is no allegation of fraud or misrepresentation on the part of the decree-holder.

This case was referred to the Full Bench by Peacock, C. J., and Mitter, J., under the following remarks :—

Peacock, C. J.—WE think it clear that the plaintiff is not entitled to recover. There is no evidence whatever to warrant the harsh terms which have been used by the Subordinate Judge, in which he charges the decree-holder with having unjustly named the property to be that of the judgment-debtor, and substantially states that he ought to be subjected to the penalty of deceit practised by him. If the decree-holder had sold this property himself by private sale, believing the property to be his own, the rule of *caveat emptor* would have applied, and the purchaser could not have recovered back the purchase-money from him. If the judgment-debtor had sold the property believing it to be his own, the purchaser could not have recovered back the purchase-money from him. Then why should it be recovered back from the decree-holder, because, believing the property to be the property of the judgment-debtor, he applied to the Court to cause it to be seized and sold in execution of his decree, and because the Court, believing it to be the property of the judgment-debtor, caused it to be sold in execution, and the purchase-money to be paid over to the decree-holder?

If a vendor by private sale does not guarantee a title, I cannot understand upon what principle it can be concluded that a decree-holder who asks to have property sold in execution, or the Court which causes it to be sold, guarantees title. There is no allegation or proof whatever of fraud or misrepresentation,

or that the decree-holder did not honestly believe that the property which was sold belonged to the judgment-debtor. If the purchase-money realized by sales in execution is to be recovered back from decree-holders upon the mere ground of defect of title, where there is no fraud, decree-holders would be frequently compelled to refund money which has been paid over to them in satisfaction of their decree, after it is too late to obtain a fresh execution.

It appears to me that the decisions of the Sudder Court which have been quoted are correct.* There may be a difference in words, but in this respect there is no difference in substance between Regulation VII. of 1825 and Act VIII. of 1859. The recent decisions with reference to Act VIII. of 1859 are not literally binding upon us with reference to this case under Regulation VII. of 1825; but if our view of the construction of Regulation VII. of 1825 is correct, it appears to me to be in substantial conflict with the cases which have been decided on Act VIII. of 1859. It is, therefore, right that we should refer the case to a Full Bench in order that the question, which is a very important one, may be set at rest. We would, therefore, refer these cases† to a Full Bench irrespective of the question of limitation. If it should become necessary, we will consider the question with reference to the period from which limitation in a case like this should be reckoned if the suit will lie.

† Regular Appeals Nos. 117, 118, and 127 of 1868.

In the suit against the purchaser, the Court did not set aside the sale on the ground of its invalidity, but the plaintiff in that suit recovered upon the ground that the sale did not affect this property. The words "by setting aside the sale" were incorrectly used in the plaint in that suit, and followed in the decree.

The following are the judgments of the Full Bench:—

Macpherson, J.—It appears to me perfectly clear that the words used in Clause 4 of Section 3 of Regulation VII. of 1825, which are relied on by Mr. Paul, refer exclusively to cases in which the sale is set aside for irregularity, or the like, by the summary proceedings which may be held under that Section.

Clause 4 says: "Whenever a public "sale may be set aside as invalid under "the preceding Clause, or on any account "whatever, and no collusion or fraud shall "appear on the part of the purchaser, he "shall be entitled to receive back his pur-"chase-money." Now, the "preceding Clause" is Clause 3, and that Clause treats exclusively of the summary setting aside of a sale. This shows that the recovery of possession of the property by a third party through the means of a civil suit subsequently brought was not contemplated, nor anything save the setting aside of a sale under Clause 3. The words "or on any account whatever" must be read with reference to their position and to the context; and so reading them, there is no doubt they apply only to the setting aside of the sale in a summary way. The whole of Section 3 refers to summary proceedings at or about the time of the sale, and have no application whatever to a civil suit brought subsequently by a party to recover lands of which he is dispossessed. And Clause 7 expressly says that it is to be clearly explained to bidders that nothing is guaranteed to them in the property sold "beyond the rights and interests therein of "the individuals answerable for the amount "of the decree, &c," which means the rights and interests, if any, and whether they be great or whether they be small.

Section 258 of Act VIII. of 1859, which has been referred to, is in its operation very similar to Clause 4 of Section 3 of Regulation VII. of 1825. It declares: "Whenever "a sale of immoveable property is set aside, "the purchaser shall be entitled to recover "back his purchase-money." That Section intervenes between Sections 256 and 257 (which treat of the circumstances under which a sale may be set aside in a summary manner for irregularity) and Section 259, which says that, if a sale is not set aside in a summary manner under those Sections, but is confirmed, a certificate shall be granted to the purchaser "to the effect that he has "purchased the right, title, and interest "of the defendants in the property sold." Coming, as Section 258 does, between these two Sections, and in a portion of the Code which treats exclusively of summary proceedings to be taken with reference to sales in execution of decrees, it seems to me that the declaration that the purchaser shall be entitled to "receive" back his purchase-money after a sale is set aside applies only to its being set aside summarily, and does

* Decisions for 1856, p. 885.
" 1857, p. 486.

not apply to a case where a third party sues to recover the property after the final confirmation of the sale, and the granting of a certificate. I have thought it right to make these observations, because I find that, in the case of Brojendur Roy Chowdhry *versus* Juggurnath Roy (6 Weekly Reporter, page 148), the learned Judges, deciding that the purchase-money could be recovered, expressly relied on the language of Section 258.

Loch, J.—I was one of the Judges who decided the case reported in 1 Weekly Reporter, page 55. I think it right to express my concurrence in the view now expressed by my colleague, Mr. Justice Macpherson. Looking at the position which Section 258 holds in the Code, I think it is substantially similar to the provisions of Section 3, Regulation VII. of 1825; and that its object is to entitle a purchaser to recover his purchase-money when the sale has been summarily reversed under the provisions of Section 257 of Act VIII. of 1859. When disposing of the case reported in 1 Weekly Reporter, we did not keep this sufficiently before us; but we thought that, whenever a sale is set aside, the purchase-money ought to be refunded. But as I have said, after carefully looking at the law and the position which Section 258 holds, I think the opinion there expressed was not correct, and that the purchaser can only recover the purchase-money, as provided by Section 258, when the sale is set aside under Section 257, Act VIII. of 1859, for any irregularity in publishing or conducting the sale.

Peacock, C. J. (Bayley, J., concurring).—I have very little to add to what I stated when these cases were referred. It appears to me to be clear that the plaintiff is not entitled to recover back his purchase-money. When he purchased under the execution, no title was guaranteed to him. All that was guaranteed to him under Clause 7, Section 3, Regulation VII. of 1825, was that he should have the rights and interests in the lands, whatever they might be, which belonged to the judgment-debtor. In other words, he was guaranteed that the judgment-debtor should not recover back the lands. In this case, the sale was completed, and every thing was done which was tantamount to a conveyance, and the sale has not been set aside. In an ordinary case between vendor and purchaser, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity—Sugden on Vendors and Purchasers, page 441.

There is a great distinction between a purchaser's being evicted by title paramount and that of the conveyance by the vendor being set aside. In the one case, the owner of the land recovers notwithstanding the conveyance, because it was a conveyance of his land by a person who had no right to convey it; in the other case, where a sale has been set aside, the purchaser usually has a right to recover back his purchase-money, because it would be inequitable that the vendor should retain the purchase-money when there are grounds for setting aside the sale by which the contract is put an end to. But a Court of equity does not set aside a conveyance, simply because the conveying party had no title to the property. There must be something more, such as fraud or the like, to induce the Court to interfere in that manner. A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title, and he purchases the property with his eyes open, and he regulates the price which he bids for the land with reference to the circumstances under which he is purchasing and the risk he runs.

The decision of the Lower Court is reversed with costs.

Kemp, J.—I understand that the sale in this case was made under Regulation VII. of 1825, and not under Act VIII. of 1859. I also understand that in this case the sale was not set aside for irregularity, but it was simply declared in a regular suit instituted by a third party that the sale passed nothing. I, therefore, entirely concur in the judgment which has just been delivered by the Chief Justice that a suit by the purchaser to recover the purchase-money will not lie.

In the suit which was decided by Mr. Justice Markby and myself, reported in the 6th Volume of the Weekly Reporter, the sale was held under Act VIII. of 1859, and was set aside. Therefore, under Section 258, Act VIII. of 1859, the purchaser in that case was clearly entitled, in my opinion, to recover the purchase-money.

The 2nd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges.*

Registration—Act XX. of 1866.

Case No. 1288 of 1868.

Special Appeal from a decision passed by the Judge of Purneah, dated the 17th February 1868, affirming a decision of the Subordinate Judge of that District, dated the 2nd October 1866.

Luchmeeput Singh Doogur (Plaintiff), *Appellant,*

versus

Mirza Khyrat Ali (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Rash Beharee Ghose* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

Cases Nos. 1312 and 1313 of 1868.

Special Appeals from a decision passed by the Officiating Judge of Patna, dated the 24th February 1868, affirming a decision of the Subordinate Judge of that District, dated the 18th April 1867.

Sham Narain Lall and others (Defendants), *Appellants,*

versus

Khemajeet Matoe (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* and *Moonshee Mahomed Yusuff* for Appellants.

Baboos Kishen Succa Mookerjee and *Debendro Narain Bose* for Respondent.

Where an instrument creates a title or interest in land, and is also a bond for money lent, it may, under Act XX. of 1866, be received in evidence as a document in a suit to recover the money lent, even if it be not registered.

The latter cases followed the reference in the former case, which was referred to the Full Bench by L. S. Jackson and Dwarkanath Mitter, JJ., under the following remarks:—

Jackson, J.—THE instrument on which the plaintiff sued in this case is one by which the defendant bound himself to re-pay a sum of money lent him by the plaintiff, and also assigned, by way of security for the re-payment of the money, certain immoveable property. I take it that the defendant, being in need of money, applied to the plaintiff, and the plaintiff told him that he was ready to lend it, provided security were given for its re-payment, and thereupon, security being given, the loan was made. That, I apprehend, is one and the same transaction. Section 17 of Act XX. of 1866 provides: "Certain instru-" ments shall be registered, provided the pro-" perty to which they relate shall be situate " in a district in which, and provided they "shall have been executed on or after the " date on which (the said) Act No. XVI. of " 1864 or this Act shall have come or shall " come in operation."

Amongst the descriptions of instruments required to be registered are such as purport or operate to create, declare, assign, limit, or extinguish any right, title, or interest in immoveable property. It is not contended that the instrument did not create, assign, limit, declare, or extinguish any right, title, or instrument in immoveable property, but it is contended that it had another effect, that is, it contained certain stipulations which might be enforced without acting upon that portion of it which purported to create the interest in immoveable property, and the appellant's contention is that registration of it was essential in so far as it created such interest, but not in so far as it merely secured the re-payment of the money, and we are referred to a case in 9 Weekly Reporter, page 111, which, though not precisely in point, yet bears strongly on the present case.

In that case, the parties appear not to have been represented in this Court, and consequently there was no argument, and the reasons of the decision are not given. The learned Judges who heard the reference merely state that the opinion of the Small Cause Court was correct. In that case it appears that the plaintiff sued merely for his money, and I do not understand the opinion of the Small Cause Court Judge who referred the case to go further than to say that the document was producible in evidence for the purposes of the particular suit. In the case before us the plaintiff sued both for the money and for enforcement of the mortgage-clause. But it seems that, when the document was tendered in evidence, and objected to as being unregistered, the plaintiff's vakeel verbally offered to abandon that

portion of the relief asked for which related to the mortgage. I might therefore perhaps say that the two cases are not precisely similar, but it would be hardly fair not to admit that the principle of the decision of that case will, in fact, govern the present. With great respect, I think that the terms of Section 49 and Section 17 of the Registration Act of 1866 do effectually bar the reception of those documents in evidence. The document is one which purports to create an interest in immoveable property; therefore, under Clause 2 of Section 17, it is an instrument of which the registration is compulsory, and it seems to me no answer to this argument to say that the instrument has other effects besides the creation of that interest; because, as long as it purports to create such interest, I think, whether it has other effects or no, it must be registered. Being then an instrument of which the registration is compulsory, it comes under the terms of Section 49, which provides that "no instrument required by Section 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall be acted on by a public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered." The Section does not say no such instrument shall be received in evidence for the purposes of enforcing the particular interest described in Section 17, but no such instrument shall be received in evidence *in any civil proceeding in any Court.* It appears to me impossible to avoid the distinct exclusion contained in those words, and therefore, inasmuch as the admission of this document appears to me to have been rightly refused by the Court below, if we had not been pressed by the contrary decision in 9 Weekly Reporter, I should be bound to dismiss the special appeal.

I think it my duty, in consequence of the decision referred to, to refer this question to a Full Bench. It is a question which will constantly arise, and which appears to me to deserve consideration by a Full Bench.

Mitter, J.—I think that the decision quoted in 9 Weekly Reporter, page 111, is correct. The instrument in question was not merely an instrument purporting to create a title or interest in land, but it was also a bond for money lent. So far as this instrument purported to create a title or interest in land, it cannot be used as evidence by the plaintiff; but as far as this instrument purports to be a bond for money lent, it must be regarded as valid, notwithstanding Section 49 of Act XX. of 1866. The two transactions might have been reduced to two different instruments, and in that case the objection now taken by the respondent could not have arisen. The fact of the two transactions having been reduced to one writing does not deprive the plaintiff of the right to recover the money he lent to the defendant. Section 49 of Act XX. of 1866 is something in the nature of a penal provision. The fact of the plaintiff's treating it as a mere bond, and the fact that there was a mortgage-clause in the bond, does not deprive him of his just due under that instrument. I would therefore reverse the judgment of the Lower Appellate Courts. Nor do I think that the plaintiff, by having asked for the enforcement of the mortgage-lien, has deprived himself of the right of treating the instrument in question as a simple bond for money lent. The first portion of the claim was given up by the plaintiff. But whether it was given up or not, the Court ought to have enquired into the genuineness of the bond itself, so far as it purported to be a bond for money lent.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—Case No. 1288 of 1868.—We are of opinion that the document is admissible as a bond, simply for the purpose of enforcing against the obligor personally the payment of the money secured by it; but that, without registration, it is not admissible as evidence to prove that the obligee was entitled to the security of the land. There are many cases under the Stamp Law, which enacts that documents are not to be admitted in evidence unless they are stamped, in which such documents have been admitted for collateral purposes. So where an instrument contains several distinct contracts, and as such requires several stamps, it may be used as evidence of one contract for which it was stamped, although it would not be admissible as evidence in respect of the contract for which it was not stamped.

Section 34 of the Registration Act requires that every document to be registered must be presented at the proper registration-office by some person executing or claiming under the same, or by the representative of such person, or by the agent of such person duly authorized by power-of-attorney executed and authenticated in the manner thereinafter mentioned.

Suppose that in the present document the defendant had covenanted with the plaintiff that he would appear at the registry office, and admit the execution of the contract, so that the document might be duly registered and the plaintiff acquire a title. Suppose defendant refused to go to the registry office, and that, when the plaintiff went, the Registrar had refused to register, and the plaintiff thereupon sued the defendant for breach of the contract by which he lost the security of the land, according to the contention of Mr. Gregory, the document could not be used as evidence of the covenant to get it registered, because it had not been registered. In that case, the party who had contracted to register would be relieved of his obligation, because the document had not been registered through his default.

Or suppose a document of that sort had contained a power authorizing the plaintiff to act as the attorney for defendant and to register the document, and when the plaintiff produced the power to the Registrar for the purpose of proving his authority to register, the Registrar had said: "I cannot "admit this document, because it has not "been registered. I cannot look at it."

It appears to us that the object of the Legislature in Section 49 was that no document should be received in evidence as a document affecting an interest in land unless it should have been registered; but that it was not the intention that such a document should not be admissible in evidence for a purpose for which registration was not necessary.

The decision of the Lower Court will be reversed, and the case will be remanded for trial on the merits. The costs of this appeal will be paid by the respondent.

Peacock, C. J.—Cases Nos. 1312 and 1313.—These cases prove most conclusively that the document ought to be admissible for a collateral purpose without being registered. The plaintiff sues the defendants for refusing to register a document which required to be registered, and which the defendant had agreed to register, and which the plaintiff says the defendant refused to register. Now, in order to prove his case, he must prove, first, that there was an agreement to register, and then that the defendant refused to register. But, according to the contention of Mr. Gregory, when the plaintiff endeavours to use the document in proof of the defendant's contract to register, the defendant may say, "You cannot "prove that fact by this document, because "it has not been registered." Now, suppose an agreement to register should recite that defendant had, on the date of the agreement, executed a zur-i-peshgee lease, without specifying what the lands were which were included in it, and without mentioning the amount which was to be secured, and suppose that the plaintiff should sue the defendant upon that agreement for refusal to register, the agreement would prove that there was a zur-i-peshgee lease, but it would not prove what lands were included in it, or what amount was intended to be secured by the zur-i-peshgee lease. The plaintiff would have to prove the zur-i-peshgee lease for the purpose of showing what damages he had sustained in consequence of the breach of the defendant's agreement to register. Now if, when in order to prove the amount of damages sustained by the defendant's refusal to register, and not for the purpose of establishing the zur-i peshgee, the plaintiff should offer the zur-i-peshgee deed in evidence, the defendant could successfully object to its admissibility upon the ground that it was not registered, the plaintiff might be without a remedy. If such were the law, the grossest injustice might be perpetrated. It appears to me that, putting such a reasonable construction on the law as the Court ought to put, they would not allow the defendant to avail himself of the non-registration of the document for the purpose of protecting himself in a suit against him for a breach of his covenant to register.

The decisions of the Lower Appellate Court in both these cases are affirmed with costs.

The 2nd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges.*

Reversioner—Cause of action—Limitation—Adopted son.

Case No. 7 of 1868.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 19th September 1867.

Sreenath Gangooly and others (Plaintiffs), *Appellants,*

versus

Mohesh Chunder Roy and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Onookool Chunder Mookerjee, Sreenath Doss,* and *Kishen Dyal Roy* for Appellants.

Baboos Unnoda Pershad Bannerjee and *Romesh Chunder Mitter* for Respondents.

In a suit by a reversioner upon the death of a Hindoo widow who had succeeded as heiress of her husband to recover possession of property by right of inheritance as next heir of the husband, the reversioner's cause of action arises at the time of the death of the widow, when the right of entry first accrued to the reversioner; and this is so, even when the widow in her lifetime professed to adopt a son, and put him in possession of the property, if the reversioner denies the validity of the adoption.

This case was referred to the Full Bench by Kemp and E. Jackson, JJ. under the following remarks:—

Kemp, J.—THIS was a suit to set aside an adoption made by the widow of Sudasib Roy, on the allegation that such adoption was invalid, inasmuch as it had been made without the consent of her husband, and to recover possession of certain estates situated in Zillahs Rungpore and Dinagepore.

In the plaint it is stated that, on the death of Sudasib Roy, the maternal grandfather of the plaintiffs, which took place in 1225 B.S., his widow, Beemola Debia, held possession of the estate of her deceased husband, and died in 1268 B. S. The plaintiffs date their cause of action from the death of Beemola Debia, or from 1268 B. S., and instituted this suit in 1273 B. S.

The principal defendant, Mohesh Chunder Roy, who is the son of the adopted son, in his written statement alleges that his father, the late Issur Chunder Roy, was duly adopted in the month of Joisto 1231 B. S., under a deed of permission granted by Sudasib Roy Chowdhree, to his wife Beemola Debia, and that the suit of the plaintiffs is clearly beyond time.

The Principal Sudder Ameen of Rungpore, on the issue in bar, after quoting and commenting upon certain decisions of the High Conrt and the late Sudder Court, observes: "That the cause of action in a suit "to set aside an adoption arises from the "time of the adverse possession by the "adopted son, and not from the death of "the widow, who was not in possession; but "that, when no adverse possession is proved, "it arises from the death of the widow." After laying down this proposition of law, the Principal Sudder Ameen proceeds to find that the present defendant, Mohesh Chunder Roy, has been in possession in right of inheritance for more than 12 years, and that the father of the present defendant was for some time in possession adversely to the plaintiffs. The suit was therefore dismissed as beyond time.

The plaintiffs appeal. The question for decision is, whether there has been a possession by the adopted son or his heir, for more than 12 years, adverse to the widow; for it seems to be settled law that, if without fraud or collusion a suit by the widow would have been barred, the reversioners, the plaintiffs in this suit, are also barred.

I am of opinion that the possession of an adopted son, or of his heir, with the acquiescence of the adopting mother, is not an adverse possession as against her in the sense in which that term is used with reference to the Statute of Limitations. The widow might think it proper to recognize the status and possession of the adopted son, but it is clear that the reversioner can have no right of entry during the lifetime of the widow. The possession of the adopted son is no trespass

on the proprietary right of the widow, though it might become so if persisted in when that proprietary right has passed into the hands of the reversionary heirs. In the case before us, the reversionary heirs are well within time from the date of their cause of action, *viz.*, the widow's death, and there has been no recognition on their part of the adoption. The decisions bearing upon this point which have been brought under our notice by the learned Counsel on both sides during the course of the argument are not altogether uniform; and as the subject is of great importance, I would submit the case to a Full Bench, with the view of obtaining a decision upon the following question.

In a suit by a reversioner to set aside an adoption and to recover possession in right of inheritance, does the cause of action to the reversioner arise from the death of the widow, when the right of entry first accrued to the reversioner, or from the date of the possession taken by the adopted son, though such possession is taken with the consent of the widow, the life-tenant. Whether the case is to be remanded for trial on the merits or dismissed as barred by the Statute of Limitation will depend upon the ruling of the Full Bench upon the question submitted for their decision.

Jackson, J.—As the decisions on the question of limitation, as raised in this suit, are conflicting, I concur with Mr. Justice Kemp in referring the question for conclusive determination by a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J. (Loch, Bayley, and Kemp, JJ., concurring).—It appears to me that the cause of action accrued at the time of the death of the widow. Although the suit is said to be a suit to recover possession by setting aside the illegal adoption of Issur Chunder Roy, the suit is in fact a suit by the reversionary heir to recover possession, notwithstanding that adoption, on the ground that the adoption was not valid. The cause of action, therefore, is the wrongful possession as against the reversionary heir; and the question is whether it is a cause of action which accrued to the reversionary heir on the death of the widow or was a mere continuation of the cause of action which had accrued to the widow, as the heir of her husband. If it was a continuation of the cause of action which had accrued to the widow, then the cause of action accrued when the widow's right to commence the action as heir of her husband first accrued. But in this case no cause of action did accrue to the widow by the entry of the adopted son, who claimed under the widow's own adoption, and who took possession as the adopted son with her consent.

Mr. Justice Kemp says: "I am of "opinion that the possession of an adopted "son, or of his heir, with the acquiescence "of the adopting mother, is not an adverse "possession as against her in the sense in "which that term is used with reference to "the Statute of Limitations;" and I entirely concur with him in that remark. The case is not like the case of a person claiming to be a son of a deceased husband and obtaining possession adversely to the widow. For instance, if a person claiming to be a legitimate son of a deceased husband should claim possession from the surviving widow, and should take possession from her adversely, when the person claiming to be the son was really not so, his possession would be adverse to the surviving widow, for which she might bring an action, and according to the Shiva Gunga case, see Moore's Privy Council cases, Volume XI., p. 50,* the reversionary heir would be bound by the decision in any suit brought by the surviving widow to contest the legitimacy of the person claiming to be the son, provided there should be no fraud or collusion between that person and the surviving widow. If, in such a case, the reversionary heir would be bound by a decision against the widow without fraud or collusion, he would also be bound by adverse possession against the widow; and his cause of action on the widow's death would be merely a continuation of the cause of action which accrued when the person claiming to be the son first entered. This appears to me to be consistent with justice, because, although a widow does not take an absolute estate by inheritance from her husband, she, during her life, is the heir, and the complete heir, of her husband for the time.

If in this case the adoption had been an act done by the widow as heir of her husband, the case would have been different; but the adoption by the widow was not in her character as heir to her husband; and the possession taken under her own adoption and with her permission was not adverse to herself as heir. It appears to me, on the authority of the Full Bench case cited by the learned Advocate-General, and which is reported at page 505 of Volume IX. of the

* 2 W. R., p. 31.

Weekly Reporter, we ought to hold that the cause of action did not accrue until the widow's death. In coming to this conclusion, I do not mean to say that a reversionary heir might not have a cause of action, during the widow's life, to set aside an invalid adoption; but that would be in the nature of a declaratory suit.

The case will go back with this expression of our opinion on the question of limitation to the Division Bench which referred it.

Macpherson, J.—I concur in the proposed answer to the question before us.

On the death of the widow of Sudasib Roy, the plaintiff, as his next heir then alive, sued to recover possession of certain property which had been inherited by the widow of Sudasib from her husband, asking also that an alleged adoption under which the defendants claimed might be declared invalid.

The defendants in effect pleaded that the adoption referred to by the plaintiff was valid, and that the suit was barred by limitation, because it was not instituted within twelve years of the origin of the plaintiff's cause of action, and because there had been more than twelve years' adverse possession.

The plaintiff's cause of action did not, and could not, accrue to him until the widow died, because his right to recover possession depended wholly upon his being, in fact, the next heir of Sudasib on the death of the widow. The defendants say that the suit is absolutely barred by Act XIV. of 1859, because the alleged adopted son was put into possession immediately on the adoption, many years ago, and that possession has never since been disturbed. But the defendants can derive no benefit from possession through or under, or by the act of, the widow, unless the possession was properly given by the widow. An improper giving away, or other alienation of her husband's estate, by a Hindoo childless widow, is of no operation as against a reversioner. Therefore—it being admitted that the property in this case was originally inherited by the widow—until it is ascertained whether she, in giving possession to her alleged adopted son, acted in a manner warranted by Hindoo Law, it cannot be ascertained whether that possession was adverse to the reversioner. Whether the widow's act was warranted by Hindo Law and binding on the reversioner, depends upon whether any adoption was legally made by her. Of course, if he was, in truth, legally adopted, Kirtee Chunder (the alleged adopted son) became the son of the widow's deceased husband Sudasib, and as such would legally inherit his estates, and the plaintiff cannot possibly now be the next heir of Sudasib. But if the adoption was invalid, the possession held under the gift or alienation of the widow is no bar to the plaintiff's suit; for, if the gift or other alienation by the widow was not in other respects warranted by law, the fact that she made it in the belief that she had adopted, or saying that she had adopted, Kirtee Chunder so as to make him the son of Sudasib, when she had *not* so adopted him, would in no degree add to the validity of the gift or alienation, so far as the reversioner was concerned.

The 3rd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges.*

Appeal to Privy Council—Security from decree-holder.

In the matter of Dittia Hurruckman Singh, general agent on behalf of Dhurm Narain Singh, *Petitioner*,

versus

Modhoosoodun Pyne and others, *Opposite Party.*

Baboo Bykuntnath Paul for Petitioner.

Baboo Hem Chunder Banerjee for Opposite Party.

During the course of a suit for damages, plaintiff applied that security might be required from the defendants under Section 81, Act VIII., 1859, and on their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on appeal by the High Court. He then appealed to the

Privy Council, and prayed to the High Court either to continue the attachment, or to require security from the defendants, pending the result of the appeal.

HELD that the Court was not competent to adopt either course.

This case was referred to the Full Bench by Loch, J., under the following remarks :—

THE petitioner is the plaintiff in a suit for damages. He sued to recover the value of certain logs of timber which, as he alleged, the defendants had carried off. During the course of the suit, the plaintiff applied to the Court to require security from the defendants under the provisions of Section 81, Act VIII. of 1859; and as they were unable to give it, their property was attached, and among it the logs referred to in this petition. Plaintiff obtained a decree in the first Court which was reversed on appeal by the High Court and the suit dismissed. Plaintiff has appealed to the Privy Council, and now prays to the Court to retain the logs under attachment or to require security from the defendants, respondents. It is objected, on the other side, that the suit having been dismissed, this Court can make no order retaining the logs under attachment, and a case reported in 9 Sevestre, page 49, is quoted in support of this contention. If, as it is stated, the defendants have no property from which the amount of the decree could be realized in the event of the appeal to the Privy Council being successful, except the property which has been attached under the provisions of Section 81, Act VIII. of 1859, it appears to me that much injustice might be done to the plaintiff if successful before the Privy Council, for his decree would be worth nothing if the defendants have no other property than that which has been attached if it were released from attachment without security being furnished ; and I think the proper order to be made in this case is that the property continue under attachment pending the appeal to the Privy Council, unless the defendants, respondents, are able to give security. As, however, an opinion has been expressed by another Judge of the Court to the effect that this Court has no authority to pass order on such applications, I think the question should be submitted for the decision of a Full Bench as below.

In cases when property has been attached by the first Court under the provisions of Section 81, Act VIII. of 1859, and the plaintiff's case is dismissed, and the decree of the Lower Court reversed on appeal to the High Court, but no order for the withdrawal of the attachment is made on the decree of the High Court—whether on the plaintiff filing an appeal to the Privy Council, this Court has jurisdiction, on the application of the plaintiff, appellant, to continue the attachment pending the decision of the appeal to the Privy Council, or to call upon the respondent to give security to the value of the property attached, before being allowed to remove it.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—It appears to me that the Court cannot, on the application of the plaintiff, continue the attachment pending the decision of the appeal to Her Majesty in Council, or call upon the respondent to give security before being allowed to remove it.

Section 81 of the Code of Civil Procedure authorizes the Court in cases where the defendant is about to dispose of his property for the purpose of delaying the execution of any decree which may be passed against him, or with that object to remove the property out of the jurisdiction of the Court where the suit is pending, to call upon the defendant to furnish sufficient security to fulfil any decree which may be passed against him in the suit; and it is only upon the defendant's failing to give that security that the Court can order his property to be attached. Now, the security to be given is that he will fulfil the decree which may be passed in the suit. The words "in the suit" must mean in the suit to which Act VIII. of 1859 relates, that is to say, a suit within the meaning of Section 1 of that Act, or in other words, a suit over which the Civil Courts in this country have cognizance.

The Court is not authorized to call upon a defendant who has got a decree in his favor in this country to give security to fulfil any decree which may be passed against him by Her Majesty in Council.

When an attachment issues against a defendant's property under Section 87, the Court is bound to remove that attachment on the defendant's furnishing security "as above required" (that is, to fulfil the decree of the Court) together with security for the costs of the attachment. After the plaintiff's suit has been dismissed finally by the Court of the highest jurisdiction in this country, he cannot require the

defendant to give security to fulfil the decree which has been decreed in his favor, or any decree which may be given against him on appeal to Her Majesty in Council. It would be unjust to call on the defendant to give security when the decree has been passed in his favor, and the plaintiff's suit has been dismissed.

Further, if the defendant, having had his property attached before decree, offer to give the requisite security, the attachment must be removed. When the Court pronounces a decree in favor of a defendant, the Court must assume its own decision to be correct. Then why should the Court call upon the defendant to give security to the plaintiff when the Court has decided that the plaintiff is not entitled to anything? The Court could not allow the plaintiff to seize the defendant's property in execution when the plaintiff has failed to obtain a decree. When a plaintiff obtains a decree, the Court could not allow him to execute it without security pending an appeal to Her Majesty in Council. But if the Court, after giving a decree in the defendant's favor, and dismissing the suit of the plaintiff, can order plaintiff to have an attachment against the defendant's property, the plaintiff is better off, and the defendant is almost in a worse position than if the plaintiff had got a decree against him. If plaintiff got a decree against the defendant, he could not attach his property without giving security; whereas, if the order can be made in this case, the plaintiff, although he has failed in his suit, may keep the defendant's property under attachment without giving any security at all. That would be a most anomalous state of affairs; and under these circumstances, I think that the judgment of Mr. Justice Jackson is correct, and that the Court has no power to continue the attachment, or to call upon the defendant to give security before he is allowed to remove the attachment.

It is true that the words of Act VIII. of 1859 are that the attachment shall continue until the further orders of the Court. We are not called on to say whether, when the plaintiff's suit is dismissed, any further order of the Court is necessary to enable the defendant to be relieved from the attachment; but if such an order is necessary, it appears to me that the defendant is entitled to it under the spirit of Section 87 of that Act.

The rule is discharged with costs.

The 3rd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges*.

Civil suit—Order by Magistrate—Nuisance—Chapter XX., Code of Criminal Procedure.

Case No. 432 of 1869.

Special Appeal from a decision passed by the First Subordinate Judge of Hooghly, dated the 15th December 1868, reversing a decision of the Moonsiff of Amtah, dated the 30th July 1868.

Oojulmoyee Dossee (Plaintiff), *Appellant*,

versus

Chunder Koomar Neogee, Overseer on behalf of the Magistrate of Howrah (Defendant), *Respondent*.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboo Juggadanund Mookerjee for Respondent.

An order passed by a Magistrate for the removal or suppression of nuisances under Chapter XX. of the Code of Criminal Procedure cannot form the subject of a suit or be set aside by a Civil Court.

This case was referred to the Full Bench by Loch and Mitter, JJ., under the following remarks:—

Loch, J.—In support of the special appellant's plea that a case of this kind can be brought in the Civil Court, the pleader has quoted a decision reported in 7 Weekly Reporter, page 95, and, no doubt, that judgment does support his statement. But another decision, reported in 11 Weekly Reporter, page 434, holds a contrary opinion; and as questions of this kind are continually arising before the Mofussil Courts, we think it advisable that this case should be referred for the decision of a Full Bench; and the question that we would propose for the decision of the Full Bench is, whether an order passed by a Magistrate, under the provisions of Chapter XX. of the Code of Criminal Procedure, can be set aside by, or can form the subject of a suit in, a Civil Court?

We reserve the other points taken in this special appeal for further consideration.

The following are the judgments of the Full Bench :—

Peacock, C. J.—This is in substance a suit brought in the Court of the Moonsiff to set aside an order made by the Magistrate under Section 308 of the Code of Criminal Procedure for the removal of a wall as encroaching on a public road. The order was made against the plaintiff's husband, but the plaintiff in substance alleges that the wall belonged to her, and not to her husband, and that she is not bound by the order made against her husband. If she is not bound by the order which has been passed against her husband, there is no necessity for her to have it set aside. The case must be decided as if the suit had been brought by the husband.

Section 308 gives the Magistrate a summary jurisdiction for removing nuisances. It enacts that, whenever a Magistrate "may "consider that any unlawful obstruction or "nuisance should be removed from any "thoroughfare or public place, or that any "trade or occupation, by reason of its being "injurious to the health or comfort of the com-"munity, should be suppressed or should be "removed to a different place, or that the "construction of any building, or the dis-"posal of any combustible substance, as "likely to occasion conflagration, should "be prevented, or that any building is "in such a state of weakness that it is "likely to fall or thereby cause injury "to persons passing by, and that its re-"moval in consequence is necessary, or "that any tank or well adjacent to any "public thoroughfare should be fenced in "such a manner as to prevent danger "arising to the public, he may issue an order "to the person causing such obstruction or "nuisance, or carrying on such trade or oc-"cupation, or being the owner or in posses-"sion of, or having control over, such build-"ing, substance, tank, or well, as aforesaid, "calling on such person, within a time "to be fixed in the order, to remove such ob-"struction or nuisance, or to suppress or "remove such trade or occupation, or to stop "the construction of, or to remove such "building, or to alter the disposal of "such substance, or to fence such tank "or well (as the case may be), or to appeal "before such Magistrate within the time "mentioned in the order, and show cause "why such should not be enforced."

Section 309 provides for the service of the order, and then Section 310 provides that the person to whom such order is issued shall be bound, within the time specified in the order, to obey the same, or to appear before the Magistrate to show cause as aforesaid, or he may apply to the Magistrate by petition for an order for a Jury to be appointed to try whether the order is reasonable and proper.

Now, these summary powers are given to the Magistrate for the purpose of enabling him speedily to remove nuisances. If, when a Magistrate, having entered into the question, has determined that a nuisance does exist, he is to be restrained by a Court of Civil Judicature from carrying his order into execution, it might be two or three years before the nuisance could be removed, by which time, as suggested by the Government Pleader, all the injury may have been actually sustained. While the suit is going on, persons may be poisoned by the malaria arising from the nuisance, or the conflagration may take place, or lives may be lost by the falling of a ruinous wall on passengers, or their cattle may be drowned in a tank or well which has not been properly fenced to prevent danger.

The object of the Act was to enable the Magistrate to make an order speedily, and speedily to carry that order into execution. Section 311 provides that no suit or action shall be entertained in any Court in respect of any thing necessarily or reasonably done to give effect to such order. It would, as it appears to me, be mere trifling with the Act if, when it says that no action shall be entertained in any Court in respect of anything necessarily or reasonably done to give effect to an order of this nature, we should hold that the Civil Courts could interfere to restrain the Magistrate from giving effect to his order at all; for that is really what is sought to be done by this suit. If the Magistrate had carried it into effect, no suit could have been brought against him or against any one acting under his order; and yet it is contended that a suit will lie to prevent him from carrying his order into effect.

It was said during the argument that no appeal was given from the Magistrate to any other Court. That probably was because the Legislature thought that the matters to which Chapter XX. of the Code of Criminal Procedure related were such as could not be properly left to the delay of an appeal, and therefore a substitute for an appeal was provided by enacting that,

if the party against whom the order is made should object to the order of the Magistrate, he may require the Magistrate to appoint a Jury to try whether the order was reasonable and proper; and in that case the person against whom the order is issued has a right to appoint two out of the five members of the Jury appointed to try the question.

The Act provides in Section 310 that "the Magistrate shall suspend the execution of the order pending such enquiry, and "be guided by the decision of the Jury, "which shall be according to the opinion of "the majority;" and in order to prevent any delay, it goes on to say that, "if the petitioner "shall, by neglect, or in any other way, "prevent the appointment of a Jury, or if "from any cause the Jury so appointed shall "not decide and report within a reasonable time, to be fixed in the order for the "appointment, their functions shall cease "from the date of the expiration of such period "unless they be continued by special order "of the Magistrate, and if from any of "the above causes no decision be made by the "Jury, the order of the Magistrate shall be "carried into effect as hereinafter provided." There is thus an express provision that, unless the order of the Magistrate is found by the verdict of a Jury to be unreasonable or improper, it is to be carried into effect, and by Section 311 no action is to be brought against any one for giving effect to it. Surely, in the face of this enactment, no Civil Court can restrain a Magistrate from carrying into effect an order under this Chapter.

Section 312 says: "If, in a case referred "to a Jury, the Jury shall find that the order "of the Magistrate is reasonable and proper, "the Magistrate shall give notice thereof "to the person to whom the order was "issued, and shall add to such notice an "order to obey the order first mentioned, "within a time to be fixed therein, under the "penalty provided by the Indian Penal Code "as aforesaid. If such latter order shall "not be obeyed, the Magistrate may proceed "as in the last preceding Section." The Magistrate may order the party to carry out the order; and if he do not carry it out, he is liable to be punished for disobedience under the Indian Penal Code, and the Magistrate may himself proceed to carry the order into effect.

To show that the Legislature intended that the order should be carried into execution speedily, and to protect the public even for the short time during which the order is under enquiry by a jury, Section 314 provides that, "if, pending the enquiry by a "Jury, the Magistrate shall consider that "immediate measures are necessary to be "taken to prevent imminent danger or injury of a serious kind to the public, it shall "be lawful for such Magistrate to issue such "an injunction and order to the person mentioned in that behalf in Section 308, as "shall be required to obviate or prevent such "danger or injury; and in default of such "person forthwith taking all necessary measures ordered to be taken by such injunction "or order, the Magistrate may himself use, or "cause to be used, such means as may be "necessary to obviate such danger, or to "prevent such injury, and no suit or action "shall be entertained in respect of anything "necessarily or reasonably done for that purpose," the latter words being similar to those used in Section 311. If a suit will lie to prevent a Magistrate from carrying his order under Section 308 into effect, it may also be contended that, if a Magistrate attempts to secure the public under Section 314, a suit will lie against him in a Moonsiff's Court for taking steps to protect the public. It appears to me that the Act would be entirely frustrated if we were to hold that any suit of this nature can lie to restrain a Magistrate from carrying into effect such orders as he may pass under the summary powers which are vested in him for the protection of the public.

The decision of the Lower Appellate Court is affirmed with costs.

Loch, Kemp, and Macpherson, JJ., concurred.

Bayley, J.—As I was the Judge who delivered judgment in the case reported at page 95, Volume VII, Weekly Reporter, holding that Civil Courts had jurisdiction in cases coming under Chapter XX. of the Criminal Procedure Code, I wish to add a few words to the judgment just delivered by the Chief Justice, and concurred in by the other three Judges.

In that case, it certainly appeared to me that the question was one of private right between the parties, *viz.*, that the land claimed by the Magistrate as the Government land on the one hand was claimed by the opposite party as his private land on the other, and that the road claimed by the Magistrate as a public road was distinctly claimed by the other party as his own private road. I then

considered, after reviewing the cases then cited by me, that this question of private right like all other questions of such character might form the subject of a regular suit in the Civil Court.

I have now had the benefit of a more full argument on the point, and considered the provisions of Section 311 to the effect that no suit or action will lie against a Magistrate for acts done by him under the jurisdiction given in the preceding Sections, *viz.*, 308, 309, and 310 of the Code; and looking to the reasons given in the judgment of the Chief Justice, based upon a consideration of the character of the acts to be done by the Magistrate under those Sections, and the necessity for vesting the Magistrate with summary powers in regard to them, the object of which would be defeated by admitting a civil suit against the order of the Magistrate, sanctioned by a Jury as provided in Chapter XX., I am of opinion that the view now taken by the Full Bench is the correct one. The proviso of Section 311, it seems to me, clearly bars the jurisdiction of the Civil Court, and that for clear objects in the contemplation of the Legislature; and although there is some slight difference between the actual facts of this case and those of the one reported at page 95, Volume VII., Weekly Reporter, still the principle which the Judges of the Division Bench in this latter case in Volume VII., page 95, intended to uphold was one distinctly opposed to the principle now laid down by this Full Bench. I am now free to admit that I was wrong in my former decision, and I fully concur in the decision now delivered by the learned Chief Justice.

The 3rd September 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, and A. G. Macpherson, *Judges.*

Practice—Appeal—Review—Section 377, Act VIII. of 1859.

Case No. 2734 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 26th August 1868, reversing a decision of the Moonsiff of Gopalpore, dated the 26th February 1868.

Narain Mundul and another (two of the Defendants), *Appellants,*

versus

Banee Madhub Sircar (Plaintiff), *Respondent.*

Baboo Ashootosh Dhur for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

HELD (Kemp, J., dissenting) that, when the last day for filing an appeal or review falls on a Sunday, or on a holiday on which the Court is closed, whether that holiday consists of a single day or of several days, the appeal or review may be filed on the day after the holiday.

This case was referred to the Full Bench by L. S. Jackson and Markby, JJ., under the following remarks :—

Jackson, J.—IN this case a decision was given in favor of the plaintiff by the Moonsiff on the 10th July 1867. On the 30th October, that is, 112 days after, the defendants applied for a review, writing their application on a paper bearing a stamp of 8 annas. From the 27th September to the 30th October, that is, for 33 days, the Moonsiff's Court and offices were entirely closed. On the 4th of February, the review was admitted, but the Court required an additional stamp of Rs. 14, which was furnished by the defendants.

Upon the re-hearing, the plaintiff again obtained a decree, but a less favorable one than upon the first occasion. He thereupon appealed, and objected, amongst other grounds, that the review ought not to have been admitted.

The Subordinate Judge, being of that opinion, reversed the second decree of the Moonsiff, and restored the original decree made previous to the review.

The defendants have now appealed against the decision of the Subordinate Judge, and the plaintiff, in support of that decision, has contended—*first*, that the stamp which the petition of review now bears is insufficient by 8 annas; *secondly*, that if it were sufficient, yet the petition having been presented after 90 days, stamped with a petition-stamp of 8 annas only, ought to have been rejected under Section 377, and that the Moonsiff had no power to order the addi-

tional stamp to be affixed; *thirdly*, that no just and reasonable cause was shown within the meaning of that Section why the application was not made within 90 days; and, *lastly*, that, apart from the question of time, there was no good and sufficient reason for admitting the review within the meaning of Section 376.

We think there is nothing in the first and second of these contentions. The Moonsiff appears to have dealt with the question of the insufficiency of the stamp in a manner analogous to that provided by Section 31 for dealing with similar questions when they arise in respect of plaints. No special provision is made by the Code of Civil Procedure for dealing with such questions when they arise in respect of appeals or petitions for review; but we think the Moonsiff was right in proceeding by analogy to the practice in respect of plaints, and that, the defendants having supplied such additional stamps as the Court required, their application for review is so far well founded, though in point of fact there is a slight error in the Moonsiff's calculation of that stamp, if the full stamp was necessary.

We think that the last point taken by the plaintiff does not now arise, supposing the decision of the Moonsiff as to there being good and sufficient reason within Section 376 to admit the review, to be open to appeal; that question was not in any way before the Lower Appellate Court. The decision of that Court rests entirely upon the question of *time*, and upon the sufficiency of the cause shown for delay within the meaning of Section 377. If any question is open to the plaintiff under Section 376, he must take it, if at all, in the Lower Appellate Court, should this case be eventually sent back there.

The important question to be considered in this case is that which arises under the third contention of the plaintiff. We have a not very clear account of what passed before the Moonsiff upon the application for review, but on the whole we think that what the Moonsiff did was this—he considered that the application, having been made more than 90 days after the original decree, was made after the proper time had expired, notwithstanding that, from the 27th September to the 30th October, the Court and offices were closed, and the application could not have been presented, because there was no officer present to receive it. This is shown by his having dealt with the case under the latter branch of Section 377, and by his having required, what he considered, the full stamp to be paid by the defendants. But it is, in our opinion, also clear that the Moonsiff considered the mere fact that the Courts were closed during part of the time that the 90 days were running, to be in itself "just and reasonable cause" for not having preferred the application within the limited period.

It has been held by this Court that a decision on this point is open to appeal, and we are certainly not inclined to agree with the Moonsiff in this view of the case. The Courts were not closed until the 27th September, that is, 78 days after the decree. We think that, unless there was something exceptional in this case, of which we see no sort of indication, and which, indeed, is not suggested, there was ample time for the plaintiffs to decide whether or no they would prefer a petition of review, and to prepare and to prefer that petition before the Courts were closed.

The defendants have, however, now contended that they were on the 30th October entitled, as a matter of right, to present this petition of review. They argue that the period during which the Courts were closed ought to be altogether excluded from calculation of the 90 days, and that, so doing, the petition was presented within 90 days from the date of the decree. They rely, in support of this contention, on a decision of Loch and Glover, JJ., reported in 6 Weekly Reporter, p. 19, which certainly appears to go to this extent.

Although this is not, as we have shown, the aspect under which the Moonsiff deals with the case, yet, if the defendants are right in this contention, the decision upon the case before granting the review ought undoubtedly not to be set aside on the ground that the petition for review was presented after the expiration of the prescribed period. We are, therefore, under the necessity of considering whether we should adopt the ruling just referred to.

Upon the whole, we have come to the conclusion that we ought not to do so. With great respect for the Judges who decided the case referred to, we think there is no general rule that the period during which the Courts are closed for the vacation are *dies non*, and are to be excluded in calculating the 90 days prescribed for filing petitions of review and other similar calculations. We think the rule is the other way

namely, that the closing of the Courts in no way affects those provisions of the Legislature, which require certain steps in procedure to be taken within a certain time. Undoubtedly, the opening and closing of the offices of Courts of justice ought to be so regulated as not to inflict any hardship by excluding parties from access to them at the necessary times, but at the same time we think that no one has a right to insist that these offices shall never be shut, or, if they be shut, to deduct the period that they are so in any calculation of the kind now under consideration. We think that the fact of the Courts being shut is only one of the circumstances which may be taken into consideration when deciding whether there was just and reasonable cause for the delay.

In this particular case, there was, as we have already said, no hardship whatever, the defendants having ample time to make their application before the offices were closed.

The result of our opinion is, that the review was admitted after the 90 days had expired, and that the Principal Sudder Ameen was right in thinking that no just and reasonable cause had been shown for the delay within the meaning of Section 377, and acting on this view we should dismiss this appeal with costs. But although a very few rupees are at stake, we have no power to close this litigation. As we differ from a decision of another Division Bench, it will not be in accordance with the practice of the Court for us to express any final opinion, but we must send the question upon which we differ from the other Division Bench for the consideration of five Judges.

The question for the determination of the Full Bench will be—whether the period during which the Mofussil Courts are closed for the Dusserah vacation, and during which an application for a review cannot be filed because there is no officer to receive the application, ought to be absolutely and invariably excluded in calculating the 90 days within which it is directed by Section 377 of the Code of Civil Procedure that reviews shall ordinarily be filed.

The following are the judgments of the Full Bench—

Kemp, J.—The point referred for our determination is whether "the period during "which the Mofussil Courts are closed for "the Dusserah vacation, and during which "an application for review cannot be filed "because there is no officer to receive the "application, ought to be absolutely and "invariably excluded in calculating the "period within which it is directed by "Section 377 of the Code of Civil Procedure that reviews shall ordinarily be filed."

I am of opinion that, as a matter of right, the applicant cannot claim to deduct from the 90 days any holiday or holidays which may occur within the 90 days within which, under Section 377, Act VIII. of 1859, the application "shall" be made. If the 90th day happen to be a holiday, and the application is filed on the next Court day, then such circumstance would be taken into consideration when the Court has to decide whether the applicant has shown just and reasonable cause for not applying within the period prescribed under Section 377. If it should so happen that the Court is closed on the 90th day, and the application is filed the next day, no Court exercising a wise discretion would say that such was not a just and reasonable cause for not having preferred the application within the limited period. We are not to presume that the Courts will exercise the discretion given them by this Section in an improper or arbitrary manner. The law does not enact that the parties are to have any time given them beyond 90 days except upon a just and reasonable ground for the delay being shown to the satisfaction of the Court. In this case the applicant allowed 78 working days to elapse before taking any steps towards making an application to review the judgment passed against him.

It has been said during the course of the argument that the law will not compel a person to do an impossibility, and that if the Courts are closed on a day on which the 90th day allowed by law falls, the applicant is compelled by circumstances over which he has no control to file his application after the expiry of the time allowed him by law. My reply to this is that under Section 377 that circumstance is just one of the circumstances which may be taken into consideration under Section 377 when the Court decides whether the applicant has been able to show just and reasonable cause to its satisfaction for not having come in within the limited period.

I have very little to add to the judgment of the learned Judges by whom this case has been referred to us. I entirely concur in

the opinion expressed by those learned Judges, and I regret to find that that opinion is not concurred in by the other Judges who form this Bench.

Peacock, C. J.—The question which is propounded for the decision of the Full Bench is whether the period during which the Mofussil Courts are closed for the Dusserah vacation, and during which an application for a review cannot be filed, because there is no officer to receive the application, ought to be absolutely and invariably excluded in calculating the 90 days within which it is directed by Section 377 of the Code of Civil Procedure that reviews shall ordinarily be filed.

I rather think that the meaning of that question is whether the whole number of days which fall in the vacation are to be excluded in the calculation of the 90 days. If that be the meaning, it appears to me that the whole number of days ought not to be excluded. For instance, if 50 days have expired before the holidays commence, and 6 weeks or 42 days are allowed for the holidays, I think that a party ought not to have 40 days after the expiration of the holidays to prefer his appeal or review on the ground that 40 of the 90 days for appealing fell during the holidays. But I am of opinion that when the last day for filing an appeal or review falls on a Sunday or on a holiday on which the Court is closed, whether that holiday consists of a single day or of several days, a party has a right to file his appeal or review on the day after the holiday if it be only one day, or on the day after the last day of the holiday if it consists of several days. That, I understand, has always been the practice, and it has been also so held with reference to the time for depositing money under the Regulation relating to mortgages—*See* Sudder decisions for 1858, page 627; Sevestre's Reports, page 27; Macpherson on Mortgages, 3rd Edition, page 222; and the cases which are cited in VIII. Sevestre's Reports, pp. 99 and 100½.

To show what various opinions may be entertained when a matter is left to the discretion of the Judges and is not governed by a strict rule of law, I need only refer to the present case. The Courts were closed from the 26th September to the 29th October. Twelve days out of the 90 remained on the 27th September. The Judges who have referred this case, say: "It is, in our opinion, clear "that the Moonsiff considered the mere fact "that the Courts were closed during part of "the time that the 90 days were running, "to be in itself just and reasonable cause for "not having preferred the application "within the limited period." They held that the decision of the Moonsiff on the point whether there was reasonable excuse for not coming within the 90 days was a matter of appeal to the High Court; and they were not inclined to agree with the Moonsiff in his view of the case. The Moonsiff's decision was in accordance with the practice. The application was filed on the day following that on which the holidays expired, and the Moonsiff admitted the application. But the learned Judges held that the parties had no right to file the application on the day after the expiration of the holidays, and considered that the Moonsiff had not exercised sound discretion in admitting the application.

It appears to me that we must put a reasonable construction on the Act; and having reference to the practice which has always been adopted under this and similar Acts, of allowing parties to come in on Monday when the last day falls on a Sunday, and on the expiry of holidays if the last day happens to fall on a holiday, it appears to me that when the last day falls on a Sunday, or on a holiday, or in the middle of a number of days which are holidays, the party ought to be allowed to file his appeal or review on the first day of the sitting of the Court afterwards.

My hon'ble colleague has said that every Judge in the exercise of a sound discretion would allow an appeal to be preferred on the first day after a holiday; but we find how the discretion varies, because we find that the Moonsiff, following the practice, admitted the application for review on the day following that on which the Court re-opened after the holidays, and the learned Judges thought that the Moonsiff had exercised an unsound discretion and that he ought to have refused the application.

The decision of the Subordinate Judge is reversed, and the case is remanded to him to hear the appeal on all the points except as to the admission of the review. The respondent will pay the costs in the Subordinate Judge's Court and the costs of the appeal to this Court.

Loch, Bayley, and Macpherson, JJ. concurred with the Chief Justice.

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The 7th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Dispossession — Possessory suit—Section 230, Act VIII. of 1859—Section 15, Act XIV. of 1859.

Case No. 1782 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 4th April 1868, reversing a decision of the Sudder Ameen of that District, dated the 25th November 1867.

Brohmo Moyee Dabee and others (Plaintiffs), *Appellants,*

versus

Burkut Sirdar and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondents.

When a party has been dispossessed undera decree obtained in a suit instituted under Section 15, Act XIV. of 1859, he need not bring a regular suit on proper stamp to regain possession, but may apply under Section 230, Act VIII. of 1859.

This case was referred to the Full Bench, by Norman and E. Jackson, JJ., under the following remarks:—

Norman, J. — BABOO ISSUR CHUNDER CHUCKERBUTTY, pleader for the special respondents, objects to the hearing of this special appeal. The original suit was a suit by the defendants against Womeer Paramanic under Section 15 of Act XIV. of 1859. The special appellants, plaintiffs in this case, being dispossessed in execution of that decree, applied to the Court under Section 230 of Act VIII. of 1859. Tne case of Gobind Chunder Bagdee against Gobind Ghose Mundul reported in 7 Weekly Reporter, page 171, was cited to show that the plaintiffs (special appellants) having been dispossessed under a decree in a suit under Section 15 of Act XIV. of 1859, and not in an ordinary regular suit, could not apply under Section 230. He says that the plaintiffs ought to have brought a regular suit upon proper stamp, and that, therefore, the special appellants have now no right to be heard. We are disposed to dissent from the rule laid down in the case referred to, and therefore think that the case should be referred to a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—We think this is a very clear case. The applicant is a person other than the defendant. He has been dispossessed of land in execution of a decree, for we have no doubt that the order passed by the Court in a suit under Section 15, Act XIV. of 1859 is a decree. The plaintiff in the possessory suit is not injured. He is not worse off under a proceeding authorized by Section 230 than he would be in a regular suit brought by the applicant against him to recover the land. The argument in respect of the stamp-duty, that the applicant will be enabled to proceed without payment of stamp duty, is not one which affects the interests of the plaintiff in the possessory suit; and it appears to us to be most reasonable that, when a man is turned out of rightful possession under a decree of Court against another person, he should not have to pay stamp-duty in order to get his land back again.

The case must go back with this opinion to the Division Bench which referred it. The respondents will pay the costs incurred by this reference.

The 7th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Bond—Consideration—Onus probandi.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 29th December 1868.

Foolee Bibee, *Plaintiff,*

versus

Bassiruddy Mirdha, *Defendant.*

Reference to the High Court by the Judge of Hooghly, dated the 26th April 1869.

Bama Churn Chuckerbutty (Plaintiff), *Appellant,*

versus

Romanath Roy and others (Defendants), *Respondents.*

Where in a suit on a bond which recites that consideration passed the defendant admits the execution

of the bond, but avers that he received no consideration, or only part of the consideration, the onus lies on the defendant to show that the recitals in the bond are not correct.

Reference in the first case.—In this case, the defendant admits the execution of the bond, but avers that out of the sum covered by it, he only received Rs. 3, and the question arises, upon whom the onus of proving the consideration, to the extent of the sum not admitted by the defendant, rests.

According to the ruling in Weston and Revell, Administrators of Lethuillier *versus* Chaundraney, Administratrix, page 231, Morton's Notes of Cases, it was held that Bengal bonds are simple contracts and not specialties; and there appear to be conflicting rulings of the High Court with regard to the party, upon whom the onus of proving the consideration, or want of consideration, when pleaded in a bond-suit, rests. I think the point depends in some measure upon the form of the pleadings.

In the present case, the plaintiff merely denied the defendant's allegation that he had not received the sum of Rs. 3, and according to the rulings noted in the margin, I threw the onus of proving payment of the consideration to the extent of the sum not admitted on defendant; but as those rulings are opposed to the following rulings, *viz.*, Baboo Ghan Sam Singh (defendant), appellant, *vs.* Chukowree Singh (plaintiff), respondent, p. 197, W. R., 1864; Tekait Toop Mungul Singh (defendant), appellant, *vs.* Anundo Roy (plaintiff), respondent, page 111, W. R., Vol. III.; Mussamut Jhaloo (defendant), appellant, *vs.* Sheik Furzund Ali (plaintiff), respondent, page 203, W. R., Vol. V., I beg to solicit the opinion of the High Court as to whether I was right in throwing the onus on the defendant.

Jugut Chunder Chowdhry (plaintiff), appellant *vs.* Bhugwan Chunder Futtehdar, defendant, page 57, Hay's Reports No. 1, July 1862; Kishendyal Singh (defendant), appellant, *vs.* Monohur Lall Mohunt and another (plaintiffs), respondents, page 381, Hay's Reports, No. 3, March 1863; Sivaram Maiyan, against Sanni Aiyan, page 447, Madras High Court's Reports, 1862-63, edited by Stokes; judgment of the Privy Council in the case of Chowdhry Deby Persad *vs.* Chowdhry Dowlut Singh 6 W. R., page 55, (P. C.); 7 W. R., page 441; also on this subject, see S. D. A., 1857, pp. 925-111; 1858, pp. 41, 55, 812, 1247, 1321; 1859, pp. 113, 1251; 1860, p. 419; 7 W. R., p. 423; also the case of Manic Lall Baboo (plaintiff), appellant, *vs.* Ram Dass Mozoomdar, p. 132, W. R., Vol. X.

Reference in the second case.—In this case, the plaintiff sues to recover money lent upon a bond, alleging that the defendants and another person borrowed from him Rs. 100, and executed the bond in his favor; that one of the debtors has paid his share of the loan; and plaintiff now sues to recover the balance from the defendants.

The defendants admit the execution of the bond, but deny that any consideration has passed. They further allege that the bond was of the nature of an indemnity-bond. The Lower Court, laying the burden of proof on the plaintiff, has found that he has been unable to prove the passing of consideration, and has dismissed the case.

It is urged on appeal that the Lower Court ought to have decreed the claim in plaintiff's favor, inasmuch as defendants admitted the execution of the bond, and that as they took the special plea that no consideration had passed, the *onus probandi* lay upon them. Both parties have cited precedents of the High Court in support of their respective arguments, and in consequence of the conflicting rulings, have applied, under Section 22 of Act XI. of 1865, that the question of law "upon which party the burden of proof lies," may be referred to the High Court for its decision.

The High Court rulings bearing upon the point are noted in the margin. In my own opinion, in a case where the defendant admits execution of the bond which contains a recital that money passed, such admission creates evidence against the defendant, which he is bound to refute by showing that no debt is due, if he takes the special plea that no consideration passed. This is the principle of law which has been noted in the later decisions of the High Court, and which should, I think, govern the present case. Similarly, on the question as to whether the bond is a mere indemnity-bond or not, the defendant admits the execution of the bond, but pleads in defence that it was not a bond intended to create an immediate debt. In my opinion, the burden of proving it to be an indemnity-bond lies on the defendant, who thus seeks to restrict its operation.

In support of Plaintiff's plea.
W. R., Vol. X. p. 132.
Do. do., p. 407.
Marshall's Reports } p. 27.
W. R., Vol. V. p. 70.
S. D. R. of 1858, 30th July 1858, Moharajah Shumbhoonath Singh (defendant), appellant.
In support of Defendant's plea.
S. D. decision of 1853, p. 25.
W. R., Vol. V. p. 203.
W. R., Vol. III. p. 111.
Extra Vol., W. R., p. 197.

In accordance with the application of both parties, I submit the case for the decision of the High Court, with my own opinion as above recorded.

These cases were referred to the Full Bench by Peacock, C. J., and Mitter, J, in consequence of the conflicting decisions cited.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—In these two cases, the defendants admit in the bonds that they received the consideration. Those admissions are evidence against them, though not conclusive. If they dispute the consideration, the onus lies upon them to show that the recitals in the bonds which they have executed are not correct. This has been substantially decided by the Privy Council in the case of Debee Pershad *versus* Banee Pershad, decided on the 13th of December 1844, and reported in 6th Weekly Reporter, page 55. See also the case of Saheb Perhlad Singh *versus* Budhoo Singh, decided by the Privy Council on the 12th March 1869, and reported in 12th Volume of the Weekly Reporter, page 6.

The cases will be sent back to the Judges who submitted them to this Court respectively, with this expression of the Court's opinion.

The 7th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

Kubooleut—Pottah—Suit—Notice—Sections 9 and 13, Act X. of 1859.

Case No. 1522 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 30th March 1868, reversing a decision of the Deputy Collector of Magoorah, dated the 31st December 1866.

Ukhoy Sunker Chuckerbutty (Defendant), *Appellant*,

versus

Rajah Indro Bhoosun Deb Roy (Plaintiff), *Respondent*.

Baboos Grija Sunkur Mojoomdar and *Bungshee Dhur Sein* for Appellant.

Baboos Motee Lall Mookerjee and *Issur Chunder Chuckerbutty* for Respondent.

A landlord cannot bring a suit to compel a ryot to execute a kubooleut, unless he first tenders a pottah to the ryot such as he is entitled to receive under Section 9, Act X. of 1859; and a suit for a kubooleut at an enhanced rate of rent cannot be supported without a previous notice under Section 13, Act X. of 1859.

This case was referred to the Full Bench by Loch and Mitter, JJ., under the following remarks:—

Loch, J.—PLAINTIFF sues for a kubooleut at enhanced rates. Defendant pleads payment of rent at a uniform rate of Rupees 26 for upwards of 20 years, and alleges that he holds a mouroosee tenure and denies his liability to enhancement.

The Lower Appellate Court, setting aside the judgment of the first Court, has given plaintiff a decree. The Additional Judge rejects the defendant's receipts on what appears to the Court unsatisfactory grounds, and holds that there is no proof of a uniform payment of rent for 20 years.

A special appeal has been preferred on the following grounds:—

First.—That the suit for a kubooleut will not lie as there was no previous tender of a pottah, as required by Section 9, Act X. of 1859.

Second.—That plaintiff has failed to mention in his plaint the period for which he demands the kubooleut.

Third.—That no notice was served as required by Section 13. Act X. of 1859.

Fourth.—The Lower Court was wrong in holding that a uniform *payment* of rent for 20 years was necessary under Act X., for the law only requires the tenant to prove that the rate of rent has not been changed for the last 20 years which has been done.

Fifth.—The decision of the Judge is defective in investigation, which affects the case on the merits.

In support of the first objection taken in the grounds of appeal, the cases given in the margin (*a*) have been quoted; other cases, also noted in the margin (*b*), are pointed out on the other side as opposed to the position contended for by the special appellant.

(*a*) Marshall's Reports ... p. 400.
1 W. Reporter...pp. 81 & 82.
2 Do..... p. 56.
2 Do..... p. 96.
10 Do., Full Bench, p. 18.

(*b*) 1 W. Reporter p. 49.
3 Do..... p. 30.
4 Do ..... p. 33, Act X.
5 Do ..... p. 88.
7 Do..... p. 282.
8 Do..... p. 472.

The cases reported in Marshall and at 1 W. R., pages 81 and 82, and 2 W. R., page 96, lay down the rule that a landlord is not entitled to sue for a kubooleut unless he has either granted a pottah or has tendered a pottah to the ryot. The case reported in 2 W. R., page 56, turns on the terms of a contract, and is, therefore, not applicable to support appellant's argument while the Full Bench ruling is not in point, for though the Chief Justice in delivering judgment in that case expressed an opinion that the Court went to a great extent, when it is held that a tender was not actually necessary, a rule which he thought should not be extended, yet that was not the question which the Full Bench had then before it.

On the other hand, we find that, in the case reported in 1 W. R., page 49, the Judges who decided it held "that the High Court had already decided that Section 9, Act X. of 1859, does not require that the pottah should be tendered before suit, but merely that the condition on which it is to be decreed is that a pottah shall be given in exchange." In the case quoted from Vol. III., W. R., it appears to me that the present question was not thoroughly considered by all the Judges. The attention of the Court was principally occupied by the major question as to the proper mode of enhancing the rates of a tenant having the right of occupancy. That case was before the whole Court, and Mr. Justice Trevor, and four other Judges concurring, held that "the ordinary and most "proper mode of proceedings to be adopted "by a zemindar or other person wishing to "enhance the rent of his tenant, is doubtless "to serve a notice under Section 13 in the "first instance, and then by a suit for the "recovery of that rent to be brought within "the term specified in the proviso at the "end of Section 32, Act X. of 1859, but that "it is also competent to a zemindar or other "person to bring an action for a kubooleut, "and in that form to raise the question as to "the particular enhanced rate at which the "pottah and kubooleut shall be exchanged "between the parties." Other Judges, who concurred with Mr. Justice Trevor as to the answer to be given to the Division Bench which had referred that case, did not allude to this. Mr. Justice Morgan remarked that the appropriate form of suit in a case like the present, is a suit for enhancement brought after due service of notice specifying the grounds on which an enhancement of rent is claimed according to the provisions of Section 13, Act X. of 1859. Mr. Justice Norman, referring to the case of Romanath Chowdhry *versus* Bhoobun Mohun Biswas, held that a suit for a kubooleut is not maintainable, except in the case provided for by Section 9. The Chief Justice held that the landholder could not sue for a kubooleut at an enhanced rent without giving the notice required by Section 13, Act X. of 1859; but with regard to the point, whether the landlord could sue for a kubooleut at an enhanced rent, without tendering a pottah, he held that such a suit might be maintained, if notice of enhancement had been given for the purpose of determining the amount to which the rent may be enhanced.

In the cases reported in Volumes IV. and V. of the Weekly Reporter, it was held that, when the suit is for determination of rent as well as for a kubooleut, the previous tender of a pottah is not enjoined by law, and that it is sufficient if the decree orders the delivery of a pottah before the decree is given effect to. The Judges who disposed of the case reported in Volume VII, Weekly Reporter, page 282, did so on similar grounds to the above, and the case reported in Volume VIII., Weekly Reporter, was disposed of with reference to the judgments reported in the previous volumes which are quoted in the judgment.

The case of Sham Kanth Chowdhry *versus* Bhoobun Mohun Biswas, is reported in the Special Number of the Weekly Reporter, page 183. The question whether the tender of a pottah was necessary before the landlord could bring a suit for a kubooleut was not determined in that case. The majority of the Judges held that a suit for a kubooleut would lie without previous notice under Section 13, Act X. of 1859. The Chief Justice considered that the question did not arise as the defendant in the case was a trespasser, while Mr. Justice Norman, while agreeing with the view taken by the Chief Justice, held that a pottah must be drawn up as actually tendered to the ryot, before the landholder can acquire a right to call on the ryot to give a kubooleut. It appears to me that the law upon the point before us, *viz.*, "whether the tender of a pottah is necessary before the landlord can bring a suit for a kubooleut," as well as on the other question, whether a suit for a kubooleut at enhanced rates, without previous service of notice, can lie, is still in a very unsettled state. On the first point we have conflicting judgments, as well

as on the second, and it cannot be said that they were disposed of by a majority of the Court in the case of Thakooranee Dassee tried by the fifteen Judges, for the majority pronounced no opinion on either of these points; and, as much diversity of practice continues, and the Judges of the High Court differ in opinion on both points, I think it would be advisable to submit both questions for the judgment of a Full Bench of this Court

The second point taken in appeal has, we think, been disposed of in the judgment of the Full Bench reported in Volume X., Weekly Reporter, pages 18 and 19, when the majority of the Court held that the plaint not specifying the date for the commencement of the kubooleut sought for, was not sufficiently specific, and that the Court in which it was presented ought to have returned it, but that the plaint having been admitted and the case heard, the Judge might have supplied the omission in the decree by specifying the time from which the kubooleut ought to commence. We therefore reject this ground of appeal.

The third objection taken has been considered with the first.

We think on the fourth objection that the Judge is wrong. The law does not, as supposed by the Judge, require the ryot to prove uniform *payment* of rent for 20 years, but (see Section 4, Act X., 1859) to prove that the rent at which the land is held has not been changed for a period of 20 years.

With regard to the fifth ground taken in special appeal, we think the grounds assigned by the Judge for rejecting the dakhilahs to be quite insufficient, particularly when they had been attested by the person who gave them, to whose evidence the Judge took no exception. We forbear to pass any final order in this case till the result of the reference to the Full Bench is known.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J. (the other Judges concurring).—I see no reason to change the opinion which I expressed in the Full Bench case reported in 3 Weekly Reporter, page 119, that a landholder cannot sue for a kubooleut at an enhanced rate of rent without giving the notice required by Section 13 of Act X. of 1859. At the time of the Full Bench decision in 10 Weekly Reporter, page 14, I certainly thought that I was in a minority in the Full Bench decision of the 19th of June 1865, the first Full Bench decision to which I have referred. I have, no doubt, I was misled by the marginal note in that case, in which it was said that "a suit for a kubooleut may be "brought without notice of enhancement "(Peacock, C. J., and Norman, J., dissent-"ing); but in such a suit brought without "notice, the kubooleut cannot be decreed "except to commence with the year follow-"ing that in which the decree is given."

According to my recollection at the time, I thought that that marginal note was correct, but it appears now that there was not a majority of the Judges of the Full Bench in favor of that position. Many of the Judges did not express any opinion on that point, and it did not arise in the case. In the Full Bench decision, reported in page 183 of Sutherland's Special Number, it was not held that a suit for a kubooleut at enhanced rent would lie without notice, but merely that a suit for a kubooleut would lie without notice under Section 13, Act X. of 1859. I cannot add much to what I said in the first Full Bench case to which I have referred; but it is clear, as shown by Mr. Justice Norman, that, if the commencement of the action for a kubooleut at an enhanced rate of rent is tantamount to a notice under Section 13, the commencement of the action creates a cause of action which did not exist at the time when the suit was commenced, whereas a cause of action must accrue before a suit can be commenced upon it.

Again, if a notice of enhancement be given under Section 13, six months before the month of Chyet, that notice can merely be to enhance the rents of the ensuing year. If such notice were given, no suit could be commenced before the ensuing year for enhanced rates for that year, and the ryot, under Section 19, knowing that his landlord intended to enhance his rent, might in or before the month of Chyet after the notice relinquish the land in respect of which the rent was sought to be enhanced. But if the suit to enhance is tantamount to a notice, it must be commenced in or before the month of Chyet, in order to enhance the rent of the succeeding year, and if commenced six months before the end of Chyet, all the expenses of the suit might be incurred before the

end of Chyet, and the whole expenses of the suit and the vexation attending upon it would be unnecessarily incurred if the tenant in the month of Chyet should give notice of his intention to relinquish the land.

I think it was urged in the course of the argument that, if the suit was brought before the month of Chyet, the tenant would not be allowed to relinquish. But if that contention is correct, it shows that the commencement of the suit would deprive the ryot of the right to avail himself of the provisions of Section 19 of the Act. It appears to me to be quite clear that a suit to enhance is not tantamount to a notice given before the commencement of the suit.

As to the other point, it appears to me that a suit cannot be brought to compel the tenant to execute a kubooleut unless the landlord has tendered a pottah to him, such as he was entitled to receive. Whether after the expiration of the notice to enhance, a suit could be commenced to declare what were the fair and reasonable rents, and that the tenant would be bound to execute a kubooleut at those rents upon the landlord's executing or tendering him a pottah, is a matter on which it is not necessary for me to express any opinion. It was stated in argument that there is a case to that effect decided in the Agra Court. We have not seen the report itself, but merely an abstract of it cited from a text-book.

The first question must be answered in the affirmative that, in order to entitle a landlord to sue for a kubooleut, he must tender a pottah; and as to the second question, we hold that a suit for a kubooleut at an enhanced rate of rent cannot be supported without a previous notice under Section 13, Act X. of 1859.

The decision of the Lower Appellate Court will be reversed with the costs of this appeal, and the costs in the Lower Appellate Court.

The 7th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Auction-purchaser—Suit—Estoppel—Section 27, Act X. of 1859.

Cases Nos. 3293 and 3294 of 1868.

Special Appeals from a decision passed by the First Subordinate Judge of the 24-Pergunnahs, dated the 15th September 1868, affirming a decision of the Sudder Ameen of that District, dated the 11th March 1868.

Chunder Narain Ghose (Plaintiff), *Appellant,*

versus

Kasheenath Roy Chowdhry and others (Defendants), *Respondents.*

Baboos Sreenath Dass and *Bungsheedhur Sein* for Appellant.

Mr. R. T. Allan and *Baboos Ashootosh Dhur* and *Ashootosh Chatterjee* for Respondents.

A purchaser at an auction-sale sued to have his name registered in the zemindary serishta in respect of certain lands purchased at an auction-sale for arrears of rent, but not until after his application to the Collector under Section 27, Act X. of 1859, had been rejected. Both the Lower Courts decided that the suit was barred by Section 2, Act VIII. of 1859. Held that the proceeding under Section 27, Act X. of 1859, held by the Collector, did not bar the subsequent suit in the Civil Court.

These cases were referred to the Full Bench by Glover and Mitter, JJ., under the following remarks:—

Glover, J.—THE plaintiffs in this case sued to have their names registered in the zemindar's serishtah, in respect of certain lands purchased by them at an auction-sale for arrears of rent. They had previously applied to the Collector under Section 27, Act X. of 1859, but that officer had rejected their application.

The Court of first instance, and afterwards the Subordinate Judge on appeal, decided that the suit was barred by Section 2, Act VIII. of 1859.

A decision of this Court in the case of Mahomed Noor Buksh *versus* Mohun,

Chunder Poddar and others, 6 Weekly Reporter, page 67, has been shown to us in which this ruling is laid down.

We are not, however (with all respect for the learned Judges who passed that decision), prepared to hold that a proceeding under Section 27, Act X. of 1869, held by the Collector bars a subsequent suit in the Civil Court.

The proceedings under Section 27 are essentially summary, and I do not understand how the ordinary remedy of a Civil Court suit can be taken away except by express legislative enactment.

The words of Section 27 are permissive, not peremptory; a party requiring his name to be registered *may* apply to the Collector, not *shall* apply to the Collector.

Moreover, even the word *shall* has been held by this Court in reference to Section 25 of the Act not to limit the jurisdiction.

If Section 27 meant that a party electing to apply to the Collector for relief was thereby precluded from any other means of establishing his right, I presume that the fact would have been clearly stated. Rights cannot be taken away by implication.

It appears to me, therefore, that this civil suit will lie, but as this opinion is opposed to that of Justices Loch and Norman in the case above referred to, this case must be sent up to the Full Bench for an authoritative ruling.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—Section 27, Act X. of 1859, directs that every zemindar or superior tenant is required to admit to registry and otherwise give effect to all transfers, when made in good faith, and all successions and divisions. There is, therefore, a direction by an Act of the Legislature to admit to registry, not for the benefit of the public, but for the benefit of a private individual. It appears to us that a breach of that direction of the Legislature gives a cause of action to the private individual, who would have a right to sue in the Civil Court unless exclusive jurisdiction is given to some other Court, or unless concurrent jurisdiction to maintain the suit is given to another Court and the party seeks his remedy in such other Court.

In the present case, therefore, the question arises whether the proceedings taken against the zemindar were proceedings in a civil suit for a cause of action. It has been held in the Full Bench case to which reference has been made, reported in the special number of the Weekly Reporter, page 118, that an application made to the Collector under Section 25 of the Act is not a suit; and in the Full Bench decision reported in the same volume, page 90, it was held that proceedings under Section 28 were a suit. The words in Section 28 are, however, very different from those in Section 25 or Section 27. In Section 28 there are the words: "Every such suit shall be instituted within "the period of 12 years from the time when "the title of the person claiming the right "to assess the land or dispossess the grantee "or of some person claiming under him, "first accrued;" but those words are not contained in Section 25 or in Section 27.

It appears to us that Section 27 falls within the same rule as Section 25, and that the proceedings authorized to be taken before the Collector under Section 27 were not proceedings in a suit; consequently that those proceedings were no bar, under Section 2, Act VIII. of 1859, to this suit.

These cases will go back to the Court of first instance to be tried on the merits. The costs will abide the ultimate decision of the suit.

APPEALS FROM ORIGINAL JURISDICTION.

The 12th April 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Stamp—Promissory note.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the ordinary original civil jurisdiction of the High Court.

L. Gomes (Plaintiff), *Appellant*,

versus

J. Young and others (Defendants), *Respondents*.

Messrs. J. T. Woodroffe and *L. A. Mendes* for the Appellant.

Mr. Marindin for the Respondents.

A promissory note is sufficiently stamped if the stamp is sufficient to cover the principal sum secured by the note.

The following is the judgment of Phear, J., in the Original Court:—

After giving the best consideration I can to the words of the Act, and some consultation with one of my brother Judges, I am of opinion that Section 22 of Act X. of 1862, applies to the promissory note* in this case. This promissory note is clearly equivalent to a Bill of Exchange, for it is a negotiable instrument payable to order, and if endorsed, it would be strictly an order for money within the words of the Section. But had I thought otherwise, inasmuch as the words of Sections 15 and 17 are entirely permissive, I would not have exercised the discretion reposed in the Court by those Sections in favor of a promissory note so exactly resembling a Bill of Exchange, and, therefore, as I think, within the mischief provided for by Section 22, unless I was satisfied that the case was one of an exceptional character; and as to that, I have no evidence before me to make me think this case is essentially different from the ordinary run of suits brought on promissory notes.

I have already said, in the course of the case, that I consider the note insufficiently stamped. I come to this conclusion, because I am of opinion that the interest which became due at the date of maturity must, for purposes of estimating the stamp, be added to the amount which is in terms secured by the note, otherwise the revenue might be materially defrauded by the simple expedient of obligations to pay money at a future date being drawn in a form which makes a large portion of the debt take the shape of interest.

I, therefore, feel bound to reject this promissory note as evidence, and as this is the sole foundation of plaintiff's suit, that suit must be dismissed, but without costs.

The following is the judgment of the Appellate Court:—

Peacock, C. J.—It appears to me that the promissory note was sufficiently stamped, it being sufficient to cover the principal sum secured by the note.

The word "sum" in the English Act has been held to be the principal sum; and I see no difference between the words "for a sum payable," in the Indian Act, and the words "for the payment of the sum," in the English Statute. It appears to me to be a distinction without a difference.

With reference to the danger to the Government revenue, which it has been suggested might result from persons securing the principal under the name of interest, I confess I do

* The promissory note was in the following terms:— "Twelve months after date we jointly and severally "promise to pay to Mr. L. Gomes, or order, the sum of "Rupees (1,000) one thousand, with interest at three (3) "per cent. per mensem for value received in cash, interest being payable monthly."

not appreciate it. If the Government should suffer in its revenue by the adoption of such a practice for the purposes of defrauding the revenue for the sake of a few annas, it has the remedy in its own hands by amending the Act. The revenue has not, as far as I am aware, been defrauded in England by the construction put on a corresponding provision of the Stamp Act. I should be very sorry to see justice defeated by holding that a man is to lose his claim by making a mistake as to the construction to be put upon the Indian Act, when the construction put upon it is in accordance with the construction which has been put upon similar words in the English Statute. The greatest injustice might be caused if we were to hold that the plaintiff should lose his whole claim simply because he made such a mistake.

I think the judgment of the learned Judge should be reversed, and the plaintiff is entitled to a decree for the principal and interest due upon the note. The interest will be at the rate mentioned in the promissory note during the 12 months for which the note was to run, and at the rate of 6 per cent. per annum upon the principal from that time to the date of decree. Interest will run on the principal and interest from this date at 6 per cent.

The costs of suit and of this appeal will be paid by all the defendants, to be taxed on scale No. 2.

Macpherson, J.—I am of the same opinion.

The 13th April 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Acknowledgment in writing—Parol evidence.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the ordinary original civil jurisdiction of the High Court.

Woomesh Chunder Mookerjee (Defendant), *Appellant,*

versus

Eliza Sageman (Plaintiff), *Respondent.*

Mr. J. H. A. Branson for Appellant.

Messrs. J. P. Kenney and *G. E. Evans* for Respondent.

Where there is an acknowledgment in writing of a debt due, parol evidence is admissible in order to show to what debt the acknowledgment related.

The following judgment was delivered in the Original Court by—

Phear, J.—I do not think it necessary for me to determine the question which has arisen on the Limitation Act, because I have no manner of doubt that this document (the letter marked *B**) was an admission of the debt; and as the other defence taken by Mr. Branson has failed, I must give the decree asked for, *i. e.*, for Rupees 1,800, with interest at the rate mentioned in the promissory note *A* to the date of filing the plaint, and 6 per cent. on the aggregate amount from the date of decree to realization, with costs of trial and previous proceedings on scale 2.

The judgments of the Appellate Court were delivered as follows:—

Peacock, C. J.—It appears to me that this decree ought to be affirmed.

The defendant signed a promissory note, dated 1st April 1865, for payment of 1,000 rupees to Eliza Sageman, or order, with interest at the rate of 12 per cent. per annum for value received. On the 18th of July 1866, he signed an acknowledgment in these words: "I further hold myself responsible "to you for the two sums of one thousand "and nine hundred rupees, respectively, "the latter sum bearing interest at the rate "of 24 per cent. per annum. Both these "sums of 1,000 and 900 rupees, I engage to "pay to you, with interest on the latter, as "soon as practicable."

The letter is addressed to Mrs. White, but parol evidence was admissible to show that Mrs. Sageman was known as Mrs. White, and that this letter was given to her.

There is an acknowledgment of two debts It is almost impossible for an acknowledgment in writing so to identify a debt, as that no parol evidence is required for the purpose of completing the identification.

In a case, under the statute of frauds, it was held that "if a letter properly signed

* The terms of this letter are given in the 2nd para. of the Chief Justice's judgment, and are, therefore, not set out again.

does not contain the whole agreement, yet if it actually refers to a writing that does, it will be sufficient, though the latter writing is not signed; and parol evidence is admissible to identify the writing referred to." —Roscoe's Nisi Prius Evidence, page 242.

Now, if parol evidence is admissible in such a case to identify the writing referred to, it appears to me to follow that parol evidence is admissible in this case to identify the debt referred to. Suppose the defendant had said in the letter, "I acknowledge that I owe you £1,000 for which I have given a promissory note," that of itself would not identify the promissory note referred to. Even if he said "I have given you a promissory note of the 1st February 1865," that would not of itself identify the note; but some evidence would be required to show that this particular note was the note to which the acknowledgment referred.

Parol evidence is admissible for the purpose of showing parcel or no parcel. Thus, where a testator devised all his farm called 'Troques farm,' it was held that it might be shown of what parcels the farm consisted "to show what were the particular lands to which the writing referred as Troques farm." —Roscoe, page 25.

It appears to me, therefore, that parol evidence was admissible for the purpose of showing what debt was referred to in the acknowledgment; and the plaintiff proves that the debt of 1,000 rupees is the debt referred to.

It is then said that the lady on cross-examination admitted that there were three debts, and that the acknowledgment might as well have referred to the third debt as to the other two debts to which she speaks. No doubt, an ambiguity was created, as the defendant promised to pay only two debts, and there were three debts spoken to by the lady. The question then arose as to which two of the three the acknowledgment related to. But how was that ambiguity created? —Not by the writing, but by the parol evidence of the lady obtained from her upon cross-examination. It is a clear rule of law that parol evidence is admissible to explain a latent ambiguity, that is, an ambiguity raised by evidence. No ambiguity arose upon the face of the acknowledgment, until the parol evidence showed that there were three debts.

"When an ambiguity not apparent on "the face of a written instrument is raised "by the introduction of parol evidence, "the same description of evidence is admit-"ted to explain it; for example, where a "testator devised his estate called Black-"acre, and had two estates called Blackacre, "evidence was admitted to show which of "the Blackacres was meant." So "where a man devises an estate to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended."—Roscoe, page 23.

It, therefore, appears to me that the evidence was admissible for the purpose of showing that the acknowledgment related to the promissory note upon which the action was brought, and to prove that Mrs. Sageman was the person alluded to under the name of Mrs. White, and that she was the person to whom the note was given.

I might further illustrate the case thus: Suppose there were two notes of £1,000 each—one of the 1st April 1865, and one of the 2nd April 1865, and that the one of the 1st April had a surety to it; and suppose defendant said in his letter; "I acknowledge I owe you £1,000 on my note of April last," I apprehend it is clear that the plaintiff could show by parol evidence that the acknowledgment referred to the note to which there was no surety.

It is further said that there was no acknowledgment to pay interest, and the Judge has given too much interest. If the defendant acknowledged that he owed money on the note, the interest would run from that date at the latest. It may be that the Judge has given interest from the date of the note, and that he has given a little too much. But there is no appeal on that point, and as no substantial injustice has been caused to the defendant, I should be reluctant to reverse the decision as to the excess.

Under these circumstances, the decree as given is affirmed with costs of this appeal.

Macpherson, J.—I also think that the decree should be affirmed with costs. There was a direct acknowledgment of a debt; and parol evidence was admissible for the purpose of identification.

The 17th June 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Gift—Hindoo Law—Donatio mortis causa—Government promissory notes.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the ordinary original civil jurisdiction of the High Court.

Coomar Coomar Krishna Deb (one of the Defendants), *Appellant*,

versus

Coomar Woopendro Krishna Deb (Plaintiff) and Nobin Krishna Bose, executor (Defendant), *Respondents.*

Messrs. Woodroffe and *Evans* for the Appellant.

Messrs. Graham and *Marindin* for Plaintiff, Respondent.

Messrs. Piffard and *Branson* for the Executor, Respondent.

Where a Hindoo, during his last illness and two or three days before his death, handed over certain Government promissory notes to one of his sons without reading them, it was *held by Peacock, C. J.*, that the English Law was not applicable, but that the gift was under Hindoo Law a good gift, and passed not only the paper, but also the debt and the interest secured by the notes. If the English Law applied, the gift would be a good *donatio mortis causâ.*

HELD, *by Macpherson, J.*, under the facts, that the case was one of a nuncupative will, and that the paper was made over in immediate contemplation of death.

The following is the judgment of Phear, J., which was appealed against:—

I THINK the facts deposed to by the plaintiff in this case establish a good *donatio mortis causâ.* The deceased a few hours before his death, and in contemplation of death, caused the Government paper to be fetched and himself gave it into the hands of the plaintiff with the clear intention of passing the property therein to him. He only abstained from making the endorsement because, as he himself said, he was too weak to bear the manual exertion of writing. The case of Veal *vs.* Veal * shows that this transaction would have effected a valid *donatio mortis causâ* in England. It has been said that when the transfer is incomplete, a Court of equity will not lend its aid to the donee for the purpose of making the executors complete it, unless it would have done the same against the deceased himself had he lived. But I think that this principle has of late received considerable modification. It is one thing to hold that the donor may recall a gift as long as any thing remains to be done to make it technically perfect, and quite another to allow that privilege to his representatives after his death. In this case I see no reason why the plaintiff should not reap the full benefit of the deceased's bounty. I think that the words of the deceased which accompanied the act of handing the paper to the plaintiff constituted alone a testamentary disposition, and that under the law and practice which prevail here, probate of these words could be given. I do not doubt that the plaintiff has a perfectly good title to the absolute property of the paper and of the debt secured by it. He has the document of title in his possession obtained by delivery at the hand of the deceased himself, and does not need powers of administration to be granted to him. If the Bank will not recognize his right without the endorsement of the executor-defendant, I think this ought to be given.

I will add that it appears to me a *donatio mortis causâ* has not the same signification here as it has in England, where all the personal property of which the deceased dies possessed goes at once to the executor of his last will. Here title by those who take is made independently of the executors, and is a matter of fact to be made out by the best evidence available, whether there is a will or not.

I have already said I did not think the intervenor, who was by his Counsel in Court at the time of trial, had made out any ground for adjournment. The matter to be tried is most simple, and the intervenor-defendant (as shown by his own acts) has been thoroughly acquainted with it for a long time past. I, therefore, make the decree as against the intervenor, as well as the other defendant, that the plaintiff is entitled to the declaration of right for which he prays. I further order the executor-defendant to endorse the Government paper which is the subject of the suit. The executor-defendant must pay plaintiff's costs on scale 2, and he must reimburse himself

* 27 Beavan, 303.

those costs, and his own costs as between attorney and client out of deceased's estate administered by him, of which, of course, the Government paper does not form part. The intervening defendant must bear his own costs.

On the appeal from the above judgment coming on for argument, the Appellate Court fixed the following issue for trial, *viz.*, whether the notes in the plaint mentioned did or did not pass by a valid gift from the late Rajah Aupurva Krishna Bahadoor to the plaintiff as in the plaint alleged. Liberty was given to the parties to adduce further evidence, which was accordingly taken by the Appellate Court on the 16th of April.

The judgments of the Appellate Court were delivered as follows:—

Peacock, C. J.—There is no doubt, in my mind, that certain Government promissory notes were given and delivered to the plaintiff by his father Rajah Aupurva Krishna Deb at a time when he was in possession of his faculties and capable of making a gift. The notes have been produced and identified by the plaintiff. The gift was one which, in my opinion, cannot be governed by the strict principles of English Law, the parties to the transaction being Hindoos.

I am not convinced that, in fact, the deceased contemplated death, or that he intended the gift to be conditional upon his decease; for if the evidence of the plaintiff is believed, his father upon being asked to endorse the notes said: "As soon as I get "a little better, I will sign them. What "cause have you for being anxious, seeing "I have given them in the presence of so "respectable a man as Dr. Baillie, and in "the presence of my worshipful mother," &c. From this, it appears that the deceased manifested some hope of recovery, and an intention that the gift should take effect even if he should recover from his illness.

The notes were given during the last illness of the deceased, and only two or three days before his death. If the strict rules of English Law were applicable to a gift of this nature by one Hindoo to another, the gift would probably be presumed by law to have been in contemplation of death, and also upon condition that the gift was to hold good only in the event of the donor's dying of that illness—See cases cited in note to Ward and Turner, 1 White and Tudor's Leading Cases, pp. 602 and 603.

I am of opinion that presumptions of English Law are not, like presumptions of fact, applicable to this case, which must be governed as to the legal effect of the transaction by Hindoo Law. In the absence of any presumption of law, I should find as a fact upon the evidence that the gift was not upon condition that it was to hold good only in the event of the deceased's dying of that illness.

If the case is governed by English Law, I have no doubt that there was a valid *donatio mortis causâ*—See Veal and Veal, 27 Beavan, p. 303. I do not think that this was a case of a nuncupative will; for if the gift was not a *donatio mortis causâ*, it was intended to take effect immediately, and not after death; whereas a gift by nuncupative will is not to take effect until after death —See Duffield and Elwes, 1 Bligh's New Series, pp. 529, 536. Even if what was said amounted to a nuncupative will, the gift was valid between Hindoos, whose dealings are not governed by the English Statute of Frauds.

But assuming that this was intended as a gift *inter vivos*, and not as a *donatio mortis causâ*, I am of opinion that, according to Hindoo Law, the gift was valid, and that the debt and interest secured by the Government notes, and not the mere paper, was given. The Statute of Frauds is not applicable to Hindoos, and a conveyance may be made verbally without deed and without writing. The distinction which has been made between trusts created by *donatio mortis causâ* and gifts *inter vivos*, that the one is a trust created by operation of law, and the other one to which the Statute of Frauds applies (as to which see Duffield and Elwes, 1 Bligh, N. S., 543), is not applicable to cases between Hindoos. If the gift were to be governed by the English law, and treated as a voluntary gift without consideration, and not as a *donatio mortis causâ*, I think the relation of trustee and *cestuique* trust was created between the donor and donee. Speaking generally the Government is not bound to pay to the holder of a Government promissory note, unless he is the payee or the personal representative of the payee, or unless a valid order by endorsement has been made which brings the holder within the term "or order." But the rule is as general that the Government is not bound to pay either the payee or his order, or his executor or administrator, without production of the note, as that it is not bound to

pay the holder or producer of the note, unless he is the payee or the legal representative of the payee, or a person who derives title through the payee by valid endorsement or endorsements.

Assuming that there was a valid gift of the Government notes, that is to say, of the documents, it is necessary to see whether that gift constituted a gift of the money secured by the notes, or only a gift of the documents. I am of opinion that it constituted as between the donor and donee a valid gift of the principal and interest secured by the notes, and not merely a gift of the paper on which the security was written and printed. Though there may not have been such a complete transfer of the debt, as to enable the donee without some further act to enforce the security against Government in his own name, it is clear that the donor if he had lived, or his representatives after his death, could not at law have compelled the plaintiff to return the Government paper; and if they could not have compelled the donee to return the notes, and could not have compelled payment of the notes without producing them, the effect would be that Government would not have to pay either the donor or donee, unless some course were open in equity for one party or the other.

I doubt whether equity could order the donee to return the notes. In the case of a bond given as a *donatio mortis causâ*, Lord Hardwicke held that the donee might cancel, burn, or destroy—see Ward and Turner, 1 White and Tudor's Leading Cases, 597. If he could cancel a bond, why should he not cancel a Government note, or even give it to Government or release Government from payment, even though he might not be able to sue in his own name on the notes?

In the case of a gift of a bond as a *donatio mortis causâ*, the donee cannot sue the obligee at all in his own name, but equity allows the donee to use the name of the donor's legal representative; so if a bond or mortgage-deed are given and delivered as a *donatio mortis causâ*, the debt passes and a trust is raised by operation of law, which entitles the donee to the assistance of a Court administering equity as well as strict law, to compel the executors and the heirs of the donor to do that which will make the gift effectual for all purposes—see Duffield and Elwes, 1 Bligh's New Series, 541, 542, and 543. A good *donatio mortis causâ* is as good as a gift by will, and I apprehend that a bequest of Government paper would pass not only the paper, but the principal and interest secured by it. So a conveyance by deed and delivery of Government paper to a volunteer would pass the principal and interest as well as the paper, as between donor and donee, although the donee could not sue in his own name without an endorsement.

The only difference that I can see, even under English Law, between a transfer of a bond and the transfer of a negotiable instrument, is that if the latter is transferred by instrument, the transferee may sue in his own name, whereas the transferee of a bond cannot. A bond and a bill of exchange and a promissory note are all choses in action. A bond under English Law cannot be assigned so as to give the assignee a right to sue at law in his own name; but the endorsee of a bill of exchange or promissory note, according to the law merchant in the one case, and the Statute of Anne in the other, may each sue in his own name. Both bills of exchange and promissory notes may be pledged by delivery as security without endorsement, and such pledge gives an equitable lien on the debt secured by the bills and notes, and not merely an equitable right to hold the paper. A transfer by deed and delivery of Government paper would, in my opinion, in the case of Europeans, constitute the relationship of trustee and *cestuique* trust even in favor of a volunteer. In this case, the delivery without a transfer by deed was as valid between Hindoos as if there had been a conveyance by deed and a delivery. The notes, therefore, in my opinion, passed to the donee.—See Ellison and Ellison, 1 White and Tudor's Leading Cases, p. 176 and Notes.

The delivery without endorsement of a promissory note payable to order was held to amount to a valid *donatio mortis causâ*—see Veal and Veal, 27 Beavan, 303. But that must have been upon the ground that the delivery was not a mere delivery of the paper, but a delivery of the debt.

This case differs from a mere delivery of stock-receipts, or receipts for South Sea annuities, as to which, see Ward and Turner, 2 Vesey, 431, and Duffield and Elwes, 1 Bligh's New Series, 536. They are not documents of title, for stock passes by transfer, and not by delivery or endorsement of stock-receipts. The delivery of such stock-receipts by the donor to the donee would not prevent the donor from transferring to another. But the donor in this case could not have

transferred the Government securities to any one else, whilst they were in the possession of the donee. If the English Law is to be applied in its entirety to this case, the plaintiff would be entitled to succeed. It cannot, I think, be applied only in part so as to defeat the plaintiff's right.

I am of opinion that the decree must be affirmed with costs, subject to a modification of the numbers of the notes.

Macpherson, J.—I also think that the decree of Mr. Justice Phear should be affirmed with the amendments proposed. But I am inclined to treat what occurred as amounting to a nuncupative will as to this Government paper. Rajah Aupoorva Krishna evidently had the matter in his mind for some time; and it appears to me that although he meant to retain the papers during his own life, he wished to see them actually in the plaintiff's hands before he died. My opinion is that what Rajah Aupoorva Krishna did was done by him in immediate contemplation of death. The plaintiff says that some few days previously, his father spoke to him about his having made a will. At the time he gave his son the Government paper, he had been long ill, and was in fact in great danger; and Doctor Baillie, who was his medical attendant, says he believes he was aware of his danger, though he (Doctor Baillie) never told him expressly that he thought he was dying. It appears to me that a gift made under such circumstances must have been made in contemplation of death. And what took place between the plaintiff and his father as to endorsing the paper is not necessarily inconsistent with this view. The father when asked to sign said: "I am very weak now—how can I "sign all these papers? Let me get a little "strength, and then I will endorse them," &c. This, however, might well have been said by a man who knew he was dying, but who thought that he would rally temporarily before the end came, and I see no reason why he should not have said what he did, even though he knew that he could not eventually recover.

The 5th July 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Execution of decree—Warrant—Discretion—Section 221, Act VIII. of 1859.

Kalee Chunder Paul (Decree-holder), *Appellant*,

versus

Thakoor Doss Biswas (Judgment-debtor), *Respondent*.

This was an appeal from an order of the Hon'ble J. B. Phear, dated the 17th June 1869, declining to issue a third warrant for the arrest of the defendant (judgment-debtor), the first and second warrants having been returned unexecuted.

Mr. Piffard for the Appellant.

No one for the Respondent.

HELD by *Peacock, C.J.*—That even although a Judge may have a discretion, under the Code of Civil Procedure, as to issuing warrants for the execution of decrees, the fact that the decree-holder has not used the utmost possible diligence in executing a previous warrant is not a sufficient ground upon which a fresh warrant should be refused.

Under the circumstances, HELD that the warrant ought to be issued to run for a year.

HELD by *Macpherson, J.*—That in the exercise of the discretion given by Section 221, Act VIII. of 1859, a Court may properly refuse fresh warrants when it is not satisfied that the parties have made reasonable endeavour to execute those which have expired.

Peacock, C. J.—IT appears to me that in this case a writ ought to be issued. The first writ was issued on the 19th June 1867, and the Sheriff was commanded to execute it on or before the 19th July. The Sheriff returned that writ on the 11th September, stating that he had made diligent search after Thakoor Doss Biswas, Ucoor Chunder Mitter, and Ram Lall Koondoo, but that they were not, nor was any or either of them, found within the town of Calcutta. Another writ was issued on the 18th June 1868,

returnable on the 18th July 1868; and that writ was returned by the Sheriff in the same manner, stating that he had made diligent search after Thakoor Doss Biswas, but that he was not found within the town of Calcutta. I do not know why the second writ was issued only against one of the defendants and not against the whole of them. It would have been more regular if the writ had been issued against all.

The plaintiff swears that, on the 8th January 1867, a decree was obtained by him against the defendants under the provisions of the Bills of Exchange Act. He says: "The defendants have not, nor hath "any of them property within the local "jurisdiction of this Hon'ble Court where-"upon the said decree could be satisfied "during the respective periods the said "writs remained in force. I made diligent "search and enquiry for the said defendants "for the purpose of executing the same, "but the same could not be executed owing "to the said defendants purposely concealing "themselves and keeping out of the way of "the process of this Hon'ble Court, and also "owing to the short time within which the "said writs were made returnable.

"I believe that if a period of one year be "allowed for the return of a writ of attach-"ment, I may be able to execute the same "against the said defendants."

In England, formerly, if a writ of execution were returned *non est inventus*, the plaintiff, as a matter of course, without applying to the Court, had a right to obtain an *alias*, and after that a *pluries*. Afterwards, writs of execution were made returnable immediately after execution, and the writ, if not returned, continued in force until the Sheriff could execute it.

By the Common Law Procedure Act, 1852, it is enacted as follows: "A writ of exe-"cution, issued after the commencement of "this Act, if unexecuted, shall not remain "in force for more than one year from the "test of such writ unless renewed in the "manner hereinafter provided; but such "writ may at any time before its expir-"ation be renewed by the party issuing it "for one year from the date of such renewal, "and so on from time to time during the "continuance of the renewed writ, either by "being marked with a seal bearing the date "of the day, month, and year of such re-"newal, or by such party giving a written "notice of renewal to such Sheriff."

It appears to me to be very reasonable and quite in accordance with the practice in England that we should allow a period of one year for execution of the writ. No injury will be done to the defendant except that he will be liable to be caught and compelled to satisfy the judgment by imprisonment. One can scarcely suppose that a plaintiff who obtains a judgment would let it lie unexecuted in order to get interest at the rate of 6 per cent. from a man from whom he cannot get payment of his debt. One would imagine that he would use every diligence to execute his decree. Even if the plaintiff should fail to satisfy the Court that he has used all diligence, that, as it appears to me, would be no ground for refusing another writ of execution. In this particular case, if the affidavit is correct, execution could not be obtained against the defendant's goods, because the plaintiff swears that defendant has no property within the local jurisdiction of the Court. Under these circumstances, I am of opinion that, although the Judge has a discretion, yet the fact that the plaintiff has not used the utmost possible diligence is not a sufficient ground upon which a fresh writ for one year should be refused. At any rate, in this particular case in which each of the two writs issued were returnable in one month, a longer period ought to be allowed and a fresh writ issued against all the defendants, returnable in twelve calendar months.

The plaintiff will be entitled to his costs of the application and of this appeal.

Macpherson, J.—While I incline to agree in thinking that in this particular case a warrant to attach the persons of the defendants should issue, I desire to add that, in my opinion, the learned Judge was right in the principle on which he considered himself to be acting when he refused to order that a warrant should issue. I think that the Court clearly had a discretion in the matter, such discretion being expressly given by Section 221 of Act VIII. of 1859. In the exercise of the discretion given by that Section, if the Court is not satisfied that the judgment-creditor has been using his best endeavours to execute the former warrant, a fresh writ ought not to be granted. In the present instance, while Mr. Piffard was addressing the Court, I was under the impression that each of the two former warrants had run for a year. Being under that impression, I thought, looking to the very meagre affidavit in support of the

application, that a third warrant ought not to issue, and that it was unreasonable on the part of the judgment-creditor to ask for it. I find, however, that the two former warrants each ran for one month only. This alters the features of the case considerably: and seeing that the time during which they ran was so short, I doubt whether I myself (if I had been acting in the exercise of our original jurisdiction) should have refused the application. I desire to repeat, however, that in my opinion the Courts of this country have, under Section 221 and the other Sections of the Code of Civil Procedure relating to the execution of decrees, a discretion in the matter and ought to refuse fresh warrants when they are not satisfied that the parties have used every reasonable endeavour to execute those which have expired. When parties do not really proceed actively, fresh warrants should not be issued merely to keep alive the decrees and enable the judgment-creditors to put them in execution at such future time as may please them.

The 27th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Hindoo Law — Promissory note — Interest — Consideration — Act XXVIII. of 1855.

Appeal from the judgment of the Hon'ble Mr. Justice Phear, exercising the ordinary original civil jurisdiction of the High Court.

Ram Lall Mookerjee (Plaintiff), *Appellant*,

versus

Haran Chunder and others (Defendants), *Respondents*.

Mr. J. H. A. Branson for the Appellant.

Messrs. P. Creagh and *C. Hyde* for the Respondents.

Per Peacock, C. J.—HELD, that by Hindoo Law the maker of a promissory note may show that there was no consideration for it: and that on a note for Rupees 1,200 "for value received in cash," no larger sum than that actually received (Rupees 700) can be recovered: and *quære*—whether by Hindoo Law a promissory note necessarily imports consideration at all.

Quære (*per* Peacock, C. J.) whether by Hindoo Law it is legal to contract for interest at the rate of Rupees 500, for the loan of Rupees 700 for one month. *Quære*, also, whether Act XXVIII of 1855 affects or repeals the Hindoo Law as to interest.

The following is the substance of the judgment of Phear, J., which was appealed against:—

I HAVE no hesitation whatever in saying that, in my judgment, the truth lies with the plaintiff. I do not in the least doubt the statement made by Chunder Coomar Chatterjee, but had I even in the first instance any reason to suspect it, my suspicion would have been dissipated when I saw the way in which defendant denied he had admitted to Chunder Coomar Chatterjee that he had, in fact, received 700 rupees. No one in Court, I think, who might be observing him at that moment, could have any doubt that he was telling a falsehood; also I am quite satisfied that the pretended receipt is a fabrication, which owes its origin to an after-thought. It seems in the highest degree inconsistent that the boy should have been so astute and so doubtful of Rakhal's honesty as to ask for a receipt, and at the same time weak enough to allow himself to be put off by a document brought out from an inner room and to be satisfied with a signature which he could not read. It is almost incredible that that occurrence should have been as he represents it. But even had it been, I should have certainly expected he would have taken the paper to some one who could tell him what the signature was, and that he would not have handed it over to be kept by a person who, according to his own account, had no interest whatever in the matter and was also unable to read English. Further, I cannot believe that if this receipt had really been given by plaintiff and handed over by defendant to Tarinee for safe custody, it would not have at once occurred to his (the defendant's) mind when he was summoned to pay Rupees 1,200 on the note. It is quite, I repeat, incredible that having once of his own accord sought this security against the note being negotiated, he should not of his own accord have applied to it for protection when full amount of the note was claimed in a suit. I entirely distrust both defendant and his witness Tarinee Churn Roy, and I have no doubt, as I have already said, that defendant received Rupees 700 as the full consideration on which he signed the promissory note.

I do not think, however, it follows from this conclusion that I am bound to give

plaintiff a decree for Rupees 1,200. This is a Court of equity as well as of law, and I am bound to be guided by principles of equity in giving judgment on the plaintiff's legal claim. Now, it is clear that the contract of law which is evidenced by the promissory note was effected by plaintiff with defendant at a time when the latter had scarcely escaped the disabilities of minority, if indeed he had really done so. Plaintiff was entirely aware of that fact, and of the further fact that the defendant was acting without advice, and it was on account of the risk which attended a transaction of this kind that he insisted on such a large margin as Rupees 500 on a Rupees 700 advance, a margin which in effect comes to interest of upwards of 800 per cent. per annum. Had the defendant come into Court in the first instance, instead of the plaintiff, to ask to have this contract set aside on tender of amount actually advanced, the Court would have granted his application and would have placed the parties as far as it could *in statu quo*. I do not think I ought now to place plaintiff in a materially better position than he would have been in if such a course had been taken. This leads me to consider the true position of the actual plaintiff in this suit. As to this, I have no doubt that the plaintiff really represents Rakhal Chunder Banerjee; and that something has taken place between Rakhal and Ramlall to the effect described in their evidence is, I think, probably the case; but it is equally apparent from Rakhal's evidence that this was done in order that Ramlall might appear as the plaintiff instead of himself. There is nothing illegal in this transaction, and it does not disqualify the plaintiff from recovering in this suit. The true holder of a negotiable document may at all times, if he is so minded, endorse the note to another for the express object of the latter suing it out; and if the note were first endorsed in blank, the simple handing over of the note would be sufficient. There is no doubt the class of cases to which Mr. Creagh referred, and which laid down that by mere writing of the name on the back is not of itself the whole of a transaction of endorsement. There must be some delivery, some intention to pass the legal rights on the note to the endorsee, but obviously that intention always exists when the person *hands it over* for the purpose that the transferee should sue. The principle of law to which Mr. Creagh attached some importance, applies to those cases where the endorsee's name has been put on the note, and there has been no complete manifestation of the endorser's intention that the endorsee should obtain legal right under the endorsement. It is, in fact, to protect the endorser that this principle has been laid down. I am not at present prepared to cite an English decision to this effect, but I am pretty confident that such a one has been recently given in Westminster Hall. But though Ramlall is entitled to sue on the note, he can stand in no better position relative to defendant than Rakhal himself: he has given no further consideration than Rakhal, even if the arrangement of which he speaks amounted to substantial consideration at all. That being so, it appears to me that defendant has the same equities against him that he had against Rakhal; that is, as I think, he is entitled to have a decree such that the effect will be the same as if the transaction were set aside on payment of the sum actually advanced. I propose to give plaintiff a decree for Rupees 700, but defendant must pay costs. Under the circumstances I shall give no interest. If the defendant had come to set aside the transaction, he would have had to pay interest probably without costs. At present I do not think the plaintiff could have taken this suit into the Small Cause Court, and is, therefore, not deprived of his costs here. But I will consider that point. A suit under the Summary Procedure Act cannot be brought in any other Court than the High Court.

[After the adjournment of the Court, the learned Judge said:] On consideration, I think the plaintiff ought to have confined his claim to Rupees 700 and to have brought his suit in the Small Cause Court: therefore each party must bear his own costs.

Judgments of the Appellate Court.

Peacock, C. J.—This is an appeal from the judgment of Mr. Justice Phear. The suit was brought under the Bills of Exchange Act, for the recovery of Rupees 1,200 due on a promissory note. The defendant got leave to defend upon the terms of bringing the Rupees 1,200 into Court which he did. The learned Judge who tried the case gave the plaintiff a decree for Rupees 700 only, without costs.

In the plaint, interest is not asked for—only the principal is claimed.

The promissory note is as follows: "One "month after date I promise to pay to Baboo "Rakhal Chunder Banerjee, or order, the "sum of Rupees (1,200) one thousand and

"two hundred only, for value received in "cash." It was endorsed *benamee* by Rakhal Chunder Banerjee on the back "Pay to Ram Lall Mookerjee, or order."

This suit is between two Hindoos, and, in my opinion, it must be determined according to Hindoo Law. What is said by Sir Francis Macnaghten in his "Considerations of Hindoo Law" does not get rid of the express directions contained in 21 Geo. III., C. 70, Sec. 17, that in all matters of contract and dealing between Hindoos, the Court shall administer the Hindoo Law.

By English Law, a contract under seal imports consideration. So, by English Law, a Bill of Exchange or a promissory note imports consideration.

The Privy Council have in a recent case expressed a doubt whether, according to Hindoo Law, a contract under seal does import consideration—(12 Weekly Reporter, Privy Council cases, page 6).

I equally doubt whether, according to Hindoo Law, a promissory note necessarily imports consideration; at all events, I am clearly of opinion that the maker may show that there was *no* consideration.

The note sued upon contains a promise to pay Rupees 1,200 "for value received in cash;" and I apprehend that the defendant is not bound to pay any part of the Rupees 1,200, which he can show he never received.

It is clear that the defendant received only Rupees 700, and if this promissory note be enforced, he will be compelled to pay Rupees 1,200 for Rupees 700 for a month. The defendant was induced by the payee, a money-lender, to write that he had actually received the Rupees 1,200, though, in fact, he received only Rupees 700.

Upon this ground alone, I am of opinion that the plaintiff can recover no larger sum, by way of principal, than the amount which the defendant received in cash.

Beyond this, I doubt whether, as between Hindoos, the plaintiff can be entitled to recover interest at the rate of Rupees 500 for the loan of Rupees 700 for one month. He could not legally receive in advance Rupees 500 for the loan of Rupees 700 for a month: nor could he by taking a contract to pay 1,200 at the end of a month, in consideration of an advance of 700, entitle himself to recover a higher rate of interest than the Hindoo Law sanctions.

The Hindoo Law restricted the rate of interest to be charged by Hindoos, and I do not think that Act XXVIII. of 1855 was ever intended to repeal the Hindoo or Mahomedan Law as to interest. That Act is entitled "An Act for the repeal of the Usury Laws." It recites that "it was expedient to repeal the laws in force relating "to Usury," and it enacted as follows, in Section 1:—

"Section 30 of the Act of Parliament "passed in the thirteenth year of the reign "of his late Majesty King George the Third, "entitled an 'Act for establishing certain "Regulations for the better management of "the affairs of the East India Company as "well in India as in Europe,' shall not apply "in any part of the territories in the possession, and under the government of the "said Company to any bond, contract, or "assurance whatsoever, which shall be made "or entered into within the said territories "after the passing of this Act; and the "several parts of Regulations mentioned in "the schedule hereto annexed, and all laws "in force in any part of the said territories "relating to usury, are hereby repealed."

That Act did no more than repeal the various Regulations and Acts which the English Government of India had passed on-

the subject of usury. That Act was not intended to interfere with the rules of the Hindoo Law as laid down by Menu for the regulation of Hindoos in their dealings.

In Colebrooke's Digest, I find the following text (Book 1, Chapter 2, Section 1, Clause 23)—"*Menu:* A lender of money may "take, in addition to his capital, the interest "allowed by Vasishtha, an eightieth part of a "hundred by the month."

Clause 24.—"*Vasishtha:* Hear the interest "for a money-lender declared by the words "of Vasishtha: five majhas, or one suverna "for 20 palas, or 80 suvernas, he may claim "and should receive each month: thus the "law is not vitiated." That is, one for 80 for a month.

Clause 26.—"*Vrihaspati*, quoted in the "Rutnacara: The eightieth part accrues "monthly on the principal; and if the in-"terest be received, the loan is doubtless "doubled in the third of a year less than "seven years, that is, in six years and eight "months."

Clause 29.—"*Menu:* If he have no pledge, "a lender of money may take two in the "hundred by the month, remembering the "duty of good men: for, by thus taking two "in the hundred, he becomes not a sinner "for gain."

"He may thus take, in proportion to the "risk, and in the direct order of the classes, "two in the hundred from a priest; three "from a soldier; four from a merchant; and "five from a mechanic or servile man; but "never more as interest by the month."

Clause 32.—"*Yagnyavalkya* ordains: All "borrowers who travel through vast forests "may pay ten, and such as traverse the "ocean, twenty in the hundred, to lenders "of all classes, according to circumstances, "or whatever interest has been stipulated "by them as the price of the risk to the "lender."

Clause 33—"*Menu:* Whatever interest "or price of the risk shall be settled be-"tween the parties by men well acquainted "with sea voyages or journeys by land, "with times and with places, such interest "shall have legal force."

It may be contended that the rule *factum valet* applies. As to this, I express no decided opinion. But it seems to me that, as yet there is no *factum*, as the plaintiff has not got the interest.

In this case, the plaintiff, if he can enforce his contract, will receive upwards of 800 per cent. per annum, whereas the highest amount allowed by Menu to be taken from a merchant was 4 per cent. per month.

It occurred to me that, perhaps, the plaintiff might be entitled to interest on the Rupees 700 at the ordinary rate. But there is no appeal as to that, nor does the plaintiff claim interest in his plaint, so we need not interfere.

The decision of the learned Judge will be affirmed with costs on scale No. 2. The Rupees 1,200 which the defendant brought into Court, being still in Court the defendant is at liberty to withdraw Rupees 500 out of that sum; and further, out of the remaining Rupees 700 belonging to plaintiff, he will be entitled to be paid his costs when taxed. The plaintiff may take out the residue, if any.

Macpherson, J.—I also think that the decree of the learned Judge ought to be affirmed. It appears to me that he gives very sufficient reasons for the conclusions at which he arrived, and that, under the circumstances, his decree was perfectly right.

The 25th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Champerty—Hindoo widow—Reversioner—Accumulations—Jurisdiction—Waste.

Appeal from the judgment of the Hon'ble Mr. Justice Phear, exercising the extraordinary original civil jurisdiction of the High Court.

Charles Grose and Heera Lall Seal (two of the Defendants), *Appellants*,

versus

Omirtomoyee Dassee (Plaintiff), *Respondent*.

The Advocate-General and *Messrs. Graham* and *Marindin* for the Appellants.

Messrs. Kennedy and *Branson* for the Respondent.

B, a childless Hindoo widow, entered into an arrangement with *G*, whereby she appointed *G* her irrevocable attorney to institute—and *G* agreed to institute and prosecute (with funds which he was to provide)—a suit in *B's* name to recover her husband's estate from his brothers; and as part of the arrangement, *B* conveyed and assigned to *G* all that she might recover, with all interest and accumulations thereon—the agreement being that *G* should retain half of all that was recovered, for his own absolute benefit as remuneration for his trouble, and that, out of the remaining half *G* should re-pay himself all sums of money spent by him in prosecuting the suit or for *B's* maintenance *pendente lite*, making over only the residue of such remaining half to *B*. A suit was accordingly instituted and *B* obtained a decree, in execution of which a large sum of money was paid into Court:—

HELD that a suit would lie by the reversioners to restrain waste and to prevent the payment of the money out of Court to *G*.

HELD by *Peacock, C. J.*, and *Macpherson, J.*—That the contract was void against the reversioners, otherwise than as a mere security for sums properly paid and costs properly incurred by *G*, with interest on such sums and costs.

HELD by *Peacock, C. J.*—That the arrangement by which one-half share was assigned to *G* absolutely as remuneration was not binding on the reversioners—if not upon the ground of champerty, upon the ground that it was an unconscionable bargain and a speculative, if not gambling, contract.

HELD by *Phear* and *Macpherson JJ.*—That the whole contract and assignment were void under the English Law as savoring of champerty and maintenance, and as being an unconscionable and gambling transaction, and therefore contrary to public policy.

The suit by the reversioner was originally instituted in the Hooghly Court, and *H*, who was a defendant, was not subject to the jurisdiction of that Court. *H*, however, joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted.

HELD that, after the case had been so transferred to the High Court (to the ordinary original jurisdiction of which *H* was admittedly liable), *H* could no longer object to the jurisdiction.

HELD by *Peacock, C. J.*, and *Macpherson, J.*—That the case having been transferred from the Hooghly Court, the law applicable to it was the law which would have governed it if it had been tried in Hooghly.

Per Macpherson, J.—HELD that the law applicable to the case if tried in the Court of Hooghly was precisely the same as the English Law applicable to it.

HELD by *Macpherson, J.*—That, under Hindoo Law, accumulations should be treated as *corpus*, and not as income.

The judgment of Phear, J., appealed against was as follows:—

ON the 29th February 1836, Ramtonoo Chunder died, leaving five sons, who continued for some time to live in joint enjoyment of the paternal estate. On the 25th October 1847, Modoosoodun Chunder, one of these sons, also died, leaving Bamasoonduree his widow, then 11 years old. There was no other widow, and Bamasoonduree was childless, but he left besides an only daughter Omirtomoyee, the plaintiff in this suit, an only daughter by another wife who had pre-deceased him. After his death, the surviving brothers retained the enjoyment and use of the whole estate. At length, disagreements arose between them and Bamasoonduree, but it is not necessary that I should go into details relative to what took place between October 1847 and April 1859. During this interval, Bamasoonduree made certain claims on the brothers in respect of her husband's share in the family-property, and I believe she instituted more than one suit against them—certainly one suit—before 1859. On the 4th April of that year, she entered into an agreement with one Charles Grose, by which, after reciting the material facts as to the condition of the family and of the property and the nature of her claim, and stating that she was unable from poverty to prosecute that claim, she assigned all which she might be entitled to recover and receive from the estate of Ramtonoo in right of her deceased husband, together with all interest and accumulations which had accrued or might thereafter accrue thereon, and all benefit and advantage to be had or derived from the suit about to be instituted, and she appointed Charles Grose her attorney to institute and carry on any suit or suits in her name for the purpose of recovering her right and share in this property, and it was then agreed that of the property, &c., which might be recovered, Grose should in the first place retain one moiety for his

own absolute use and benefit by way of remuneration and reward for his trouble and labor in the conduct and management of the contemplated suits and proceedings, and, as to the remaining moiety, that he should repay himself all such sums as he might from time to time have advanced and paid for the maintenance of Bamasoonduree, with interest at the rate of 12 per cent. per annum, and also all such sums and costs as he might from time to time have advanced or been put to in carrying on and managing the suits, with 12 per cent. per annum interest, and should pay over the residue to Bamasoonduree herself. Although this agreement does not make mention of any existing suit brought by Bamasoonduree, Grose in his evidence before me stated that, such a suit was existing at the time of the agreement, but was almost immediately afterwards withdrawn. On 10th May 1859, Bamasoonduree by Grose filed a fresh bill against her husband's surviving brothers for recovery of her husband's share in the estate together with accumulations. On 19th August 1861, a decree was made by the Supreme Court in that suit to the effect that Bamasoonduree was entitled to $\frac{1}{5}$th-share of the accumulations which had been made by the brothers to Ramtonoo's estate between the death of Ramtonoo and the death of Muddoosoodun, and also to the gains and profits made by Muddoosoodun's brothers by the use, after his death, of this $\frac{1}{5}$th share of the accumulations, the whole to be enjoyed by her as a Hindoo widow in the manner prescribed by the Hindoo Law; and finally by a decree, made on 8th August 1864, affirmed on 18th January 1866, the share of the accumulations belonging to Muddoosoodun at the date of his death was determined to be 84,685 rupees, and in lieu of the subsequent gains and profits thereon, 10 per cent. per annum on this sum was awarded to Bamasoonduree. In pursuance of this decree, the defendants have paid into Court a sum which I am told amounts to Rs. 2,40,000.

The plaintiffs in the present suit are Omirtomoyee and her infant son. They, on behalf of the reversionary heirs, seek to have this agreement of 4th April 1859 between Bamasoonduree and Grose (together with any sub-assignments as may have been made on the footing of it) set aside as being a void contract; and they further in substance ask for an order that the money should be paid into Court, and there kept during the life of Bamasoonduree for the benefit of the reversionary heirs. It is obvious, passing by for the moment the misjoinder of Omirtomoyee's son with herself as plaintiff, that she has no personal rights to vindicate. She can only properly stand before the Court on two grounds. These are: *firstly*, she may be entitled as the present representative of the ultimate heir to come into Court for the purpose of preventing the risk of losing evidence by lapse of time, and may ask that the validity of the deed, considered as an alienation against the interest of the ultimate heirs, may be tried now, instead of waiting until the death of the widow for this purpose; or, *secondly*, she may come into Court, also in the interest of the ultimate heirs, to protect the property from actual waste and, to keep it intact during the widow's enjoyment of it. The plaint in this case is unfortunately not framed with any clear conception of plaintiff's rights of suit; neither is the history connected with it and the words made use of in the body of it altogether creditable to the persons who were concerned in filing it. I think, however, that I ought to treat it as raising both the objections which I have mentioned on behalf of the ultimate heirs. Upon the foundation of this plaint and the subsequent written statement of plaintiff, which I am bound to say does not offend in the same manner as the original plaint, very many issues have been raised, as many as 17 in all. Some of these have been abandoned, and others are, I think, unnecessary on the facts which have come out, and it seems to me that, substantially there are but four principal questions or issues to be determined in this suit. First—Is the suit barred by lapse of time? Second—Was the alienation to Grose void as against the reversionary heirs by Hindoo Law? Third—Was it absolutely void as being contrary to public policy within the operation of any law affecting champerty and maintenance? And fourthly—Ought the money to be brought into Court, and there retained for the purpose of preventing waste? I may say that, as the money has, in fact, been brought into Court, this last issue is now confined to the question whether the money should be retained in Court for the purpose of preventing waste.

Now, taking the first issue, I think, if I were compelled to treat the plaint simply as asking for a declaration that the deed of 1859 was void, the suit would be barred by lapse of time. But I have already said that the plaintiff, as representing the reversionary heirs, has another alternative, which is that she can come into Court to prevent

waste whenever waste is threatened, and in this case the plaintiff distinctly asks for relief against waste. Hitherto without doubt there has been no waste. The property is safe enough where it is; but if the contract between Bamasoonduree and Grose is void on either of the grounds which I have specified, then payment of the money out of Court, in pursuance of the terms of that contract, would, I think, be unmistakeable waste. It seems to me that the fact of the contract of alienation being a material element to be considered in the question whether or not such a payment would be waste, does not have the effect of carrying back the date of the contemplated waste to the date of the contract, and, therefore, the plaintiff is in time to question by this suit any thing which may result from handing over this property to alienees under the contract of 1859.

Coming next to my second question, I think, I ought to hold that the alienation is void by Hindoo Law as against the heir. All contracts of alienation of property, as I understand the Hindoo Law, which are made by a Hindoo widow during her limited enjoyment of the inheritance, are liable to be avoided by the heir on her death, unless the alienee can defend the alienation by showing either that there was, in fact, lawful occasion for the alienation, and that the bargain was fair and reasonable, or if this was not actually the case, that he at least acted fairly and honestly, and was led by *bonâ fide* enquiry to believe that there was such occasion. Now, Mr. Grose's evidence in this case leaves no room to doubt that there was no enquiry whatever on his part. He cannot for a moment be allowed the benefit of the last alternative. Then, was the alienation, in fact, justified? that is, was there lawful occasion for it, and was the consideration under the circumstances commensurate with the property decreed? Now, on this point again, I take it that no one can have the least doubt that the transaction was one purely of a gambling character. I think, it is true, there was lawful occasion for Bamasoonduree to alien a portion of the property or for her to create an incumbrance upon it, and no doubt, under the circumstances of the case, in any negotiations for this purpose she must have expected that the consideration she should obtain would be relatively small as compared with the burthen placed on the property. But here Bamasooduree got no consideration that could be termed definite in any sense. Grose gave time and labor, the latter not even skilled or professional labor, for the chance of half of what should be recovered; he did not give any sum of money out and out. If anything substantial was recovered, he would get his money back again, in addition to the half share of the property. He did not even attempt to estimate what would be the cost to him of carrying on the suit There was no sort of calculation made of what the consideration given by him, if any there was, amounted to; and so far as I can see, there was no obligation incurred on his part to expend any more money, time, or trouble than might just please himself. There is nothing in the contract (unless it is to be supplied by implication on some principle of equity), which should prevent him from giving up the matter at any stage he chose. In short, this was nothing more or less than a pure gambling transaction, not to be defended, in my judgment, as against heirs under Hindoo Law.

As regards the 3rd issue, it is a little difficult to say how far the English Law against champerty and maintenance at present reaches. Sir Robert Barlow was not altogether so unhappy in the use of the words "dead letter," as Mr. Kennedy in his argument seemed to imply. In the ninth edition of Story's Eq Ju., Section 1057 C, the writer suggests: "That the common law "notion of maintenance as applicable to "the assignment of rights of action has "become practically obsolete," and even in Chitty's Statutes, the observation occurs that "the doctrines of maintenance, champerty, "and buying of titles, are become in a "great measure obsolete as matter of Cri-"minal Law, and very seldom come into "notice as affecting the validity of con-"tracts." Still there undoubtedly does exist in England even now, a law forbidding champerty and maintenance. The change which has taken place is not, properly speaking, in the law itself but in the circumstances of society, which have so altered as to elevate a large class of transactions out of the mischief named champerty and maintenance, and thus left the subject shorn of its original dimensions. If we go back to the accepted definitions, we find that "maintenance in general signifies an unlawful taking in hand or upholding of quarrels or sides to the disturbance or hindrance of common right," and champerty is *but a* particular form of maintenance, namely, "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it." The essen-

tial element of the mischief is, I apprehend, "the disturbance or hindrance of common right;" and the forms in which this appeared most prominent to the eyes of the statesmen and jurists of England in early days were those of judicial corruption and the practice of buying upon speculation controverted rights and titles which the owners themselves did not think it worth while to prosecute. Where persons who by their position have the power to influence the fate of a cause in its progress through the Courts are in the habit of bargaining with the suitors for their rights, there all impartial administration of civil justice is at an end; and it was to meet an evil of this sort that the Legislature of Edward I. specifically prohibited any officer connected with Courts of law from purchasing titles of land depending in suit. Again, with any complicated system of proprietary rights, there must exist cases in considerable numbers in which, although the strict legal rights of parties relative to the same subject of property are not ascertained—indeed, are in some sort disputed—yet the parties themselves prefer peace and quietness with their neighbours to the vexation and harassment of a lawsuit in assertion of a doubtful claim. It is manifestly much to the public interest that this disposition to forbearance should prevail, and, therefore, should be protected from artificial disturbance. Accordingly, it is the policy of the English Law to repress all fostering of litigation by third persons whose motive is not the desire of vindicating right, but the hope of speculative gain. In this spirit the Statute of Henry VIII. forbade the assignment of any rights or titles which the assignor was not in the enjoyment of at the time of the transfer. The circumstances of society in England have no doubt, long ceased to be such as to call for the indiscriminating enforcement of sweeping enactments like these, and they have become practically obsolete. The purchase of a title pending in suit (even by a Queen's Counsel) is not now necessarily invalid, and the assignment of a chose in action is not of itself contrary to modern law.

Nevertheless, as I have already said, the principle of public policy which once found action in these Statutes is still operative, and the Courts both of law and equity give effect to it as part of the common law of England. It is important, however, for the right understanding of its application, that it should not be confounded with any of the rules of equity under which a transaction between parties is judged of solely with regard to the conduct of the parties towards each other. The late Lord Justice Turner in the case of Knight *versus* Bowyer, where "objection "was made on the part of the appellants to "the title of some of the plaintiffs, upon "the ground that their interests were ac-"quired by means of a purchase which was "illegal and invalid, as being affected by the "laws relating to champerty and main-"tenance," said that, "in order to main-"tain the objection as an answer to the "suit, the appellants must show that "the purchase was illegal and void upon "principles of public policy, upon grounds "far higher than the mere interest of the "parties."

So far, then, as the present issue is concerned, I have to look to the general nature of the transaction, and to consider it in reference to the interests of the community at large, rather than to its merits as between the parties; and in this aspect, it is not now-a-days a critical fact that the subject of the contract was matter in suit or about to be put in suit, for, as Lord Justice Turner also remarked in the course of the above cited judgment: "The cases abundantly prove "that property which is in litigation may be "made the subject of sale and purchase;" still I think the character of Grose's dealing with Bamasoonduree is to a considerable extent affected by the element of uncertainty involved in her claim against the Chunders. She was not suing to recover specific property or an ascertained sum of money, but she was seeking an account and a decree for the amount which should be found due on that account, and the transaction between her and Grose amounted to this, namely, an assignment to Grose absolutely of one moiety of her expectation, and an assignment to him of the other moiety as security for the costs and charges which he should be at in carrying on the suit in her name—the whole contract being made in consideration of his conducting the suit as her attorney, and advancing money necessary for its prosecution. I omit mention of the Rupees 16 per month maintenance, because it was an entirely insignificant ingredient in the bargain. Now, in acting thus, Grose was unmistakeably maintaining and upholding Bamasooduree's suit for the sake of a *share*, and that the lion's share, in the ultimate fruit. Moreover, it seems to me to be the effect of the deed between Bamasoonduree and Grose that Grose staked the outlay which was to be made by him against reimbursement and remunera-

tion out of the property to be recovered. Bamasoonduree was not made personally liable to repay Grose his costs and expenses, nor did he obtain any other security for them than that founded on the success of the suit. This I need hardly say is undisguised champerty forbidden by the law in England as a transaction detrimental to the general interests of society. If, therefore, I have to apply English Law to the determination of the issue, which is now under my consideration, in the same way as it would have been applied if the facts had occurred in England, it cannot be doubted that I must declare the contract in question to be void.

But it is said that, in hearing this suit, the Court is exercising its extraordinary jurisdiction; that the law by which its decision must be governed is the law prevailing in the Mofussil; and that there is nothing in that law to invalidate a contract of this sort. The starting point of this argument, as it seems to me, is taken upon mistaken ground. I am of opinion that this case must be treated exactly as if the plaint had been originally filed in this Court. It appears to me that all which took place in the Hooghly Court was without jurisdiction. The cause of action did not arise within the district of Hooghly. One only of the defendants dwelt there, and no order was passed to allow the suit to be instituted in that Court. This Court has jurisdiction to entertain the suit, because the cause of action wholly arose within the local limits of the town of Calcutta, and I think the commencement of the suit dates from the time when the plaint was brought into this Court from the Hooghly Court. All irregularity of proceeding which has occurred is rendered unimportant, and of no effect, because the parties have all appeared in this Court prepared to go to trial, and no one has been misled or put under disadvantage by the course which has been pursued.

Then, is the law which renders champerty and maintenance illegal in England part of the law which this Court in the exercise of its ordinary original civil jurisdiction is bound to administer? Viewed in the light in which I have endeavoured to place it, I think that it is; in other words, that the law which forbids and makes void all acts contrary to public policy, and subversive of the general interests of society is in force at least within the Presidency-town. It was part of the law of England in 1726; it is so still; and there is nothing whatever, as I conceive, in the circumstances of this country to make it inapplicable here. Consequently, according to authorities which I have no occasion now to discuss, the late Supreme Court was, I imagine, bound to treat it as being in force within the limits of its jurisdiction, excepting so far as its operation might be affected by the necessity of applying Hindoo or Mahomedan Law in cases where a Hindoo or Mahomedan respectively were concerned; that is to say, it was always in force because I apprehend this exception can only have regard to the conflict of private rights; and, finally, the law of the Supreme Government is the law of the High Court in its ordinary original civil jurisdiction.

Next comes the question, is the contract between Bamasoonduree and Grose such as to be opposed to the interests of society as it exists in this country? To this, I think, there can be but one answer. The facts of the suit in which it was made afford ample illustration of the mischief to follow from transactions of this sort. Grose wagered beyond his means and has become insolvent. As Bamasoonduree assigned to him, so he in turn has assigned to others. Bamasoonduree, moreover, under a pressure, which it is not necessary now to inquire into, has, as I am told, assigned away nearly all the small residue of interest in the suit which remained to her; and thus it happens that, although the long and tedious litigation in this country has resulted in a decree vindicating her rights, and under that decree the large sum of 2,40,000 rupees has been paid into Court nominally to her credit, yet, if these assignments are good in law, she will be left without benefit from either assignment or suit. Persons who are strangers to the record will, for insignificant consideration, appropriate the whole fruit of the Court's judgment, and even Grose himself bids fair to be a ruined man. This case, unfortunately, is of no exceptional character. It is but a type of what goes on daily in every Court of civil justice throughout Bengal. Speculative traffic in law-proceedings has assumed the dimensions and respectability of a regular trade. A large class in the community fattens and grows rich on the spoils of needy suitors. Litigation is promoted and maintained without reference to the wishes or interests of the nominal parties. As often as not, in cases where proprietary interests are in contest, the names on the record represent puppets which move at the bidding of persons who are in no way before the Court. The proceedings are carried on, not to adjust the rights of suitors seeking equity

and justice, but in order that contingencies may be determined, according to which the players in a great game of speculation will draw the stakes. I feel it impossible to exaggerate the magnitude of the evil. The benamee system confined to the tenure of property is bad enough, but, when it invades our Courts of justice, and takes away all sincerity and truth from the solemn administration of the law, it becomes destructive of the highest interests of society. I will add that the habitual treatment of legal proceedings as so much merchandize to be bought and sold at any stage is pregnant with risk to the integrity of those upon whom the Civil Courts are greatly dependant for guidance. I am afraid that there are vakeels of this Court who make use of the opportunities afforded to them by their position for buying up and maintaining pending suits, and I am sure there are Attorneys whose regard for the interests of their clients is deadened by familiarity with dealings of a champertous character. In short, it seems to me incontestible that the contract which the plaintiff impeaches is vicious to a degree, and offends against the law, under which private contracts may be void upon public grounds.

I have assumed that such a law was introduced into Calcutta by the Charter of 13 Geo. I. I might perhaps, have taken higher ground, for I am disposed to think that there is a power inherent in every Court of justice which receives its authority from the State, to subordinate the interests of private persons to those of the public, and to take care, where the two are in conflict, that the latter should prevail. The Privy Council in Fischer *versus* Kamala Naicker,* 8 Moore's Indian Appeals, 187, clearly attribute a power of this kind to the local Courts of this country. Their Lordships there say, in reference to the Court of the Sudder Adawlut at Madras: "It may be admitted "that the Court would have the right, per-"haps, even lay under an obligation, to take "cognizance *motu proprio* of any objections "manifestly appearing on the face of the "proceedings which showed that it was "against morality or public policy." If it was not so manifest, according to their Lordships, the Court ought not to enquire into it unless the issue has been distinctly raised between the parties; and in a following passage of the same judgment the Privy Council, as it seems to me, unmistakeably sanction the proposition that maintenance which has the qualities attributed to champerty and maintenance by English Law, *viz.*, "which is something against good policy and justice," is in this country matter of objection to the validity of a transaction such as the Courts ought, on the foregoing principle, to give effect to, when it is properly brought to their notice.

There are several decisions of the late Sudder Court of this Presidency which show that the action of that Court was in conformity with this principle. In the Sudder decisions of 1825, p. 12, Ramgolam Sing *versus* Kemat Sing, the plaintiff's suit had been dismissed. To enable him to appeal he agreed with a stranger that the latter was to advance funds necessary for carrying on the appeal, in consideration of which the stranger was to receive one-half the estate, if the decree should be in appellant's favor. The Court said it could find no precedent to warrant such a proceeding, and observed that it savoured strongly of gambling, and moreover was not a fair transaction, for if a decree passed in favor of the appellant, the stranger would obtain a moiety of an estate worth 2 or 3 lakhs of rupees by risking about Rupees 2,000, which he would have to pay for costs if the appeal were dismissed; on this ground, the appeal was suspended until the agreement was cancelled. No doubt, this decision does not amount to a judicial declaration of the principle which I mentioned. There was, in truth, no decision passed at all, and there were two alternative grounds put forward upon either of which the agreement was considered to be bad. I think, however, that the report is important as showing that the Court at that day was prepared to hold a gambling contract between private persons void, and this could only be upon the ground that it was against public interest. It may also be remarked by the way that the present case falls within the second of the two alternatives..

In 1836, Sudder Decisions, page 131, B. N. Sing against Teckarain Sing, it appeared that for the purpose of carrying on a suit to recover property, *A* obtained money from *B* on a bond by which he bound himself in the event of success to transfer a two-annas share of the property to *B*. He succeeded, and accordingly transferred the two annas share. Afterwards, by fraud, *A* ousted *B*, and got back into possession of the two annas share. *B* sued to recover this from *A*, but the Sudder Dewanny Adawlut held that the bond was a gambling transaction and could

* 3 W. R, Privy Council, 33.

not be recognized as the foundation of title as between the parties to it. Here the decision is undoubtedly open to question, because on the facts stated it would be difficult to say that there had not been a fair purchase of the two annas share by *B*. The transaction does not appear to fall within the vice of champerty. Nevertheless, the decision itself is valuable as showing that the Sudder Court considered that gambling transactions, that is, transactions opposed to the general interests of society, were such as the Court was bound to hold void between the parties themselves.

In the same year, 1836, Sudder Decisions, page 298, is reported a case the name of which I have not noted. There one Soburunnissa Khanum, having instituted a suit in the Provincial Court of Patna to recover the moiety of a certain estate, entered into an agreement with one Ramsoonder, whereby, after reciting that for the purpose of carrying on the suit and paying all expenses of the same, she had appointed Ramsoonder her agent, and had made over to him the necessary papers, she agreed that, in the event of obtaining a decree, the agent should receive $\frac{14}{16}$ of whatever should be awarded to her as his share for the risk and trouble incurred by him, but should the suit be unsuccessful, he should stand the loss of the expenses incurred by him. It will be observed that this contract is substantially the counterpart of the contract made by Bamasoonduree with Grose. Ramsoonder carried on the suit to a successful termination, and his heirs sued Soburunnissa to obtain the fourteen-sixteenth, but the Court said the transaction which gave rise to plaintiff's claim was a species of gambling, and the share to be enjoyed by the party who offered to take the risk was out of all proportion to the entire claim of the plaintiff, and on the strength of the two foregoing decisions to which I have referred, the Court declared the engagement illegal, and established the point for future guidance. If that guide is still to be followed, the contract of Bamasoonduree with Grose must undoubtedly be held void.

But it is said that the three precedents just mentioned have lost their force, and that the Sudder Court and this Court in its appellate jurisdiction have repudiated the authority of that guide. I have been referred to some cases in support of this proposition; but it appears to me that none of them are more than mere *dicta* of the Judges constituting the Court. In the case of K. L. Bhoomiah *versus* Peary Soonderee and another, reported in the Sudder Decisions for 1852, p. 394, Sir Robert Barlow, after mentioning by the way that the law of champerty was now a "dead-letter" in the English Code, declared, without giving any reasons whatever, that the case of Ramgolam Sing was an erroneous decision. Mr. Jackson in the same case said that, although those precedents had been hitherto good and valid, and it was right that the Lower Courts should follow them, still as the matter had then been brought up generally for consideration before the whole Court, he had no hesitation in declaring his opinion that an arrangement of the nature of champerty is not of itself illegal and void. He went on to say: "It has been usual to apply "the terms to arrangements between one of "the parties to a suit, and a third person to "the effect that the third person shall ad-"vance to the party the means of carrying "on the suit, in consideration of which he "is to receive a share of the thing litigated. "I know of no law against such an arrange-"ment, and there is certainly no reason "why it should be declared illegal. Such "arrangements must stand or fall by the "peculiar nature of their *conditions*. They "are liable to question like any others when "a suit is brought to enforce or avoid "them." It is clear that Mr. Jackson had not inquired very closely into the meaning of the word "champerty" in English Law, and there is nothing in the opinion which he has in these words expressed necessarily inconsistent with the existence of a rule against real champerty in this country. In the next sentence he applies this opinion to the facts of the case in the following words: "But it is a very different thing to say that "*A* having sued *B*, *A's* suit shall be dis-"missed because it appears that *A* has ar-"ranged with *C* to let him have a share of "the thing claimed in consideration of *C's* "advancing money to carry on the suit. The "right of *A* to the thing claimed by him is "by no means dependent on the validity "of the engagement between *A* and *C*."

The three other Judges who made up the Court cleared up all doubt as to the character of the engagement between *A* and *C* by stating "that the plaintiff had sold one-half of the "property in dispute to a party who, under a "document termed an *oomed-kobala*, or con-"tingent bill of sale, had advanced funds for "the prosecution of the suit," and then, refraining from the expression of any opinion adverse to the validity of the before-mentioned precedents, they said: "It does not

"appear to us to be a necessary or a legitimate "consequence from such a ruling that plaint-"iff's suit against another who, as the plaint-"iff alleges, wrongfully withholds from him "his property, must be dismissed whatever "its merits, only because the plaintiff has "obtained funds for carrying it on by means "of such an agreement." I see nothing open to question in this opinion, and I think it would certainly have been carrying the law against champerty an unjustifiable length to hold merely on such facts as these that the plaintiff could not recover in his suit.

In the case of Ramnarain Shaw *versus* Moharajessury Dassee, reported in page 1310 of the Sudder Decisions for 1852, a Court of three Judges, while it entirely agreed with the unanimous decision arrived at by the whole Court in the case just quoted, which it understood to "lay down that there is nothing in our Code making it illegal for a party to receive, and another to give, funds for the purpose of carrying on a suit on a promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiff, but that contracts of this nature must be decided on their own character and circumstances, and that the Courts should not recognize and enforce agreements which appear to be exorbitant and to partake of the nature of gambling transactions," went on to state that the facts in the particular case before it did not even constitute champerty in the English sense. At most they exhibited "the species of maintenance which consists in the maintaining or assisting by a third party of a plaintiff or defendant, with money or otherwise, in prosecuting or defending his suit." The Court finally remanded the case to the Court of first instance for re-investigation as to the fairness and honesty of the agreement between the plaintiff and defendant; and consequently this report does not furnish us with any authoritative decision in point.

There is another decision, Marshall, p. 303, which certainly contains a very strong *dictum* in favor of the present defendants, but the decision in that case, so far as it determined any issue as to champerty, was founded on the assent of parties and was not come to by the Court in the exercise of judicial discretion. Moreover, of the two cases quoted to support it, the one given by the Privy Council I have already referred to as an authority the other way, and the remaining one is that, which I have just discussed.

I now come to a last alternative. If I am wrong in treating this suit as a suit brought in the ordinary original civil jurisdiction of this Court, and if I am bound to deal with it as if it had been properly instituted in a Mofussil Court, still it seems to me that the result must be the same. The transaction is one which the decision of the Privy Council in the Madras case and the decisions which I have last mentioned in the late Sudder Court of this Presidency show cannot be tolerated even by a local Court of justice in the Mofussil. On the whole, from whatever point of view I look at the contract between Bamasoonduree and Grose, it seems to me to be void. Then, is the plaintiff entitled to take advantage of this fact and to ask the Court to adjudicate with regard to it? I have already said she is entitled to step in to prevent waste as against Muddoosoodun's heirs, and it would be waste if the money which constitutes their inheritance were paid out of Court to Bamasoonduree's assignees under a contract which is void. This waste, it is true, is not yet committed. The plaintiff comes here to prevent it, but it is said there is no overt act towards its commission, and that this Court will make no order with regard to dealings with a property which is in the hand or power of a Hindoo widow merely because she is under the disqualifications of a Hindoo widow. That is probably true, but I do not think the argument is well-founded in fact. There is no evidence of intention in this case to commit waste, but the several defendants in this very suit are stoutly maintaining their rights to this money under the contract which is impeached, and I cannot for a moment doubt that they will act upon the contract as soon as they see the coast clear for the exercise of those rights.

Finally, I am of opinion that the plaintiff's suit is not itself affected by the vice of maintenance, as has been suggested. The evidence of Baboo Ashootosh Dhur satisfied me that in one sense it is maintained and supported by the Chunders. But I, at the same time, think that they stand in such a situation with regard to plaintiff that they may well enough assist her with funds and advice in the prosecution of her rights. Although they have been directed to pay this large sum of money to Bamasoonduree for her benefit, they are not the less interested in this large fortune being kept in the family; and I see no reason for attributing the part which they have played in this case in aid of the plaintiff seeking to protect the reversionary

heirs' rights, to any improper motive. It is not merely the aiding and succoring of a suitor which constitutes maintenance, and I quite adopt the words of Lord Abinger when he says: "If a man were to see a poor person "in the street oppressed and abused and "without the means of obtaining redress, and "furnished him with money or employed "an attorney to obtain redress for his "wrongs, it would require a very strong "argument to convince me that that man "could be said to be stirring up litigation and "strife, and to be guilty of maintenance."

I think it is perhaps as well I should say in conclusion that, although I feel bound to hold, on the facts of this case, that the contract which was made by Bamasoonduree with Grose was of such a character as to be void, yet I do not understand that there is any thing in equity which prevents a suitor, pending a suit or any other legal proceedings, from assigning the whole or part of the subject of litigation. There is nothing to prevent him, as far as I know, from stopping short of an absolute assignment and confining himself to simply mortgaging the property. Such an assignment in the Courts of Equity at home, and so undoubtedly here, would give the assignee substantial rights. But to assert and realize those rights, his proper course of action is to come into Court to get himself made a party to any existing suit, or if need be to take independent supplementary proceedings himself for the purpose of maintaining his rights. It is only when the assignment itself contains such ingredients as makes it a transaction in opposition to, or detrimental to, the general interests of society that the Court is bound to declare it void in favor of persons properly entitled to ask for such an adjudication.

I think the Court must in this case declare, as between the reversionary heirs of Muddoosoodun and the defendants in this suit, that the contract of April 1859 is void, and that the money in Court to the credit of the suit of Bamasoonduree *versus* the Chunders and others, should be retained until further order of Court. It will be understood that the declaration just made only operates so far as the inheritance is concerned, which the present plaintiff is entitled to protect. Whether or not this inheritance embraces the whole fund in Court, it is not now necessary to determine. That issue will be raised when an application is made for the payment of any of the moneys out of Court.

The judgments of the Appellate Court were delivered as follow:—

Peacock, C. J.—UPON the best consideration that I have been able to give to this case, it appears to me that the deed of the 4th April 1859, executed by the defendant Bamasoonduree Dassee, so far as it relates to the 8-annas share of the property assigned to the defendant Charles Grose and his assigns for his and their own absolute use and benefit, as a remuneration for managing the suit or suits therein referred to, is not binding upon the plaintiff or her son, or upon the persons who, upon the death of Bamasoonduree, may succeed to the property of her deceased husband Muddoosoodun Chunder; and I am of opinion that the plaintiff as the daughter and presumptive reversionary heir of Muddoosoodun, is entitled to maintain this suit for relief and protection. As to the other 8-annas share of the property conveyed by the deed, I think it was well and sufficiently charged as a security for all moneys necessarily and properly advanced for carrying on the suits. It may be a question hereafter between Bamasoonduree. the widow, and the reversionary heirs as to what portion of the money so advanced is chargeable upon the 8-annas share of the principal charged for those advances, and what portion on the accumulations or interest of such 8-annas share; but with this we have nothing to do at present. The principal question that we have to determine in this suit is whether the deed is wholly valid or absolutely void as regards the reversionary heirs, or binding upon them to any, and what, extent?

Two preliminary objections have been made: *first*, that this Court had no jurisdiction to decide the case against the defendant Heera Lall Seal; *secondly*, that the suit is barred by limitation.

The suit was originally commenced in the Court of the Principal Sudder Ameen of Hooghly, on the 22nd of February 1866, against Bamasoonduree Dassee, Charles Grose, and Heera Lall Seal, as the three principal defendants. the first two defendants being residents of Zillah Hooghly, and Baboo Heera Lall Seal being a resident of Calcutta.

I quite agree with the learned Judge who tried the case in his remarks as to the plaint. The suit may, however, be treated substantially as a suit to set aside as regards the

plaintiff and her son, two kobalahs, *viz.*, the one above-mentioned, dated the 4th of April 1859, executed by the said Bamasoonduree Dassee to the said Charles Grose, to which I shall have presently more particularly to refer; and the other, dated the 14th of November 1860, being an assignment by the defendant Charles Grose to the defendant Heera Lall Seal of the interests which the former took under the aforesaid deed of the 4th of April 1859; also to deprive the said Bamasoondurce Dassee of the property which, as widow and heiress of her late husband Muddoosoodun Chunder, she had recovered under a decree of the High Court, dated the 8th August 1864, affirmed on appeal on the 8th of January 1866, and to secure it for the benefit of the reversionary heirs of the said Muddoosoodun Chunder. The plaintiff being a female, would not, if she should survive Bamasoonduree, take an absolute estate as reversionary heir. She had therefore, in my opinion, a right to sue on behalf of her son as well as on her own behalf. The son is an infant and is not, as I understand the case, a party to the suit.

On the 23rd of April 1866, the suit was removed into the High Court upon the application of the defendants Charles Grose and Heera Lall Seal, to be tried by the said Court in the exercise of its extraordinary original civil jurisdiction under the provisions of Section 13 of the Letters Patent.

Upon the argument of this appeal, it was contended on behalf of the defendant Heera Lall Seal that, as he resided in Calcutta, and the money to which Bamasoonduree Dassee was entitled under the decree of the High Court was in Calcutta, the Court at Hooghly had no jurisdiction over him either in consequence of his place of residence, or in consequence of the place in which the cause of action accrued.

It appears to me, however, that the defendant Heera Lall Seal by joining in the application to have the suit removed into the High Court, admitted the jurisdiction of the Court to try the case in the exercise of its extraordinary original civil jurisdiction, and that he cannot now dispute the jurisdiction. If the suit had not been removed, an order might have been made for the trial of the suit in the Hooghly or some other Court under Section 4, Act XXIII. of 1861. This Court must, therefore, try the case, and apply the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly.

As to the question of limitation, it appears to me that the suit was not barred on 22nd February 1866, when the plaint was filed in the Court at Hooghly. Indeed, the first objection with regard to the want of jurisdiction, *viz.*, that the money was in the High Court in Calcutta, shows that, according to the defendant's own contention, the cause of action at the earliest accrued in 1864, the date of the first decree.

As to the merits of the case, it appears that, in 1859, Bamasoonduree Dassee, being in want of funds for the purpose of carrying on proceedings to recover certain moneys which were due to her as the widow and heiress of her deceased husband, applied to the defendant Charles Grose, and executed the deed of the 4th of April 1859. By that deed, the defendant Charles Grose agreed with due diligence, and to the best of his ability, to manage a certain suit then intended to be prosecuted by the said Bamasoonduree for the recovery of her rights, and any other suits or proceedings which might be deemed advisable, and to find all such sums of money as might be necessary to carry on the said suits and proceedings, and to allow the said Bamasoonduree 16 rupees a month for maintenance until the execution of the final decree which might be obtained in such proceedings, or until he should have recovered by means of the said suits sufficient means for her maintenance and support: and the said Bamasoonduree, in consideration thereof, assigned to the said defendant Charles Grose all her interest as such widow in the estate and property of her deceased husband and the profits and accumulations thereof, to hold the same, and all benefit and advantages to be derived from the suit then intended to be brought in respect thereof, and all other suits or proceedings connected with the said property, upon the terms that the said Charles Grose and his assigns should retain an 8-annas share thereof for his own or their absolute use for his or their trouble and labor in the conduct and management of such suits or proceedings, and should, out of the residue thereof, reimburse himself all moneys which he should advance and pay for the maintenance of the said Bamasoonduree, and all sums and expenses which he might advance or incur in conducting and managing the said suit or suits, with interest upon such sums at the rate of 12 per cent. per annum.

It is contended that this deed is void upon the ground of champerty and maintenance,

and that it is not binding upon the reversionary heirs. It appears from the recitals in the deed that the surviving brothers of Muddoosoodun Chunder, the husband of Bamasoonduree, had upon his death taken possession of the whole of his estate, and had ever since held and enjoyed the same and received the profits and accumulations thereof, and had disputed the right of the said Bamasoonduree as his widow to any portion of the estate of her late husband; and that she being a widow and unable personally to appear in public, and having no knowledge of business, and having been reduced to extreme poverty and distress in consequence of her being unable to procure any money from the estate of her late husband, even for her maintenance, and being unable in consequence of such poverty to institute proceedings to obtain an account of the estate of her late husbaud, had applied to the said Charles Grose to assist her.

It appears to me from the above recital and the evidence in the cause, that the deed was not altogether void on the ground of champerty and maintenance.

In the case of Fischer and Kamala Naicker,* 8 Moore's Indian Appeals, 187, the Lords of the Judicial Committee, in referring to a question of champerty, say: "The "Court (referring to the Sudder Court) "seem very properly to have considered that "the champerty, or more properly the main-"tenance, as to which they were enquiring, "was something which must have the qua-"lities attributed to champerty or mainte-"nance by the English Law. It must be "something against good policy and justice, "something tending to promote unnecessary "litigation, something that in a legal sense "is immoral, and to the constitution of "which a bad motive in the same sense is "necessary."

It appears to me that the assignment of the 8-annas share as security for the advances and expenses which Grose or his assigns might reasonably and properly make or incur for the maintenance of the said Bamasoonduree Dassee for carrying on the necessary proceedings to enforce her rights, with 12 per cent. interest on such advances, was not void, but that it created a charge upon that 8 annas share of the property which was binding upon the reversionary heirs of Muddoosoodun to the extent of such advances and expenses. As regards that part of the deed, however, by which the other 8-annas share of the property to be recovered was assigned to Grose and his assigns for his and their own use as remuneration for their trouble and labor to be bestowed in the conduct and management of the suits, I am of opinion that the deed was not binding upon the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain and a speculative, if not a gambling, contract.—*See* the case of Rajah Saheb Perhlad Sein *versus* Baboo Buddoo Singh, and other cases, decided in the Privy Council on the 12th of March last, and reported in Volume XII., Weekly Reporter, Privy Council cases, page 6.

In the present case, the amount recovered by the decree of the 8th August 1864 consisted of the sum of 84,685 rupees principal, with interest thereon at the rate of 10 per cent. per annum from the 25th of October 1847, being the date of the death of the said Muddoosoodun Chunder, to the date of realization. One-half of the principal and of the accumulations thereon by way of interest from the date of Muddoosoodun's death would be upwards of a lakh and fifteen thousand rupees; and if the deed of April 1859 should be supported as to the 8-annas share assigned to Grose for his absolute use, he or his assigns would be entitled to that amount for their trouble and labor independently of all advances and expenses in the conduct and management of the suit.

Independently, however, of the fact of the illegality of that part of the contract, it appears to me that there was no necessity for the widow's employing Grose or his assigns to manage the suits, and to contract to pay them such an exorbitant sum for their labor, and that consequently that part of the contract is not binding upon the reversionary heirs. For the above reasons, I am of opinion that upon the authority of the case before the Privy Council to which I have just referred, and the general principles of equity, justice, and good conscience (which is the law which would have been administered at Hooghly), it ought to be declared that so much of the deed of the 4th April 1859 as assigned to the defendant Charles Grose for his own use and benefit an 8-annas share of the property referred to in the deed is not binding upon the plaintiff or her son, or upon the persons who, upon the death of Bamasoonduree, may be entitled to take by inheritance the property of the said Muddoosoodun Chunder, deceased, and that no force or effect as against such heirs can or ought

* 3 W. R. 33.

to be given to that part of the deed. This affects only one-half of the property.

As regards the other half, the case is very different. The widow under the circumstances had a right to charge the property which might be recovered, with the amount of all such advances and expenses as might be necessarily made or incurred for the purpose of conducting the suits and realizing the estate of her husband, and for her own maintenance in the meantime. If there was a necessity to procure advances for the purpose of realizing the estate of her husband, I think she was justified in charging the *corpus* of that portion of the estate, as well as the accumulations in respect of it, with the amount of such advances and expenses and a reasonable amount of interest, and I think that 12 per cent. was not unreasonable, looking at the nature of the security. The probability is that no one would have advanced money upon the accumulations alone which might accrue during the widow's lifetime, even if the widow ought to have borrowed upon the security of such accumulations alone, and could have obtained sufficient advances upon such security.

If in a case of necessity, the widow could charge the accumulations which might accrue after her death with the moneys advanced during her lifetime to carry on a suit for the recovery of the principal and such accumulations, there seems to be no reason why she might not also charge the principal. She charged only half of the principal and of the accumulations as a security for the advances, and I am of opinion that there was a legal necessity for such charge, and that the deed of April 1859 is binding upon the reversionary heirs so far as it charges an 8-annas share of the property and accumulations with the advances and expenses to which I have referred. It appears to me that the contract to that extent was not inequitable nor immoral; that it was not against good policy or justice; that it did not tend to promote unnecessary litigation; and that it was not void upon the ground of champerty or maintenance within the definition in Fischer and Kamala Naicker to which I have already adverted. Indeed, if the advances had not been made, it is probable that the reversionary heirs of Muddoosoodun would have lost all the benefit of the fund now in Court.

We have nothing to do in this case with the question as to how far the deed of the 4th April 1859 can be supported against the defendant Bamasoonduree. This suit relates only to the rights and interests of the reversionary heirs, and our decree must be confined to the questions involved in the suit.

The only remaining point to be considered is whether the assignment by the widow to Grose for his own use of the 8-annas share to enable him to reimburse himself the advances and expenses which he might make or incur, has so far endangered the property as to induce this Court to interpose for the purpose of protecting it for the heirs in reversion. The widow, by the deed of the 4th of April 1859, assigned the whole property to the said Charles Grose, one-half for his own absolute use with power to recover the other half and thereout in the first place to pay and reimburse himself for the advances and expenses charged upon that half, and she appointed the said Charles Grose and his assigns to be her lawful attorney or attorneys for her and in her name to execute releases, acquittances, and discharges for all sums of money which might be from time to time realized, and she covenanted not to revoke the said power or to appoint any other attorney or to change any attorney who might be appointed or employed by the said Charles Grose or his assigns in and about the premises. I therefore think that a sufficient case has been made out to induce this Court to protect the property now in Court for the benefit of the reversionary heirs, to prevent the said Charles Grose or his assigns from taking out of Court and appropriating to his or their use the 8-annas share assigned to him for his absolute use, and from taking out of Court the whole of the other 8-annas share for the purpose of reimbursing himself.

In the case of Huree Dass Dutt *versus* Apoorna Dassee, 6 Moore's Indian Appeals, p. 445, it was held that a Court of equity will not interfere unless it is shown that there is danger from the mode in which the tenant for life in possession is dealing with the property; that the mere fact of the tenant for life keeping in hand for about three months part of the *corpus*, for the alleged purpose of an eligible investment, does not amount to waste, nor is it in derogation of the rights of those entitled in reversion; and that the title of a Hindoo widow to her husband's property, though a restrictive one, is not in the nature of a trust.

But that was a very different case. for there the money sought to be secured remained in the hands of the widow to whom

as heiress the law entrusted the care and custody of it. In this case, however, the widow has assigned the property to a third person, and made him the custodian of it, and that custodian has been obliged for want of funds to assign it to another.

If the money now in Court be paid out to Grose or his assigns to be held by him during the widow's life, the reversionary heirs will probably on her death be driven to a suit to recover it; and the property may probably pass by assignment or get into the hands of the person who may not be in a position to satisfy any decree which may hereafter be obtained against him by the reversionary heirs if he refuses to pay over the money. To compel security in this case is very different from compelling a widow to find security when she, as heiress, is entrusted by law with the custody of the property which comes to her by descent from her husband.

Suppose a widow, having a right as heiress of her husband to a large sum of money or of Government securities in Court, should assign such money or securities to a third person his representatives or assigns in trust to hold and manage the property during her lifetime, and to pay to her the interest and dividends during her life, and after her death to pay over the principal to the reversionary heirs of her husband, and should appoint the assignee and his assigns her attorney irrevocably to take the money out of Court, I apprehend the Court upon a suit filed by the reversionary heirs would not allow the money to be paid out of Court without security to the trustee appointed by the widow, even though it should not be proved that the trustee was insolvent. The Court would not, I think, allow the trustee to have the custody of the money which ought to remain in the custody of the widow.

In this case the 8-annas share assigned to Grose for his own use ought not to be paid out of Court to Grose or his assigns without security, even if the assignment to that extent is binding upon the widow; for the principal which belongs to the heir may be misappropriated and nothing may he forthcoming upon the death of the widow, and at all events the reversionary heirs may not be able to obtain possession of it without a suit, whereas a widow is, according to the Hindoo Law, supposed to be subject to the moral control of her relatives.

For similar reasons I am of opinion that the other 8-annas share ought not, without proper security, to be paid out to Grose or his assigns to enable him to reimburse himself the advances and expenses properly charged upon such share, but that it ought to be declared that, as regards the reversionary heirs, that share is well and sufficiently charged with the payment of all such costs and expenses as aforesaid and 12 per cent. interest thereon, and that without the further order of the Court no larger portion of that share shall be paid out of Court than the amount which is sufficient to discharge the advances and expenses charged thereon. We cannot in this suit order that even that amount shall be paid out, for we cannot in this suit decide as to the rights and interests of Bamasoonduree and the other defendants as between themselves. Bamasoonduree has not appealed, and therefore as far as this suit goes she is willing that the deed shall be set aside, and the whole money remain in Court until further orders as decreed by the Lower Court. We cannot, therefore, in this suit direct an account to be taken of the advances and expenses.

The decree of the Lower Court will be modified by declaring that the said deed of the 4th April 1859, so far as it relates to the 8-annas share of the property therein mentioned which purports to have been assigned to the said Charles Grose and his assigns upon the terms that he or they should and might retain the same for his or their own absolute use and benefit, is not binding upon the plaintiff or her son or upon the person or persons who upon the death of the said Bamasoonduree Dassee, or other determination of her estate, may be entitled to inherit the property of the late Muddoosoodun Chunder, deceased, as his heirs; and that no force or effect ought to be given to that deed as against the plaintiff or her son or other such heirs as aforesaid so far as it relates to the said 8-annas share of the property therein mentioned, and that an 8-annas share of the moneys decreed by the said decree of 8th August 1864, being the said share so purporting to have been assigned to the said Charles Grose and his assigns for his and their absolute use and benefit, should be retained in this Court, as a security for the rights and interests of such heirs, until the further orders of the Court, and that no larger portion of the other 8-annas share of the said property now in Court than shall be sufficient to satisfy and discharge the advances and expenses charged thereon by the said deed of the 4th April 1859 shall be paid out of Court to the said

Bamasoonduree Dassee or to her attorney the said Charles Grose or his assigns. This decree is not to affect any order for the payment of maintenance to the said Bamasoonduree Dassee or any other order if ever made by this Court before the decree of the Lower Court.

The suit of the said plaintiff will be dismissed except as to the relief granted by the decree of the Lower Court as hereby modified.

The plaintiff in her written statement claims maintenance, but no such claim was made in the plaint. On the contrary, the plaintiff claimed to have the whole of the property made over to her on the ground that Bamasoonduree was leading an immoral life. The plaintiff is not entitled under this appeal to have a decree for maintenance.

The defendants by their appeal have endeavoured to support the deed of 1859 altogether, but they have failed as to the half of the estate which was made over to the defendant Charles Grose for his own absolute use and benefit. Under these circumstances, no costs of this appeal will be awarded. I think we ought not to interfere with the decree of the Lower Court so far as it relates to the costs incurred in that Court, as the plaintiff has succeeded in the suit as to an 8-anna share of the property assigned; and as to the costs awarded against Bamasoonduree she has not appealed.

Macpherson, J.—I concur in the proposed decree, but upon grounds which on some points are slightly different from those assigned by the learned Chief Justice.

Bamasoonduree Dassee, the childless widow of Muddoosoodun Chunder, was in 1859 engaged in litigation with reference to her husband's share of the joint family property inherited by him and his brothers from their father Ramtonoo. On the 4th of April 1859, she entered into an agreement with the appellant Grose, by which she assigned to him all that she might be entitled to recover and receive from the estate of Ramtonoo in right of her deceased husband, together with all interest and accumulation which had accrued or might thereafter accrue thereon, and all benefit and advantage to be had or derived from a suit about to be instituted; and she appointed Grose her attorney to institute and carry on any suit or suits in her name for the purpose of recovering her right and share in this property; and it was agreed that, of the property recovered, Grose should in the first place retain one moiety for his own absolute use and benefit by way of remuneration and reward for his trouble and labor in the conduct and management of the contemplated suits and proceedings; and, as to the remaining moiety, that he should repay himself all such sums as he might from time to time have paid for the maintenance of Bamasoonduree, and also such sums and costs as he might from time to time have advanced or have been put to in carrying on and managing the suits, with interest at 12 per cent., and that he should pay over the residue to Bamasoonduree herself. Almost immediately after this agreement was entered into, a suit which was then pending was abandoned, and a new one instituted. In that suit, Bamasoonduree got a decree for her husband's share of the joint estate with accumulations, to be enjoyed by her "as a Hindoo widow in the manner prescribed by the Hindoo Law." Without entering into the details of the litigation, I shall only say that it has been very protracted, and that a large sum amounting to nearly three lakhs of rupees is now in Court to the credit of the suit, representing the share to which Bamasoonduree is entitled.

On the 14th November 1860, Grose executed a sub-assignment to Heera Lall Seal (who also is an appellant before us), assigning to him all his rights, &c., under the agreement of the 4th April 1859, in consideration of Heera Lall Seal advancing money for carrying on the suits, &c.

The litigation has, in fact, been carried on throughout wholly by Grose and Heera Lall Seal.

In February 1866, the plaintiff instituted this present suit in the Court of Zillah Hooghly; but the suit was subsequently removed to this Court under the powers vested in the High Court by Section 13 of the Charter.

The suit was instituted by the plaintiff Omirtomoyee Dassee, in her own right and as the mother of her infant son Goure Churn Kurmokar; and the plaint prayed that the rights of Omirtomoyee and of her son might be secured; that Bamasoonduree might be cut off from her right to the property left by her husband and the property might be made over to Omirtomoyee; or (in the alternative) that, for the purpose of securing the plaintiff's future rights, the deeds of April 4th, 1859, and November 14th, 1860 might be set aside as regards Omirtomoyee and her son.

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Nothing can be more loose and inaccurate than the plaint, inpeaching as it does Bamasoonduree's right to hold her husband's estate on the ground (amongst others) of unchastity, a ground which was at the hearing wholly abandoned. Strictly speaking, the plaint was so bad that the plaintiff was entitled to no relief under it. But whatever the defects which existed in the manner the suit was originally brought before the Court, it appears to me that considering the shape in which the case is now presented to us in appeal, we must dispose of it on its merits. Mr. Justice Phear, by whom it was tried, was of opinion, after written statements had been put in and issues fixed, that the substantial issues to be determined (putting aside certain questions of jurisdiction which I shall notice presently) were, *firstly*, whether the suit was barred by limitation; *secondly*, whether the alienation to Grose was bad by Hindoo Law as against the reversioners; and, *thirdly*, whether the alienation to Grose was absolutely void as savoring of champerty and contrary to public policy. On these issues, the learned Judge tried the case, deciding them all in favor of the plaintiff, and directing that the money in Court to the credit of the suit of Bamasoonduree Dassee should be retained in Court until further orders.

Against this decision the defendants Grose and Heera Lall Seal have appealed. The grounds of appeal are common to both, except as regards one point which affects Heera Lall Seal only.

The suit, as I have said, was in the first instance instituted in the Zillah Court of Hooghly; and it is admitted that Heera Lall Seal was not in any way subject to the jurisdiction of that Court. But Heera Lall Seal would have been subject to the jurisdiction, if leave to sue in the Hooghly Court had been obtained from the High Court, or if the suit had been instituted in the High Court as a Court of ordinary original civil jurisdiction; and Mr. Justice Phear, being of opinion that all that took place in the Hooghly Court was without jurisdiction, held that the suit must be treated exactly as if the plaint had been originally filed in this Court, and that all irregularity of proceeding which had occurred was rendered unimportant because the parties had all appeared in this Court ready to go to trial, and no one had, in fact, been misled or put to any disadvantage by the course which was pursued.

The Advocate-General for Heera Lall Seal still urges in appeal that he is not subject to the jurisdiction in this suit. No doubt, if the suit had remained in the Hooghly Court, Heera Lall Seal might successfully have pleaded that the Court had no jurisdiction over him. But then the Hooghly Court would have had jurisdiction over him if leave to sue in Hooghly had been obtained under Section 4 of Act XXIII. of 1861. It is true that in his written statement, dated the 2nd of April 1866, Heera Lall Seal states he is not subject to the jurisdiction; but he took no active steps to establish that defence. On the contrary, he allowed (indeed I believe he caused) the suit to be transferred to this Court, which certainly would have had jurisdiction if the suit had been in the first instance instituted here. If Heera Lall Seal meant to contest the jurisdiction, he should have had the question decided before the suit was removed to this Court. The suit having been removed here, and all the parties being thus brought before a Court which unquestionably would have had jurisdiction if the suit had been in the first instance instituted in it, it appears to me that the original want of jurisdiction was cured, and no question as to it could any longer be raised.

This disposes of the special ground of appeal taken by Heera Lall Seal.

There has been considerable discussion as to the law which is to be applied to this case, the question being whether the law applicable to it is that which would have been applicable had the case remained in the Hooghly Court, or that which would have been applicable had the suit been instituted in this Court as a Court of ordinary original civil jurisdiction. It is said that because the Hooghly Court never had jurisdiction over the defendant Heera Lall Seal, and the suit ought not to have been instituted there at all, and because the suit ought to have been instituted here, therefore the same law is to be applied to the case which would have been applicable if it had been in the first instance instituted here. I cannot accede to this proposition.

Whether the Hooghly Court had jurisdiction or not, the suit was brought into this Court under the power vested in the Court by the 13th Section of the Charter, and it was tried by the Court in the exercise, not of its ordinary, but of its extraordinary, original civil jurisdiction. This being so, that case falls under the 20th Section

of the Charter, which declares that "with respect to the law or equity and "rule of good conscience to be applied "to each case coming before the High "Court in the exercise of its extraordinary "original civil jurisdiction, such law or "equity or rule of good conscience shall be "the law or equity and rule of good con-"science which would have been applied to "such case by any local Court having juris-"diction therein." I have no doubt that the law which the Hooghly Court would have been bound to apply, had the suit not been removed, is the law which this Court is bound to apply. And we decided to this effect in the case of *Doucett* versus *Wise*, II. Indian Jurist, page 291 The question, however, is, in my opinion, of no importance in the present case, because I think that the law applicable to it is the same here and in the Court of Hooghly.

Mr. Justice Phear has held that the agreement between Bamasoonduree Dassee and Grose is bad as against the reversioners, the alienation being one which she as a childless widow in possession of her husband's estate was not justified by the Hindoo Law in making. The facts are, in my opinion, as found by Mr. Justice Phear, that there was no real enquiry by Grose as to there being any necessity for Bamasoonduree entering into such an agreement—no attempt by him, or by any one on her behalf, to ascertain or calculate what her rights were, or were worth—and that it was a mere speculation of Grose's by which, in the best result, one-half of the whole of Muddoosoodun's estate *must* be lost to his heirs, while the other half remained charged with all the costs and other sums advanced by Grose. An alienation such as this of the estate of her deceased husband by a childless widow is, in my opinion, not valid as against the reversioners, except so far as it may be held merely to create a charge on the estate by way of security for the costs incurred and moneys properly advanced, with interest: and if the widow is about to cause or permit money appertaining to her husband's estate, which is in Court, to be paid over under such an agreement, she is about to commit waste and may be restrained by the reversioners.

I would declare the instrument of the 4th of April 1859 to be bad as against the reversioners so far as it is an assignment of an eight-annas share of the estate to Grose absolutely for his own use and benefit, and so far also as it does more as regards the remaining eight-annas share than create a charge upon it for the payment of all costs properly incurred and moneys properly paid, by way of maintenance or otherwise, for Bamasoonduree's use by Grose, with interest upon such costs and advances at 12 per cent. This declaration will, in fact, be in accordance with the views of the plaintiff's advisers: for I understood her Counsel, Mr. Kennedy, to say that he did not object to an eight-annas share standing as a security for costs and advances.

I do not doubt that Bamasoonduree might properly have carried on her suit by means of advances from Grose, and have given him a portion of the estate recovered as security for the re-payment of the moneys advanced by him. So, perhaps, she might have raised the necessary funds by absolutely assigning to Grose a portion of what might be recovered. But she could have done this, so as to bind the reversioners, only if the transaction was a fair and *bonâ-fide* and reasonable transaction both on her part and on Grose's entered into after due consideration of Bamasoonduree's position as representing her husband's estate. In no event can it be right or in accordance with Hindoo Law, for a widow to resign her whole position as representing her husband, and to assign her whole estate to a stranger, and appoint him her irrevocable attorney for the purpose of realizing and dealing with the estate, subject only to the re-payment by him to her of such residue of a moiety as he shall consider to be payable to her, after he shall have deducted out of that moiety all his own costs and charges.

I think that the case clearly falls within the ordinary rule applicable to alienations made by childless Hindoo widows; that the assignment to Grose is not good as against the reversioners, otherwise than as a mere security for costs paid and advances properly made, with interest; and therefore that the reversioners have a right to sue to restrain waste.

It is contended for the appellants that if the plaintiff Omirtomoyee be the reversioner, her interest in the estate of Muddoosoodun extends no further than the *corpus* of that estate. There is no doubt that the income and profits arising from the husband's estate may be used by the widow at her discretion, and the reversioner cannot interfere with her in the exercise of that discretion. But accumulations are not the

same as income: and in no case that I am aware of has it been decided that accumulations can be dealt with by her as income, or otherwise than as the *corpus* may be dealt with.

I confess that I was under the impression that the late Supreme Court in disposing of a matter "in the goods of Hurrender "Narain Ghose, Kasheenath Ghose *versus* "Bissonath Biswas," had held that a widow might assign or otherwise dispose of accumulations. I have, however, referred to the only published report of the case which I can find: and it appears that the Court, while saying that the widow might dispose of the income at her pleasure, drew a distinction between income and accumulations, and did not decide that she could so dispose of accumulations. Sir Lawrence Peel said "the Hindoo authorities say that a widow "ought to live a chaste and retired life; and "her duty may be to spend no more than "is necessary for her support in a state of "seclusion. But if, instead of living strict-"ly as she should, she lives freely and "expensively, her disposition cannot be "questioned. As to the *corpus* of her "husband's property, she cannot alienate "it, but the income of it during her life "forms no part of the husband's estate. If "she received and spent it all, no one "could call her in question. So, if she "has money in hand, she may dispose of "it as she pleases. Money in hand and "accumulations are not the same thing. "We do not decide on the question as to "whether accumulations belong to the "husband's representatives: we only decide "that the promovent has a sufficient in-"terest, on the face of the proceedings." (See the report of this case in the *Englishman* of the 2nd July 1853)

No doubt, there is, in fact, a very substantial difference between mere income and accumulations. In the present case, almost simultaneously with the recovery of the *corpus* of her husband's estate, the widow gets a considerably larger sum—being accumulations accrued due since his death. Although the theory of the Hindoo Law is that the income of the husband's estate shall go to the widow for her maintenance and for the performance of pious duties, that theory by no means necessarily embraces a large lump-sum of accumulations. According to all the older authorities on Hindoo Law, accumulations should be treated in the same way as the *corpus;* and I think they should be so treated now, in the absence of any distinct authority to the contrary.

I pass on to the question whether the assignment of the 4th April 1859 is bad as against public policy, because it falls within a certain class of transactions which are sometimes said to "savor of champerty."

If the transaction would not be void by English Law on general principles as being against public policy, I may safely say that it is not void by the law applicable to the present case. I shall, therefore, first consider it with reference to the English Law.

The English Law as to maintenance and champerty has been considerably modified in late years, and many transactions formerly looked upon as bad are now deemed legal and proper. It is unnecessary for me to refer to any Statute or express law forbidding maintenance or making it an offence: for no such law has really any bearing on the question before me now. As the law stands, the mere purchase of an interest *pendente lite* (except by an attorney from his client), or the advance of money for carrying on a suit if the parties have a common interest, or if there exists between the parties the relationship of father and son, or master and servant, or the like, or if the transaction be in itself a fair and reasonable and *bond-fide* transaction as distinguished from a mere speculating in litigation, is not illegal as savoring of maintenance and champerty—(*See* White and Tudor's Leading Cases in Equity, 2nd Edition, Volume II., page 682, and the cases there quoted.) Nevertheless, the cases show conclusively that transactions in themselves unconscionable and savoring of champerty are frequently declared by the Courts at Westminster at the present day to be void on general principles of equity and as being against public policy. I shall refer at length to some of these cases to prove that this is so—omitting cases in which the parties stood in the relation of attorney and client, which cases rest on different grounds from those in which the parties do not stand in that peculiar relation to each other.

The case of *Stanley* versus *Jones*, VII. Bing., 369. was decided in 1831. There the plaintiff and defendant, who were previously strangers to each other, entered into an agreement that the plaintiff should communicate such information to the defendant as should enable him to recover a sum of money by action, and should exert his influ-

ence to procure evidence to substantiate the claim, on condition of his receiving a portion of the amount eventually recovered. The agreement was held to be illegal. Tindal, C. J., in delivering judgment, said that the object of the law was not so much to prevent the purchase or assignment of a matter in litigation, as the purchase or assignment of such a matter *for the purpose of maintaining the action;* that, in that restricted sense, champerty was still illegal, as much as it ever had been; and that the particular case before him was rather worse than one of ordinary champerty.

In 1835, in *Prosser* versus *Edmonds* (1 Yonge and Col., Exch., 481) the assignment *of a bare right to file a Bill in Equity* for a fraud committed upon the assignor was held void as contrary to public policy and savoring of maintenance. Lord Abinger in giving judgment, said that all cases of maintenance and champerty were founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce rights which others were not disposed to enforce: and he added, "there are many "cases where the acts charged may not "amount precisely to maintenance or champerty, yet of which on general principles, "and by analogy to such acts, a Court of "equity will discourage the practice."

The case of *Reynell* versus *Sprye* was heard in appeal before the Lords Justices in 1852.—(*See* 21 L. J., Chan., page 150.) The Lord Justice Knight Bruce states the agreement between the parties to have been (in effect) as follows: That inasmuch as they believed *R* to have died the owner of considerable estates, and as they believed that Reynell had some rights in these and as those rights were represented by Sprye (and therefore believed by Reynell) to be uncertain and likely to be resisted, and not easy of proof—the ascertainment and establishment of those rights were to be undertaken by Sprye—the expenditure was to be his—Reynell should incur no liability, but *Sprye should have half of all that should be eventually decreed to or obtained by Reynell.* His Lordship then goes on to say that such an agreement "may or may not have amounted "strictly in point of law to champerty or "maintenance, so as to constitute a punishable "offence, *but must in my judgment be con-* "*sidered clearly against the policy of the* "*law, clearly mischievous, clearly such as* "*a Court of equity ought to discourage and* "*relieve against.* I need not repeat a reference to the authorities quoted during "the argument, nor need I mention *Wallis* "versus *The Duke of* "*Portland,** *Kenny* "versus *Browne,*† "*Burke* versus "*Greene,*‡ and *Stevens* "versus *Bagwell,*§ if they were not particularly cited. It was suggested by one "at least of the learned Counsel that cases be-"tween solicitor and clients, and cases where "the illegality of the contract, or its contra-"vention of public policy, has been effectually "alleged by a defendant against a plaintiff, "furnish little or no support to a bill such as "that of Sir T. Reynell; and it may be "true that principles or rules are applicable "to transactions between solicitors and their "clients, which are not applicable to those "between persons standing not in such or in "any similar relation to each other; *but it* "*was not, nor could reasonably have been,* "*said that a transaction may not be bad* "*for champerty or maintenance, or, to use* "*a phrase more than once found in the* "*books, as savoring of champerty, though* "*between persons not affected by any such* "*or any analogous connection.*"

* 3 Ves., 494.
† 3 Ridg. P. C., 462.
‡ 2 Ball & B., 517.
§ 15 Ves., 139.

In this case, there had been misrepresentation on the part of Sprye, and one Yonge, a solicitor, had assisted him and was a defendant. Lord Justice Knight Bruce, however, distinctly holds the agreement void as savoring of champerty, quite independently of the misrepresentation and of Yonge being concerned in it.

Further on, in his judgment (page 655), the Lord Justice says: "If Captain Sprye "(whether student or not) was unware of "how the English Laws regard the traffic of "merchandizing in quarrels, of huckstering "in litigious discord," &c., showing very clearly what His Lordship's opinion was as to such transactions.

The case of *Sprye* versus *Porter* in 1856 (26 Law Journal, Queen's Bench, page 65) is exactly similar in principle to that of *Stanley* versus *Jones.* In giving judgment Lord Campbell says: "Here we have "maintenance in its worst aspect. The "plaintiff and *R*, entire strangers to the "property which they say the defendant has "title to, but which is in possession of "another claiming title to it, agree with "him that the legal proceedings should be insti-"tuted in his name for the recovery of it, "and that they will supply him, not with

"any specified or definite documents or in-"formation, but with evidence that should "be sufficient to enable him successfully to "recover the property. Each of them is to "have one-fifth of the property when so "recovered; and unless the evidence with "which they supply him is sufficient for this "purpose, they are to recover nothing. "They are not to employ the attorney or "to advance money to carry on the litiga-"tion, but they are to supply that upon "which the event of the suit must depend—"evidence; and they are to supply it of "such a nature and in such quantity as to "ensure success. The plaintiff purchases "an interest in the property in dispute, "bargains for litigation to recover it, and "undertakes to maintain the defendants in a "suit, in a manner of all others the most "likely to lead to perjury and to a perver-"sion of justice. Upon principle, such an "agreement is clearly illegal: and *Stanley* "versus *Jones* is an express authority to "that effect."

In the case of *Knight* versus *Bowyer*, 26 Law Journal, Chanc., page 769. the Master of the Rolls (Romilly) held that the case was clear of all questions of champerty—adding that practically interests, the subject of suits in equity, were bought and sold daily. On appeal, the decision of the Master of the Rolls was affirmed, and Lord Justice Turner said (27 Law Journal Chanc., page 528), that in order to maintain the objection that the transfers impugned were bad for maintenance and champerty, it must be shown that the purchase was illegal and void *upon principles of public policy*, upon grounds far higher than the mere interests of the parties; and that the cases showed abundantly that property in litigation may be the subject of sale and purchase.

In the case of *Anderson* versus *Radcliffe* (28 Law Journal, Queen's Bench, page 32), the attorney who had conducted a suit took an assignment of the subject of the suit (for which a judgment had been obtained) *by way of security for past advances*, and the assignment was held good. In giving his judgment, Sir William Erle remarks that the Statutes against champerty were directed *mainly against speculation in law-suits*, and were not intended to extend to a case such as was then under consideration. The decision in this case was upheld in the Exchequer Chamber (28 Law Journal, Queen's Bench, page 128): and it is to be observed that Mr. Justice Williams, who delivered the judgment of the Court, quotes the words of Lord Abinger in *Prosser* versus *Edmonds* as being still (1860) good law.

On the authority of these cases, I think that the transaction between Grose and Bamasoonduree is, according to English Law, illegal as being against public policy. There can be no question that the whole matter was a mere gambling speculation so far as Grose was concerned—a very unconscionable one too, by which he practically could lose but little, while he might gain a great deal. It is true that, in April 1859, it was not known what the result of the litigation would be; but it is clear that from the first Bamasoonduree had a good substantial case. That she had, is proved by the result, for she has been successful throughout. In the event it has turned out, that Grose, in consideration of his providing funds to carry on the litigation together with a small sum for Bamasoonduree's maintenance, got an assignment of nearly a lakh and a half of rupees to himself absolutely, while a like sum, being the balance of the amount due to Bamasoonduree has been assigned to him as a security for all advances and payments made by him. Before making this agreement, no attempt was made to ascertain what the rights of Bamasoonduree were. Grose took the assignment as a matter of naked speculation. The litigation may have been tedious and may have lasted longer than he expected; but this really does not affect the question of the nature of the transaction. Grose was examined as a witness on his own behalf, and he himself says: "Previous to the assign-"ment, I had no information as to the value "of her (Bamasoonduree's) claim. I heard "the Chunders (her brothers-in-law) were "wealthy men. I did not know the value of "her claim. First they said they expected

"the case would be compromised, but I found "out soon they would fight through. At "the time of the assignment, I did not "know it. I had no idea how long the liti-"gation would last." An assignment taken under such circumstances cannot be looked on as a *bonâ-fide* transaction, or as a legitimate dealing with property as to the right to which a suit is pending. It was an assignment "merely" (to use the words of Tindal, C. J., in *Stanley* versus *Jones*) "for the purpose of maintaining the action," and therefore against public policy and illegal. It was a transaction entered into in the course of "the traffic of merchandizing in quarrels and huckstering in litigious discord," reprobated by Lord Justice Knight Bruce in the case of *Reynell* versus *Sprye*.

But it is argued that, even if the agreement of the 4th of April 1859 be void as being contrary to public policy according to English Law, the law applicable to this case differs from the English Law, and does not treat such transactions as illegal or contrary to public policy. I think that this is a mistake, and that the law which would have been applicable to the case if it had been tried in the Zillah Court of Hooghly, is practically the same as the English Law, whatever may be the nationality of the parties.

I shall not enter at length into a discussion of the cases decided by the late Sudder Court on the question of maintenance and champerty, because they have been referred to by Mr. Justice Phear in his judgment, and I agree with him in the opinion which he has formed as to the extent to which these cases go, and the weight to be attached to them as authorities. Those decisions are more or less conflicting. It has no doubt been laid down broadly in some of them that there is no law against champerty or maintenance in the Mofussil. There is equally little doubt, however, that it has on several occasions been held that arrangements which amount to mere speculation or gambling in law-suits ought *not* to be enforced. As a matter of fact, the Sudder Court scarcely appreciated the difference between the question whether the old law contained in the Statutes against champerty and maintenance was to be applied to the Mofussil, and the question whether the particular transaction before it was illegal as being a mere unconscionable gambling in litigation, and as such contrary to public policy and bad on general principles of equity. The Courts of the Mofussil, like all other Courts administering justice according to equity and good conscience, will, and constantly do, set aside transactions which are illegal, because contrary to public policy. That it is their duty to do so is recognized by the Privy Council in the case of *Fischer* versus *Kamala Naicker** (8 Moore's P. C. Reports, page 187), where their Lordships also, as it seems to me, indicate an opinion (though they do not expressly decide the point), that even in the Courts of the Mofussil a deed savoring of champerty and maintenance may be set aside as contrary to public policy,

In the case of *Fischer* versus *Kamala Naicker*,* the Madras Sudder Court had considered that there had been champerty and maintenance, when there was not the smallest ground for such a contention. When the matter came before the Privy Council, their Lordships expressed themselves as follows: "Their Lordships are clearly of opinion "that the decree of the Sudder Adawlut in "this respect cannot be supported. The "grounds on which they arrive at this con-"clusion make it unnecessary to decide "whether, under the law which the Court "was administering, those acts which in the "English Law are denominated either main-"tenance or champerty, and are punishable

* 3 W. R. 33.

"as offences partly by the common law, and "partly by Statute, are forbidden—and also, "if so forbidden, whether the point was in "this case so raised, by the pleadings on the "points for proof recorded by the Court, "that it could be properly entered into. "They will observe, however, in passing, "that although it may be admitted that the "Court would have the right, perhaps even "lay under an obligation, to take cognizance "*motu proprio* of any objection manifestly "apparent on the face of the proceedings "which shows that it was against morality "or public policy, yet," &c. * * * "The "Court seem very properly to have consi-"dered that the champerty, or more properly "the maintenance, into which they were "enquiring was something which must have "the qualities attributed to champerty or "maintenance by the English Law: it must "be something against good policy and "justice, something tending to promote un-"necessary litigation, something that in "a legal sense is immoral, and to the con-"stitution of which a bad motive in the same "sense is necessary."

In my opinion, an agreement such as that entered into by Grose *taking it as a whole* is "something against good policy and justice, something tending to promote unnecessary litigation," and "in a legal sense is immoral," and therefore I think that by the law of the Mofussil Courts, as by the law of this Court sitting as a Court of ordinary original civil jurisdiction, and whether the parties be European or Hindoos, such an agreement is against good policy and void. The "traffic of merchandizing in quarrels, of huckstering in litigious discord" pervails in this country to a very lamentable and most pernicious extent; and it appears to me that the practice is in the highest degree against good policy.

I think, however, that Grose might reasonably and properly have taken a mortgage of a moiety of the husband's estate to secure the costs of suits, and all moneys properly paid by him for Bamasoonduree, with interest at 12 per cent. This being so, I would declare the deed of the 4th of April void as against the reversioners as being contrary to public policy, save so far as it operates as a charge on an 8-annas share, for all costs and advances, &c., properly paid, with interest.

It is argued that if Grose's agreement is to be held bad as against public policy, the plaintiff's suit ought to be dismissed for the like reason, because it was proved, or admitted at the trial, that the suit is in reallity that of Bissonath Chunder, one of the defendants in Bamasoonduree's suit, who has bought up her interest. But I think the objection fails by reason of the position of the parties and their relationship to each other. Bissonath Chunder is the uncle of Omirtomoyee Dassee, and the brother-in-law of Bamasoonduree. As one of the more remote reversioners, he has a possible interest in seeing that Muddoosoodun's estate is not wasted. Under such circumstances, even if the suit is carried on with funds supplied by Bissonath Chunder, I do not think it is bad for that reason: for the principle on which I hold the agreement with Grose to be bad, does not apply to Bissonath Chunder. Moreover, the facts are not proved to be similar in the two cases.

As to the question of limitation, I shall only say that I agree in the opinion that the suit is not barred, because the cause of action in this suit, which is practically a suit to restrain waste, did not arise until the waste was about to be committed.

For these reasons, I concur in the proposed decree.

The 23rd September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Hindoo widow—Factum valet—Letting out of parts of family dwelling-house.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the ordinary original civil jurisdiction of the High Court.

Mungala Dabee (one of the Defendants), *Appellant*,

versus

Dinonath Bose (Plaintiff), *Respondent*.

Mr. Creagh for Appellant.

Messrs. Graham and *Phillips* for the Respondent.

HELD that a son has no right under the Hindoo Law to turn the widow of his father out of the *family dwelling-house* without providing her a suitable residence, nor can he convey such right to a purchaser. The rule of *factum valet* current in Bengal will not give a good title to a person to whom another conveys more than he has a legal right to convey.

A Hindoo widow has a right to let out certain portions of the family dwelling-house to other persons as monthly tenants for the purpose of obtaining maintenance for herself or her infant child, and such tenants cannot be turned out immediately on the son's coming of age without properly determining the monthly tenancies.

The following is the substance of the judgment of Phear. J., which was the subject of this appeal :—

THE evidence in support of the nuncupative will is far too slight, if it could be depended on, to establish any thing of which a Court would grant probate. I think there can be no doubt on the evidence of Mr. Creagh's witnesses that what the dying man said was of the most general character. Then as to the alleged mortgage, I think Mr. Graham is right when he says there really is no evidence to support it. There is simply the bare statement of the female defendant that she borrowed five hundred rupees from Kanto Bose on the security of the title-deeds. She also at the same time says she borrowed two hundred rupees from other sources, and raised four hundred by the sale or pledge of her jewels and ornaments. Kanto has not been produced. Mungala was not asked if she re-paid the money, and I have no evidence where the deeds are now. I cannot say on such materials that the heir of Woomesh had not an entire right to dispose of the property. Really, the only point in substantial contest was the age of Woomesh, and as to that I think Mr. Creagh's witnesses put him out of Court. Punchanun Rooder, the first independent witness, said he has resided on the premises fourteen or fifteen years; the boy was not there when he first came, but fourteen years ago he first saw him; he was then a child playing about, and could not therefore be much less than one and a half year old. And at the end of his testimony he said it was two or three years ago, that Woomesh quarrelled with his mother and went away. If he can't speak to an event three years old within a year, his testimony is not to be depended on on a question of limitation as to six months, on which every thing turns on his correctness as to an event of fourteen years ago. The horoscope defendant relies on is worthless to show the birth of a child, and the mother was entirely unable to explain her own testimony as to the occasion when it was prepared. She says that "it was made "when he was six months old when rice was "first given, the occasion on which such docu-"ments are prepared. It was prepared when "the child was with his mother; my husband "got it prepared and gave it to me." She repeats more than once that the child was not adopted till he was eighteen months, and goes on to say "I don't know "exactly whether he is 14. He was in my "house before I adopted him. I used to "bring him and he lived here." I don't suppose any one in Court could suggest a reason on defendant's evidence. I see nothing of substance to place against the testimony of the mother. Mr. Creagh threw some implication against the trustworthiness of the mother. She not being called we should have heard some of his emphatic sentences against the party who did not bring the only person who could speak to the truth (the mother). I see nothing to lead me to believe that what the natural mother says is false. The boy is not a party to the record, and in no way damaged by the decree of the Court. If he has equities not put forward now, he will, as far as this decree is concerned, be in a position to maintain them hereafter. The plaintiff's title is made out: he has a right to recover against Mungala and the other defendants.

The judgment of the Appellate Court was delivered as follows by—

Peacock, C. J.—This is a suit brought by Dinonath Bose against Mungala Dabee and

others to recover possession of certain premises described as No. 20, Mirzapore Lane. The premises are called a lower-roomed dwelling-house with the piece or parcel of land or ground, on part whereof the same is erected and built, containing by estimation six and a half cottahs. They are all treated as No. 20, Mirzapore Lane, and I, therefore, take it that part of the land on which the house is not erected is appurtenant to the house and is part of the premises belonging to the dwelling-house. At any rate, there was no proof that defendants accepted more than the dwelling. The plaintiff claims under a conveyance from Woomesh Chunder, dated the 10th of February 1869. Woomesh Chunder was the adopted son of Soodharam Bhuttacharjee, deceased, who was the husband of Mungala Dabee; and it is in evidence that the husband lived in the dwelling-house with his wife up to the time of his death, and that at the time of his death Woomesh Chunder was an infant. Some question has been made as to whether Woomesh Chunder had attained his majority at the time when he executed the conveyance; but it is unnecessary to decide for the purposes of the present suit whether he was or was not a minor at that time. I certainly should not place any reliance on the horoscope produced by the boy's real mother, if it were necessary to decide the question, for it certainly does not come out of the possession of those with whom you would expect to find it, *viz.*, the boy's own family after he had ceased by reason of his adoption to be a member of that family. Besides, it does not, so far as I can judge, amount to a complete document of the kind.

It has been attempted to be shown that the husband by a nuncupative will gave this property to his wife. But I do not think that the evidence is sufficient to show that the husband intended to make a will.

Then again it is said that Mungala Dabee deposited the title-deeds of this dwelling-house as a security for advances which had been made to her; but that fact, I think, has not been sufficiently proved in the absence of the production of those title-deeds by some person who claims to hold them as an equitable deposit.

The first question which we have to determine is, whether the plaintiff is entitled to turn out the widow of the adoptive father of his vendor, either with or without notice; and if he cannot turn her out without notice, whether the notice given in the present instance was sufficient. The next question is, whether he is entitled to turn out the other defendants, some of whom have been proved to hold different parts of the house at a monthly rent under the widow, and others of whom have not been proved to be actually in possession. This last point may appear technical, but the probability is that if those defendants had been proved to be in possession, it would also have been proved at the same time that they were holding parts of the house like the other defendants as monthly tenants.

I have very great doubt myself whether a son, whether natural born or adopted, is entitled to turn his father's widow and the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence, and in which he left the females of his family at the time of his death. No one who is at all acquainted with the usages and customs of Hindoos, can doubt that it would be highly injurious to the reputation of the females of a family to be turned out of the residence at least until some other proper place has been provided for them. It is laid down by Catyana that "except his whole "estate and his dwelling-house, what re-"mains after the food and clothing of his "family, a man may give away whatever "it be, whether fixed or moveable; other-"wise it may not be given."—2 Colebrooke's Digest, page 133.

The meaning of that passage is, that he must not give away his whole estate without providing food and clothing for his family, and that he must reserve "one house, "without which he himself or his family "might want a dwelling." Juggunatha in his Commentary referring to this text says: "It is meant generally comprehending a "pond supplying water for common use, "and the like." The meaning being that whatever is appurtenant to a dwelling is to be retained with the dwelling.

In the Dyabhaga, Chapter 6, Section 2, para. 29, it is said that "no division of a house takes place."

The only difficulty is in deciding whether this is a moral precept or whether the right of the family to remain in the dwelling-house causes such a want of title on part of the owner to sell as would preclude the operation of the maxim current in Bengal of "factum valet."

In the Dyabhaga, Chapter 2, verses 16, 17, and 18, a distinction between the restriction of ownership and a mere moral precept

is, I think, pointed out. In verse 16 it is said: "So Vishno says 'when a father separates his sons from himself, his will regulates the division of his own acquired wealth.' But, in the estate inherited from the grandfather, the ownership of father and son is equal."

Verse 17 says: "This is very clear. When the father separates his sons from himself, he may, by his own choice, give them greater or less allotments, if the wealth were acquired by himself: but not so if it were property inherited from the grandfather; because they have an equal right to it. The father has not in such cases an unlimited discretion."

Verse 18 then proceeds: "Hence (since the text becomes pertinent by taking it in the sense above stated; because there is ownership restricted by law in respect of shares, and not an unlimited discretion) both opinions, that the mention of like ownership provides for an equal division between father and son in the case of property ancestral, and that it establishes the son's right to require partition, ought to be rejected."

That shows that with regard to ancestral property, the father's inability to make an unequal partition of ancestral property among his sons depends on restricted ownership, and that he has not an unlimited discretion over his property. In those cases where a man has no title to convey, or where his right is restricted, the rule of *factum valet* does not apply. That rule will not give a good title to a person to whom another conveys more than he has a legal right to convey. The distinction is pointed out clearly in Macnaghten's Hindoo Law from page 4 to page 10.

If a man's right is not restricted, *factum valet* applies. His act is valid if he has title although he may be guilty of an immoral act in doing what he has a legal right to do; but if his right is restricted, the rule *factum valet* does not enable him to go beyond "the restriction."

The most difficult question here is whether the passage of Catyana, which says that a dwelling-house may not be given, is a mere moral precept or a restriction on a man's right to convey. It seems to me at present that it is a restriction, and not a mere moral precept, and that the son-and-heir of the father has not such a right in the dwelling of the family that he can at once of his own pleasure turn out all the females of the family, or sell it and give the purchaser a right to turn them out.

One case was cited by Mr. Creagh from Morley's Digest, page 439, from Borrodaile's Reports, which, although not an authority in the Bengal School, tends to throw some light upon this doctrine of Catyana. It runs thus: "*A*, a widow of a Hindoo (who had by her two sons, both of whom died, one leaving *B*, his widow, and *C*, his son,) was turned out of the family house after the death of her two sons by *B* and *C*, and sued for a house and maintenance. An award of arbitration in the dispute had insured *A* a sufficient maintenance, and *B* and *C* maintained that *A's* husband had provided her with a house mortgaged to him by a third person and since redeemed, and that she was bound to provide herself a lodging out of the redemption-money. But as *B* and *C* were unable to show that *A's* husband had assigned her this house as a lodging, the Court decided, according to the opinion of the law-officers, that *A* should be allowed a suitable set of apartments in the family house, and a sum of money to provide herself with household furniture."

In the same Volume of Morley's Digest page 440, case 21, it is said: "Where one of two united Hindoo brothers, living with their mother, died, leaving a widow and a daughter, it was held, in accordance with the opinion of the law-officers, that the widow must take her daughter and live with her mother and brother-in-law in their house, the brother-in-law being entitled to provide her with maintenance and to protect her; and that should she not agree with them, the brother-in law must give up a part of the house for her residence and afford her a suitable maintenance."

Now, unless the lady had a right in a part of the house, the Court could not have decreed that she should have certain apartments allotted to her.

In the Dyabagha, Chapter II., Section 1, verses 56 and 57, it is laid down that a widow ought to remain in her husband's dwelling-house.

In Sir Francis Macnaghten's Principles of Hindoo Law, page 60, it is said: "It is now my purpose to show how far a widow having a right to maintenance may, by the Hindoo Law as administered in the Supreme Court, compel a person in possession of her husband's estate, to maintain

"her or to make an allowance for the "purpose of enabling her to maintain herself.

"In the year 1799, Sreemutty Mundaduree "Dabee, the eldest widow of Tilluckram "Puckrasee, by my advice filed a bill "against Joy Narain Puckrasee, who was "the son of Tilluckram Puckrasee by another "wife then living. This was the first "proceeding of the sort that was had in "the Supreme Court. The bill stated that "Joy Narain had threatened to turn the "complainant Mundaduree Dabee out of "the family house: that the whole tenor "of his conduct towards her was unbecoming "and improper, and that he had neglected "and refused to maintain her in a manner "suitable to the wealth of which her hus-"band Tilluckram had died possessed." The son in his answer stated that he was willing to maintain her in the dwelling-house, and a decree was made for maintenance.

It appears to me that in the present case, the adopted son was not entitled to turn the widow of his vendor's father out of the dwelling-house in which she was left by her husband at the time of his death; at any rate that he could not do so, or authorize a purchaser to do so, without providing some other suitable dwelling.

It seems quite contrary to every principle of Hindoo Law, by which the property taken by an heir is for the spiritual benefit of the deceased, to suppose that it would not have contained some provision to protect a Hindoo widow from being turned out of the dwelling in which her husband left her at the time of his death, without notice or even after a week's notice.

The defendant Mungala Dabee having been left by her husband with an adopted son, an infant, properly took the management of the house, and I apprehend that according to the doctrine laid down by the Privy Council in the case of Hunooman Pershad Pandey, 6 Moore's Indian Appeals, page 192, she had a right to do that which was beneficial; and I think she had a right to let out certain portions of that house to other persons as monthly tenants for the purpose of obtaining maintenance for herself and her infant child.

It appears to me that those monthly tenants could not be turned out immediately on the son's coming of age without properly determining the monthly tenancies, and that those monthly tenancies were not properly determined by the notice given. Even if Messrs. Beebee and Rutter (the plaintiff's attorneys) had proper authority to give the notice to them as tenants at a monthly rent, they could not be turned out at a week's notice. Even if Mungala Dabee, as the widow of her husband, had no legal right to remain in the apartments in which she was resident for the remainder of her life, it would indeed be strange if she could be turned out after a week's notice when the tenants whom she had let in as monthly tenants could not be turned out without at least a month's notice.

There is nothing to show that the son after he came of age, if indeed he is of age, ever repudiated the arrangements made by his mother during his minority in regard to the house.

In this case, it is not even proved that the demand for possession was made before the suit was brought by agents of the plaintiff authorized to make that demand for possession; and upon that ground alone if there were no others, it appears to me that the defendants are entitled to a decree. I have thought it right not to decide the case merely upon that last point, without adverting to the other points; because although I do not recollect a case myself in which an attempt has ever been made by a Hindoo son, whether natural born or adopted, to turn his mother out of the house in which his father left her at the time of his death, I cannot think that it is consistent with the Hindoo Law that such a right exists, or that such a right should be conferred on a purchaser. I am now speaking of the dwelling of the family. I am not speaking of dwelling-houses which belong to an ancestor as a mere matter of investment or productive property.

It appears to me that the plaintiff has not established a right to turn the defendants out of possession of this house, and that the judgment of the Lower Court ought to be reversed. The plaintiff in this case has attempted to do that which as a Hindoo he must have known would cast discredit upon the widow if she had to remove from the house in which her husband left her, without previously having some other proper place of residence provided for her. He ought, therefore, in my opinion, to pay the costs in the Lower Court and the costs of this appeal, both to be taxed according to scale No. 2.

Mitter, J. I entirely concur in this judgment.

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RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 1st June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Mischief—Section 425, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Moorshedabad.

The Queen *versus* Denoo Bundhoo Biswas and others.

Before a conviction can be had for mischief under Section 425 of the Penal Code, it must be proved that the accused intended to cause, or knew that he was likely to cause, wrongful loss (Section 23, Penal Code).

Norman, J.—THE prisoners, servants of the zemindar of Bally, have been convicted of committing mischief by destroying a bar of bamboo laid across a water-course.

The Deputy Magistrate finds that there is a dispute about a right of fishery in the water-course between the zemindar of Bally and the zemindar of Maharajpore; that the zemindar of Maharajpore, having set up a bar across the water-course, which obstructs the egress and ingress of fish while it allows the water to pass freely, the defendants, being unable to induce the police to interfere, threw down the bar.

Before the Deputy Magistrate the defendants produced a decision of the Sudder Ameen of Moorshedabad, affirmed by the Judge on appeal, to show that the fishery belonged to the zemindar of Bally. The Deputy Magistrate said it was unnecessary for him to go into a question of title, and adds that the decision to which the zemindars of Maharajpore were not parties is not evidence against them. He says the evidence does not clearly establish the fact of exclusive possession of either party; that, even supposing the zemindar of Bally to have been in exclusive possession, it does not follow that the removal of the bar was justified. He says that the prisoner Denoo Bundhoo should not have taken the law into his own hands. He fined the prisoners 10 rupees each.

The Magistrate, Mr. Hanky, has sent up the case under Section 434.

We think that the conviction cannot be sustained. The conviction does not show that the prisoners threw down the bar with intent to cause, or knowing that they were likely to cause, wrongful loss within Section 425. Wrongful loss is defined to be the loss by unlawful means of property to which the person losing it is legally entitled.

The conviction does not show on the face of it whether the mischief for which the defendants have been convicted is the damage to and loss of the bar, or mischief to the fishery. Suppose it to be the injury to or loss of the bar. If the fishery belonged to the zemindars of Bally, and they were in possession, servants acting under orders might lawfully remove an obstruction newly set up to the passage of fish to prevent injury to their property and interference with its enjoyment.

In Blackstone's Commentaries, Book 3, Chapter I., it is said: "Whatsoever unlawfully annoys or doth damage to another is "a nuisance, and such nuisance may be "abated, that is, taken away by the party "aggrieved thereto, so that he commits no riot "(or breach of the peace) in doing it. If "a new gate be erected across a public high-"way, which is a common nuisance, any of "the King's subjects passing that way may "cut it down and destroy it."

It is not found that the defendants wantonly destroyed or injured the bar, the whole

cost of which is stated to have been about a rupee in removing it.

Suppose the mischief for which the Deputy Magistrate intended to convict is mischief to the fishery.

First.—The Deputy Magistrate has not found or even enquired whether the zemindars of Maharajpore are legally entitled to the fishery. If not, no wrongful loss was inflicted on them.

Secondly.—It is entirely consistent with the finding of the Deputy Magistrate that the defendants were acting in good faith for the protection of their master's interests, and repelling what they believed to be an unlawful intrusion on the part of the zemindars of Maharajpore. If the defendants really acted in the belief that the fishery belonged to their master, the zemindar of Bally, it cannot be said that, in removing a bar which interfered with that fishery, they acted with intent to cause, or knowing they were likely to cause, injury to the zemindars of Maharajpore. Admitting that the decision of the Sudder Ameen is not evidence on a question of title as against the zemindars of Maharajpore, it may well have led the defendants to suppose that their master had a legal right to the fishery, and should have been considered by the Deputy Magistrate with reference to the question of the good faith of the defendants, whether they acted with intent to cause, or knowing they were likely to cause, injury to the zemindars of Maharajpore.

The Deputy Magistrate finds that the parties were jointly in possession If the act had been in its nature a malicious and wanton one, which could have had no other object than that of the injury or destruction of the property, or to prevent the title to the property being ascertained, or otherwise to injure the zemindars of Maharajpore, we have no doubt that the parties might have been convicted as in the illustration.

When *A*, having joint property with *Z* in a horse, shoots the horse, intending thereby to cause wrongful loss to *Z*, *A* has committed mischief.

In the present case, we think no intent to injure, or knowledge that injury would be caused to the zemindars of Maharajpore, appears. The act is even presumably done with a totally different object.

The conviction is therefore bad, and must be quashed, and the fines re-paid.

The 11th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Sentence—Criminal force—Rescuing a prisoner—Sections 208 and 353, Penal Code.

Criminal Revisional Jurisdiction.

Reference to the High Court by the Sessions Judge of Rajshahye.

The Queen *versus* Chunder Kant Laboree and others.

Where substantially only one offence has been committed, the several acts which taken together constitute that offence cannot legally be treated as separate offences, and the prisoner cannot legally be sentenced in respect of these as well as in respect of the principal offence.

Macpherson, J.—THESE prisoners have been convicted under Section 353 of using criminal force to certain constables in the execution of their duty, and also under Section 208 of intentionally rescuing one Kalesunker Sandial from custody; and for each offence they have been sentenced to a month and a half's imprisonment by Mr. Testro, the Assistant Magistrate of Serajgunge. The convictions and sentences were confirmed on appeal by Mr. Humphrey, Magistrate of Pubna. The proceedings were sent for on application made to this Court, it appearing upon the face of the decision passed by the Assistant Magistrate that the two separate convictions were based upon the same facts. The record has since been examined, and it seems quite clear that the two convictions, as they stand, are wrong. The facts found against the prisoners are that they formed part of a body of men who interposed between some constables of police and an arrested prisoner, and thereby rescued him.

The act which the prisoners committed was one single act. Their offence was a single offence. They intentionally rescued the prisoner. The act of rescue was accomplished by the use of a certain amount of criminal force. The prisoners under such circumstances cannot be convicted of both rescuing the prisoner and using force. The using of force was a part of the offence of causing the rescue.

We set aside the conviction of the prisoners for the offence of using force, and, as the sentences passed upon them for the offence of *rescuing* have already expired, the prisoners must be at once discharged.

The 14th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Procedure—Evidence given in a former trial—Corroboration—Section 31, Act II. of 1855.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity.

The Queen *versus* Bishonath Pal.

The irregularity and injustice of using against a prisoner in a subsequent trial the deposition of witnesses given in a previous case commented on, and the proper course which should be followed in corroborating evidence under Section 31, Act II. of 1855, pointed out.

Norman, J.—THE prisoner has been convicted of dacoity by the verdict of a Jury, and sentenced to transportation for life.

There appears to have been a very serious irregularity in the mode of conducting the trial.

The depositions of witnesses taken in the trial (in July 1867) of other persons charged with having been engaged in the same dacoity are put up with the record.

The witnesses appear to have been resworn, and each in turn says in effect: "I "gave evidence before in this Court, and "that evidence is true."

Without going into the details of the dacoity, which must have been taken by the Judge and the Jury entirely from the former deposition, each witness in turn merely adds a few particular facts and details to show the connection of the prisoner with the dacoity. Even while making these statements, the witnesses refer to their former depositions, as, for instance, thus: "It is "true that I recognized Bishonath Pal dur-"ing the dacoity," &c. "It is true that "I saw the prisoner Bishonath strike two "or three blows at Heera Lall."

The Judge's record does not clearly show in what order the evidence was laid before the Jury, but I am led to infer that the Judge, probably in the first instance, allowed the deposition on the former trial to be read in the presence of the Jury, and then proceeded to question the witness. However that may be, the course of proceeding was most irregular.

Under Section 31 of Act II. of 1855, the deposition containing the statements of a witness as to the commission of the dacoity taken on the trial in July 1867 would have been admissible in order to *corroborate his testimony* given on the trial of the prisoner Bishonath.

The evidence of the witness whose testimony it was proposed to corroborate should have been first taken, and after such witness had finished his evidence, *and not before*, the former deposition might have been put in, not to add to his testimony, but simply to corroborate it by showing that the statements made by him, while the facts were still fresh in his memory, correspond with those made by him in the Court of Session in the present case. In the present case, at the same time when each deposition was put in, the evidence of the witness not having been given in the Court of Session, there was nothing on the record which made it admissible. There was nothing which was corroborated by it.

In the Attorney-General of New South Wales *versus* Bertram, reported 36 Law Journal, Privy Council Cases, 51, on a second trial, when the witnesses were before the Jury, the deposition taken on the first trial were read, and the witnesses were asked in turn whether what was read was true, and they were then submitted to fresh oral examination and cross-examination. What was done was done by the consent of the prisoner. Their Lordships say they were not in a condition to say that any injustice to the prisoners resulted from it, but they say that no one called on to review the proceedings could be certain of the contrary.

They disregarded the consent of the prisoner, and speak of the wisdom of the common understanding that a prisoner on his trial can consent to nothing. They say it is essential that no unnecessary difficulty should be thrown in the way of the Jury's understanding, or rightly appreciating, the evidence. They point out the difficulty that a Jury must experience in sustaining their attention or collecting the value of different parts of the evidence when merely read out to them. They show that the most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witnesses in the presence of the prisoner, Judge, and Jury, is justly prized; that it cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration.

It cannot give the manner of the prisoner when that has been important in the statement of any thing of particular moment, nor could the Judge properly take upon himself to supply any of those defects which indeed will not necessarily be the same on both trials. They say: "It is, in short, or "it may be, the dead body of the evidence "without its spirit which is supplied when "given openly and orally by the ear and "the eye of those who receive it." Their Lordships add that *they do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the Jury which was adopted on that trial.*

The observations of their Lordships apply in all their force to the present case. There are, moreover, many objections to the course of proceeding in the case now before us, which did not apply to that before the Privy Council. There the depositions read had been taken in the former trial of the prisoner himself. The prisoner had been present, and had had the fullest opportunity of cross-examining the witnesses. Here the deposition read were taken in the absence of the prisoner on the trial of other persons. There the prisoner was represented by Counsel, no doubt had copies of the depositions, and not only took no objection, but actually consented to their being read on the second trial. Here the prisoner appears not to have been defended. To read evidence from written depositions must place a prisoner, who is defending himself, at a disadvantage. If the evidence is given slowly and taken down sentence by sentence in the usual way, the prisoner can follow each witness without difficulty. He has time to observe and reflect on each point that appears to make against him, and, when his turn comes, he has at least an opportunity of cross-examining or answering in his defence with reference to each of such points in detail. The disadvantage at which he will stand, if the evidence of each witness is read out without pause as a connected story, is enormous. Probably of slow apprehension at best, having lost what little presence of mind he even possessed from the terror and confusion produced by the new and alarming position in which he finds himself, his thought necessarily diverted from the words of the reader by the noise and bustle about him, the prisoner would find himself incapable of fixing his attention closely on the several facts, the hurried recital of which gives him no time to appreciate their importance or consider their bearing in the case made against him. If he does understand their significance at the moment, his mind will not have dwelt on them long enough to enable him to fix and arrange them in his memory, so that, when his time comes to defend himself, he can cross-examine or make answer in reference to them in detail in his address to the Jury. All that will be present to his mind when he comes to his defence will be a blurred and most imperfect impression of the case which he has to meet. But that is not all. The course we suppose to have been taken of reading over the deposition of a witness against the prisoner, and putting the question to him whether or not the deposition is true, is not only open to the objection that it is putting a leading question in the most objectionable of all possible forms, prompting the witness as to all the details of the story which he is expected to tell in a great degree, thereby depriving the prisoner of the means of testing the veracity or the recollection of the witness by cross-examination, but to the witness himself it is a dangerous snare. He is reminded that, on a former occasion, he deposed to circumstances tending to establish the prisoner's guilt, and it is impliedly intimated to him that the same story is expected from him again.

To illustrate further the injury to the prisoner that may result from this course of proceeding. Suppose, on the former occasion, the witness spoke positively to having recognized three or four prisoners, then under trial, amongst a body of dacoits, and also named one or two other persons not before the Court. Suppose the witness to be speaking quite honestly and to the best of his knowledge, he could not, as regards such other persons, speak under the same sense of responsibility as he would with respect to a prisoner under trial. He might have felt some doubt, hesitation, or uncertainty as regards the absent person which he might not have thought it necessary to express. No one would be there to cross-examine or check his statements as regards such persons, or to induce him to consider whether on reflection he really was quite as sure of their identity as he supposed and represented himself to be. If, at the end of these two years, the deposition is put into the hand of the witness, it would at once occur to him to think that, as, when the facts were quite fresh in his memory, he spoke positively to identify the person, he was, no doubt, then right. Doubts and

hesitation would be forgotten or cast away, and he would feel sure that what he then said was correct.

In the present case the facts are few and simple, and it may be that the prisoner has sustained little or no actual injury by the course adopted at the trial.

But I would say, with their Lordships of the Privy Council in the case I have cited, that the object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be.

A prisoner defending himself against a charge of an offence alleged to have been committed a long time previously, if he has any defence, must always be under a great difficulty in substantiating it by proof; and therefore in such cases it is peculiarly necessary to see that the case for the prosecution is not conducted so as further to prejudice him. It is impossible to say that the prisoner may not have been injured in his defence by the course adopted in the present case.

As the evidence has not been legally taken, this Court has not before it materials in which it can properly form a correct judgment as to the guilt or innocence of the appellants, and therefore, according to the opinion of the Full Bench upon an analogous point in Elahi Buksh's case,* it is necessary that there should be a new trial.

This is a Jury trial in which the Court has not the power to reverse the finding of the Jury on a question of fact. The prisoner has a right to the opinion of the Jury or of this Court on evidence duly and legally taken against him. I am, therefore, of opinion that the conviction must be quashed, and that a new trial must take place.

Jackson, J.—I concur with Mr. Justice Norman that the mode in which this trial was conducted was irregular. The evidence of witnesses given and taken down in the absence of the prisoner is no evidence against the prisoner. The irregularity alluded to is one which has been frequently animadverted upon by this Court, and upon which numerous trials have been set aside even in the time of the late Sudder Court. The conviction of the prisoner is quashed, and a new trial will be held.

* 5 W. R., Criminal Rulings, 80.

The 14th June 1869.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Approver's evidence.

The Queen *versus* Chirag Ali and another.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder.

Baboo Omarnath Bose for the Prisoners.

The unsupported evidence of an approver (especially if in itself unsatisfactory) is not sufficient to support a conviction.

Macpherson, J.—THERE is no evidence whatever to connect the prisoners with the offence of which they have been convicted save that of the approver Eusufdeen and that of Bhyrub, the manjee of the prosecutor's boat.

Eusufdeen is an approver: he admits that he himself took part in the dacoity. His evidence, therefore, is insufficient, unless corroborated in some material point directly bringing the offence home to the prisoners. So that the real question is whether the identification of the prisoners by Bhyrub Manjee can be relied upon. Unless the Court is satisfied that Bhyrub did really recognize the prisoners, and was competent to say with certainty of his own knowledge that they were two of the dacoits, the conviction ought not to stand.

According to the case made for the prosecution, the dacoits were four in number, and all had their heads bound up with cloth so as to conceal all save the eyes and a small part of the face. The approver says: "I and "Sadarooddeen wore white chudders, which "were both tied round the head and sides "of the face, so that no beard or whiskers "could be seen. Dokowree and Chirag Ali "wore white shirts and dhooties, and a fine "chudder wound round their heads over "their caps so that their faces could not be "seen." The witness Bhagirut, who went in pursuit of the dacoits, and whose brother was shot by them in the course of that pursuit, says of the man who shot his brother:

"His face was quite covered with a cloth, "so that only his eyes and nose were visible. "I could see his nose; his nose was "black, but I could not say whether he wore "moustaches or not. The other three men "had their backs to us, and I could not see "their faces at all."

Bhyrub Manjee having died before the trial took place in the Sessions Court, the evidence given by him before the Deputy Magistrate on the 4th August 1868 has been put in. He says Chirag Ali is the man who first spoke to him, and who struck him with the beetle-nut stick, and that the other prisoner, Sadarooddeen, was sitting in the stern of the dacoits' boat. "The faces "of the robbers were uncovered: they had "bound their heads with cloth. Chirag Ali "had covered his head with a cloth; he has "a mole on the left side of his eyebrow. "I saw and marked it at the time he took "the '*kulky*' from me."

The dacoity took place in the end of February, and it was not till the middle of July that the prisoners were for the first time suspected, or that any charge was made against them.

What Eusufdeen says must be accepted with the utmost caution. Not only is he an approver, but the persons by whom he now says the dacoity was committed are not the persons named originally by him. According to the evidence of Bydonath Mookerjee, the extra Assistant Inspector of Police, Eusufdeen first named Zahirooddeen and Saheem Sirdar of Luckhipoora and the two prisoners, not saying that he himself was one of the party. Some days afterwards he stated to the Deputy Magistrate that he himself and one Dokowree together with the two prisoners had committed the dacoity, and that the others whom he had named had had nothing to do with it. Bydonath Mookerjee says that Bhyrub Manjee, when confronted with these two persons, Zahirooddeen and Saheen Sirdar, said he did not recognize either of them, as he said also of Dokowree. Bydonath Mookerjee continues: "From a number of persons who "were around, Bhyrub pointed out Eusufdeen "as very like the man who was at the bow "of the dacoits' boat;" and again he says that Bhyrub "recognized Chirag Ali, the "man who had struck him, from a number of "Mollahs and constables in undress, among "whom I placed him. He said that, when "Chirag Ali gave him the *chillum*, and "also when he struck him, he noticed a "black mark on the side of his left eyebrow. "* * * Bhyrub, when he saw Sahar-"ooddeen, recognized him as the man who "was in the stern of the boat facing him "to the north, when the *chillum* was given "to him, and he returned it after duly light-"ing it."

These recognitions took place in the middle of July after a reward of 1,000 rupees had been offered by Government for the conviction of the dacoits, and after a Special Inspector of Police had been sent (several previous investigations having failed) to enquire into the case. With the record we find a police-report, dated prior to July, of Sub-Inspector Kumla Puttee Ghosal, who gives a narrative of the case and of the fruitless attempts made to find out the offenders. In that report he says (giving it as one of the reasons why the police had failed to detect the guilty persons) that, as the robbers had their faces tied up with cloths, none of the persons who had witnessed the occurrence could identify them, that therefore no suspicion fell on any one, and it was impossible even to say whether the dacoits were Hindoos or Mahomedans.

Of the two Assessors who assisted the Judge at the trial, one was not satisfied with the evidence, and would have acquitted the prisoners. The other concurred with the Judge in convicting them.

When we look to the fact that admittedly all the dacoits had their heads so tied up that their faces were scarcely visible; that Bhyrub Manjee was struck down senseless almost immediately on the dacoits coming alongside his boat; that he said in the first instance (and always until the prisoners were confronted with him) that he could not recognize the men; that, even while identifying them, he said he had never seen them save on that one occasion; when we remember this and consider that the dacoity took place in February, and the prisoners were not suspected or identified by Bhyrub till the middle of July; that they were first named after the Government had offered a reward of 1,000 rupees, and immediately upon Bydonath Mookerjee being specially deputed to enquire into the matter—I cannot say I think that very much reliance can be placed upon the identification of Bhyrub Manjee, or that it is conclusively found that the prisoners are guilty.

No doubt, if Bhyrub really did recognize the prisoners, their guilt is conclusively proved. But it is not even as if Bhyrub Manjee had been thoroughly examined by the Sessions Judge himself, and the Judge was convinced that he was a truthful witness from what he personally saw of him. Bhyrub Manjee having died before the trial, the deposition given by him before the Deputy Magistrate was received as evidence. This of course was legal and proper: still it would have been far more satisfactory if the man had been examined at the trial. Under the circumstances, there is no certainty that he did in truth recognize the prisoners; and, without being satisfied as to this, I cannot concur in a conviction which consigns these men to transportation for life.

The prisoners are acquitted, and must be discharged at once.

Jackson, J.—As the evidence stands at present, I must concur with Mr. Justice Macpherson. I am unable to place that reliance upon the evidence of the witness Bhyrub Manjee which the Sessions Judge does. Taking the circumstances of the case as told by the different eye-witnesses, I believe it to have been almost an impossibility that Bhyrub Manjee could have identified three out of the four robbers, as he in the later stages of this inquiry states that he did. The suddenness of the attack, the immediate consequence of it, *viz.*, that the witness was knocked down insensible, the fact that the robbers had their bodies and faces covered with cloth—all rendered it almost impossible that any one of the robbers should have been clearly identified at all. The witness never saw them before, but three months after he is able to recognize not one, but three of them Within these three months the same witness had always told the police that he was unable to recognize them. He died before the Sessions trial came on, and therefore the fact that he did recognize the prisoners rests solely on his deposition taken before the Deputy Magistrate, that is, the deposition which he gave after the prisoners were arrested. The prisoners on appeal state that the witness gave some depositions before the Deputy Magistrate of Madareepore, in which he deposed that he could not identify the robbers. There is with the record that officer's orders that the witnesses to the robbery should be sent to him to be examined, and it is to be inferred that they were examined; but this portion of the enquiry is not with the record. The Police Inspector who first conducted the enquiry reported that it was impossible to discover the robbers, because none of the witnesses of the offence could recognize the robbers, or even say whether they were Hindoos or Mussalmen. But a reward of a thousand rupees was offered, and a special officer was deputed to the spot. Immediately he arrives in the neighbourhood, the witness Eusufdeen became an approver, and the witness Bhyrub is said to have confirmed his statement against the present prisoners by selecting them out of a crowd of Mollahs and policemen in undress. I cannot place confidence on this evidence. I am not satisfied upon it that the prisoners were picked out of a number of people of the same description as the prisoners. Had the police officer assembled the villagers, and the witness picked up the prisoners out of them, there might have been some confidence in the identification, and some of the respectable people of the village might have given evidence to it. Even in the approver's own evidence there is a want of any information as to how he was so intimately connected with the prisoners that he should have gone out with them on such an expedition as this was. He says that he only casually accompanied them. There has been no enquiry into the antecedents of the approver and the prisoners, which would lead to the inference that they were associates in crime.

The prisoners have been sentenced to transportation for life. If they committed the offence, the sentence is well deserved. But I cannot conscientiously say that upon the evidence I am satisfied that they are guilty. I must therefore acquit them, and direct their release.

The 14th June 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Murder—Culpable Homicide—Consent to suffer harm or death—Sections 90 and 300, Penal Code.

The Queen *versus* Poonai Fattemah and another.

Committed by the Magistrate, and tried by the Sessions Judge of Purneah, on a charge of culpable homicide not amounting to murder.

The accused, who professed to be snake-charmers, persuaded the deceased to allow themselves to be bitten by a poisonous snake, inducing them to believe that they had power to protect them from harm.

HELD that the offence would have been murder under Section 300 of the Penal Code, if, under the circumstances of the case, it did not fall within the 5th Exception to that Section.

HELD that the consent given by the deceased allowing themselves to be bitten did not protect the accused, such consent having been founded on a misconception of facts, that is, in the belief that the accused had power by charms to cure snake-bites, and the accused knowing that the consent was given in consequence of such misconception (Section 90, Penal Code).

Norman, J.—THE prisoners have been convicted by the Judge of Purneah, concurring with the Assessors, of the offence of culpable homicide not amounting to murder, of three persons, Jetroo, Menghun, and Jikree, and of causing grievous hurt by means of dangerous weapons to Itwaree Masahar, and sentenced to five years' imprisonment.

They appeal.

From the evidence as taken before the Judge, it appears that the prisoners, who said they were *Gooroos*, and came from Caragolah, joined a gang of coolies employed in making bricks and doing other work for the Darjeeling and Caragolah Road, and offered to teach them snake incantation. Ten or twelve coolies, amongst whom were the three deceased and Itwaree, the injured man, were learning the incantation. They were to have paid 2 rupees or rupees 1-8 each to the prisoners. After some days the prisoners wished the deceased and their other pupils to allow themselves to be bitten by snakes. They produced from an earthen pot two koraits and a keranti.

The witness Beechoo Sirdar says: "They "began to make the snakes move about in "front of us all. We became afraid. They "said, 'Why do you fear? We are *Gooroos*, "and will soon restore you.' After this "they made us place our right hands on the "ground, and began to make the big korait "move towards our hands. We immediately from fear raised our hands. After this "the prisoners struck us with *suttams*, and "when the snake moved to a distance, we "again placed our hands on the ground. "Then the prisoners took the snake to Jetroo, "Menghun, Jikree, and Itwaree, and by striking with a rattan made the snake bite "Jetroo on the forefinger of the right hand. "The throat of Jetroo immediately became "dry, and he became senseless. Then "the snake was made to bite Menghun "on the forefinger of the right hand, but "Menghun did not suffer or become senseless. After this the snake was made to "bite Jikree on the right hand; he did not "either become senseless, but remained talking. Then the snake was made to bite "Itwaree on the right wrist; he did not appear to suffer. Jetroo died two hours "before dawn, and the prisoners then ran "away." The witnesses went in search of them, arrested them at 10 o'clock the following morning, brought them back, and made them over to the police. The story told by the witness Beechoo Sirdar is corroborated by Itwaree, Lalloo, and Lochun. There is no substantial difference in their statements, except as one or another gives fuller details on particular points.

The examination of the prisoners before the Magistrate shows that they were fully aware of the deadly character of the bite of a korait. The prisoner Poonai says he broke out the fangs of the korait, and squeezed out the venom a week before the occurrence. He admitted that he knew nothing about its teeth being extracted. He said: "When the snake was brought in, a "pang of fear shot through my vitals, and "I was afraid of its biting."

When the first man Jetroo had been bitten, and was suffering from the effects of the bite, the prisoners did not at once desist, but went on urging the snake to bite others. When they found Jetroo suffering, they apparently did not occupy themselves with uttering over him their *muntras*, which, according to the statement of Jumai before the Magistrate, is nothing more than "O "mother, one of your children has bitten "this person; heal," &c. When the snake was exhausted, and could bite no longer, their attention was directed, not apparently to the sufferers, but to the snake. They took it up, rubbed it, and, having partially restored it, painted it on the head with vermilion, and turned it out in a paddy-field.

The motive for the act of the prisoners does not seem to have been the desire of gain, though they were to have got from their pupils two rupees and one rupee and eight annas each for teaching. They do not seem to have actually received any thing, or even to have pressed for payment.

The deceased did not force the experiment on the prisoners. They did not desire to have the value of the charm tested in their own persons. They did not willingly allow themselves to be bitten. It is proved by all the witnesses that the coolies were afraid of the snake, and it was only by repeated assurances by the prisoners that they were *Gooroos*, and would protect them from harm,

and even after some actual force, for the prisoners are said to have struck and twisted the ears of some of them, that the coolies submitted to be bitten.

It is a most extraordinary case.

The Judge thinks that the act was not done with the intention of causing death, but to show that the prisoners possessed the power of restoring to health persons who may have been bitten by venomous snakes.

Looking at the ignorance and superstitious practices which seem to prevail among the low-caste coolies, to which the prisoners and the deceased belonged, the conclusion arrived at by the Judge upon the evidence as it stood before him was probably correct.

The Judge finds the prisoners guilty of culpable homicide not amounting to murder. The Judge seems to assume that the case does not come within Section 300. He refers to Clause 1. He says that the act was not done with the intention of causing death, and that none of the illustrations apply.

But Clause 2 applies to the case, and Clause 3 still more expressly. The act was done with the intention of causing such bodily injury, that is, a bite by a deadly snake, which the offender knew to be likely to cause the death of the person to whom the harm was caused.

Clause 3 appears to have been enacted to obviate any doubt which, in a case like the present, might exist under Clause 2. It says it is murder if the act is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient *in the ordinary course of nature* to cause death. Illustration C is as follows: "*A* intentionally gives *Z* "a sword-cut or club-wound sufficient to cause "the death of a man in the ordinary course of "nature. Here *A* is guilty of murder, though "he may not have intended to cause *Z's* "death."

The two Clauses explained by this illustration show that the act of the prisoners, in wilfully and intentionally causing the deceased to be bitten on their naked bodies by a deadly snake, is an injury sufficient in the ordinary course of nature to cause death; is not the less murder though they may have believed that they could remove, and intended to remove, by their incantations, the effects of the injury.

If the offence is not murder, it is because it falls within the 5th Exception in Section 300, namely, when the deceased takes the risk of death with his own consent.

Section 90 provides that a consent is not such a consent as is intended by any Section of this Code if the consent is given under a misconception of fact, and *if the person doing the act knows or has reason to believe that the consent was given in consequence of such misconception.* No doubt, the deceased gave their consent under a misconception of fact, namely, a belief that the prisoners by incantations could heal or protect them from the effects of the bites of venomous snakes.

But, if the Judge is right that the prisoners believed, though erroneously, that they had the power of restoring to health persons who might have been bitten, they did not know that the consent of the deceased was given "in consequence of any misconception." They must in that case have acted in the belief that the deceased gave their consent with a *full knowledge of the fact in the belief of the existence of powers which the prisoners asserted and believed themselves to possess.* It is because, on the finding of the Judge, the case appears to come fairly within Exception 5, that I think the conviction of culpable homicide under Section 304 must be taken to be correct, and in that view of the case the sentence of five years' rigorous imprisonment seems to me a very proper one.

There are, however, circumstances in this case which lead to a suspicion that the guilt of the prisoners in causing the snake to bite the coolies may have been of a far deeper dye than the Judge supposes.

Itwaree says, Poonai and Jummai held a poojah of *Bisscheree* in the compound of a Mussan's house. If by *Bisscheree* is meant Bissessury, the poojah was a poojah to Kalee or Bhowanee, the goddess of the Thugs—the goddess of whom it is said that the blood of a human being delights her for a thousand years. But it has been suggested that the poojah was what is called a *Beesharee* poojah from *beesh*, poison. But, if that is so, the question still remains who was the goddess to whom the poojah was addressed? Jummai says: "We did poojah to the snake-deities, offering flowers and sweetmeats."

The snakes were brought in, and put in an earthen vessel on the *mandal*, or poojah

place, and were taken from thence, and made to bite the deceased. The prisoners cherished the snake when exhausted by biting, and not only do it no injury themselves, but carry it off to a place of safety, paint its head with vermilion, as if to indicate that it is a sacred object, and to protect it from all harm, and then run away. It looks as if in causing the death of the coolies the prisoners were performing some religious rite, or doing an act in honor or for the gratification of the goddess.

It seems to me that some enquiry should be made by the police as to the prisoners' associates and their habits. Jummai says that he was bitten by a korail the Dusserah before last, and showed the marks on his arm. He also says that he saved the life of Brihuspati, a gareewan, by his muntra in the previous years.

The appeal is rejected.

Jackson, J.—I certainly would not interfere with the conviction of the prisoners, or with the sentence passed upon them. The only doubt which I have regarding their case is whether they should not have been convicted of the offence of murder. The prisoners are snake-jugglers or charmers. The proceedings held upon this trial prove incontestably that they possess no charm or antidote against the bite of a deadly snake, and also that they have no belief in any charm. They, like all jugglers, impose upon the credulity of other persons by pretending to rely upon charms, and in this way endeavour to make money. From constant practice, they are able to handle snakes without undergoing any particular risk, and the sole charm which they possess is the precaution which they take with venomous snakes of removing the poison from their fangs, and sometimes of removing the fangs altogether. That is the only real defence which is made in this case. One of the prisoners states that they had broken the snake's fangs, and destroyed its power of injuring others. From his own account, however, this had been done a week before the prisoners made the snake bite the coolies, and most probably the poisonous fangs had not been totally destroyed and had filled again, and hence death followed upon the bite.

It seems to me that in trying this case we should deal with the prisoners in exactly the same manner as we should deal with any other person who acted as they have done. We should at once discard all idea that they have any charm over a snake-bite, or even that they believe they have, unless they can prove it. On the contrary, the prisoners being in the constant practice of dealing with snakes must be held to have a thorough knowledge of the deadly nature of the bite of a korail, and it is for them to show that, when they made a deadly korail bite several people, and cause the death of three persons, they had taken the most certain precautions to prevent the bite from being injurious. If they cannot prove this, they should be dealt with as any other person should be who made a poisonous snake bite another.

The consent of the coolies to be bitten is, in my opinion, under the law, no consent, because it was founded on a misconception of facts, and the prisoners knew that the consent was given in consequence of such misconception. The coolies believed that the jugglers had power by charms to cure snake-bites. The jugglers pretended that they had such power, when they had no such power, and the consent to be bitten was given by the coolies only under the misconception that the jugglers possessed some such power. The jugglers then knew that the consent of the coolies was given under a misconception of facts as to their power over snakes.

I concur with Mr. Justice Norman that the offence of the prisoners comes under the 4th Clause of Section 300. Culpable homicide is murder if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, and if he commits such act without any excuse for incurring the risk of causing death. Any person who makes a poisonous snake bite another must be held to know that he is likely to cause death, and must be held to know that it is an act imminently dangerous; and there was no excuse for incurring the risk of death in this case. The prisoners being snake-charmers must be held to know the effect of snake-bites better than other people. It is no sufficient answer for them to say that they had made the snake safe by destroying his poisonous fangs a week previously. The evidence proves that one of the men bitten suffered from the snake-bite even before the snake had been made to bite the others, and still the prisoners went on and made the snake bite other persons. Even if the prisoners supposed when they commenced that the snake was at the time

innocuous, they must have seen, when the first coolie was so immediately affected by the bite, how dangerous it was to go on with their proceedings. They must have known that the act they were committing was likely to cause death.

I do not see that there is anything to be gained by further enquiry. The prisoners seem to me to have been snake-jugglers, imposing upon the people in order to make money, and pretending to teach snake-charms or incantations, in return for which they were to obtain money from the persons whom they were teaching.

The 24th June 1869.

Present:

The Hon'ble W. Markby and Sir Charles Hobhouse, *Bart.*, *Judges.*

False evidence—Alternative finding—Section 381, Code of Criminal Procedure.

The Queen *versus* Bedoo Noshyo and others.

Committed by the Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of giving false evidence.

An alternative finding under Section 381 of the Code of Criminal Procedure should not be resorted to until both the committing officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the charges; and such a finding cannot be based in a case of giving false evidence upon two statements which are not absolutely contradictory the one of the other, nor when in one of them the accused gives only hearsay evidence. Every presumption in favor of the possible reconciliation of the statements must be made.

Hobhouse, J.—I SHOULD have preferred in these cases that the Judge had come to a distinct finding on one or other of the alternative charges made against the prisoners, and that some attempt at least should have been made to obtain evidence upon one or other of the said charges before judgment was given, and a finding arrived at in what is known as the alternative form.

I cannot tell from the records in these cases whether or not such evidence was available, but it seems at first sight that no attempt was made to procure it; and whether the alternative finding be legally good or not, it is certainly not in the interests of justice to be resorted to until both the committing officer and the Sessions Judge are satisfied that no reliable evidence is procurable in support of one or other of the two charges.

It is quite certain, however, that we cannot now obtain any finding of the Judge on either of the charges separately, for he is no longer Judge of the District, nor can we expect after this lapse of time to obtain any satisfactory finding on a re-trial.

I think, therefore, we must take the record as it stands, and decide upon that record as to the guilt or innocence of each one of the prisoners.

Case No. 66.—In this case the prisoners were each of them charged with giving false evidence in one or other of the following instances, *viz.*, either before the Magistrate in stating that a certain person was killed by one Ekoo, or before the Sessions Judge in stating that that certain person died of snake-bite.

They all pleaded guilty to the first charge.

The Judge and the Assessors were equally unable to decide upon which one of the alternative charges Gahoree Mundul, one of the prisoners, was guilty; and so the Judge, concurring with the Assessors, came to what is well-known in our procedure as an alternative finding, to the effect that Gahoree was guilty either of an offence under the first or under the second charge, and upon this finding the Judge sentenced the said prisoner to one year's rigorous imprisonment.

The Judge, differing from the Assessors, thought himself able to decide that the rest of the prisoners before us were guilty of the charge of giving false evidence when they stated that the deceased died of snake-bite, and so he found them guilty under that charge, and sentenced each of them to three years' rigorous imprisonment.

He relied entirely on the evidence of the Medical Officer. That evidence was to the effect that, though the *post-mortem* examination of the deceased shewed no marks of snake-bite, and did show marks of violence, such as to lead him to the opinion that the deceased died by strangulation, yet that some of the internal appearances of death by snake-bite would be like those of death by strangulation. This evidence is not, in my judgment, sufficient evidence to warrant a conviction on the charge that the prisoners spoke falsely when they said that the deceased died of snake-bite, and I would therefore discharge the prisoners found guilty of this charge.

On the other hand, it is said that the first finding comes within the meaning of the Full Bench decision, to be found at page 65, Weekly Reporter, Volume VI., Criminal Rulings. As

I understand that ruling, an alternative finding, to be a legal finding, must proceed upon two statements absolutely contradictory the one of the other, and irreconcileable, and thereby necessarily one or other of them false. But in this case the two statements of Gahoree are not of this nature. In the one, according to the charge, he simply says that Ekoo told him he had killed Methee, and in the other he says he heard that Methee had died of snake-bite. These two statements are clearly not of a nature to warrant an alternative finding, and I would therefore discharge Gahoree also.

Case No. 64.—In this case the prisoner was charged as in case No. 66, alternatively, with giving false evidence.

He pleaded guilty to the second charge. The Judge thought this plea a false plea; the Assessors thought it a true plea.

But eventually the Judge, differing from the Assessors, found the prisoners guilty in the alternative form, *viz.*, guilty either of the offence of giving false evidence before the Magistrate, or of that of giving false evidence before the Sessions Court, and the Judge then sentenced the prisoner to one year's rigorous imprisonment.

Before the Magistrate the prisoner positively swore he had seen the accused beating a man so that he died. Before the Sessions Court he as positively swore he had seen no such beating.

I am of opinion, therefore, that, when the two statements to which the accused on the two several occasions deposed were of the nature shewn, the Judge was justified in his finding—see the Full Bench Ruling I have above quoted—and I would therefore uphold this conviction.

Case No. 68.—In this case the prisoners were committed to the Sessions on the alternative charge of having given false evidence, either in stating that a certain deceased person was killed by a particular person, or in stating that that deceased person committed suicide.

The prisoners pleaded guilty to the first charge.

The Judge and the Assessors were equally unable to say which statement was false and which true, and the Judge, therefore, concurring with the Assessors, came to a finding in the alternative form, *viz.*, to the effect that the accused were guilty either of an offence before the Magistrate, or of an offence before the Sessions Court, and the Judge sentenced each one of the prisoners to one year's rigorous imprisonment.

I have read most carefully, and more than once, the so-called contradictory depositions on which the prisoners have been convicted and sentenced. I find that none of the prisoners said before the Magistrate that the accused had killed the deceased. On the contrary, one of them distinctly said she had not seen the accused do so. Neither did they say before the Judge that they had seen the deceased commit suicide. They spoke as from hearsay only. I am of opinion, therefore, for the reasons given in case No. 66, that the conviction of these prisoners is bad in law, and I would discharge them.

Case No. 67.—In this case the alternative charge was of the offence of false evidence, either in stating that one Kaleemooddeen killed a deceased person, or in stating that one Shooktee killed the same deceased person.

The prisoners pleaded guilty to the first charge.

The Court, concurring with the Assessors, found the prisoners guilty in the alternative form, *viz.*, that they had given false evidence either in their respective statements before the Magistrate, or in their respective statements before the Sessions Court, and the Judge sentenced each of the prisoners to two years' rigorous imprisonment.

In the case of the prisoner Pato, she swore before the Magistrate that one Kaleemooddeen had killed the deceased, and before the Sessions Court that one Shooktee did so. But, in making this latter statement, we do not know whether she was speaking as from her own knowledge or not, and the statements are not either of them necessarily untrue nor even contradictory; for it is possible that both may have been true, for both Shooktee and Kaleemooddeen may have together killed the deceased, and we must give every doubt in favor of the accused.

In the case of the prisoner Ono, she did distinctly say before the Magistrate that she saw the accused kill the deceased, but before the Sessions Court she did not say that she saw Shooktee kill the deceased: on the contrary, she spoke of this from hearsay only.

In neither case, therefore, are the two contradictory statements sufficient to warrant an alternative finding; and both prisoners therefore should, I think, be discharged.

Case No. 65.—In this case the alternative charge was that the prisoners give false evidence, either in stating that a certain person killed the deceased, or that the deceased committed suicide.

The prisoners pleaded guilty to the first charge.

The Court, concurring with the Assessors, came to the following finding, *viz.*, to the effect that the prisoners were guilty either of having given false evidence before the Magistrate or before the Sessions Court, and the Court sentenced the prisoners to one year's rigorous imprisonment.

There is no doubt that before the Magistrate the prisoners did distinctly swear that they saw the accused kill the deceased; but before the Sessions Court, when they spoke of the suicide of the deceased, they did so from hearsay only.

I think, therefore, that in this case there were no such contradictory statements as to warrant an alternative verdict, and I would therefore discharge both prisoners.

Markby, J.—I think it would be impossible to find a series of cases more strongly illustrating than these the extreme danger of resorting to alternative findings.

The cases before us comprise six convictions for perjury. Thirteen persons, male and female, some very young, have been convicted and sentenced to various terms of imprisonment, one woman having been convicted twice. The prisoners have now been six months in jail under sentence. The cases, although arising out of facts originally unconnected, present features of remarkable similarity. All the prisoners gave evidence in the first instance before the Magistrate against persons who are accused on various occasions of having committed crimes of great violence, all, or nearly all, amounting to homicide. From the mass of papers before me I have not been able to ascertain in how many different cases the prisoners were called as witnesses, but there were certainly several such cases, and these cases were not apparently in any way connected.

All the prisoners, when they appeared as witnesses before the Magistrate, gave evidence unfavorable to the persons then under accusation.

All the prisoners, when they appeared as witnesses before the Sessions Judge, gave evidence favorable to these same persons.

All the prisoners now adhere to their second statement, and all make the same defence, *viz.*, that their first statement was a false statement made under compulsion put upon them by the police.

I gather from the judgment of the Sessions Judge that in all the cases he was strongly inclined to believe that the first statement was the true one; that he thought the charge of ill-treatment made against the police was unfounded; and that, even if true, it did not amount to a defence, because the prisoners were not in fear of instant death when they made their first statement.

I infer, however, that he had not finally made up his mind on these points, because he does not act upon this view which would lead to a conviction of all the prisoners on the charge of giving false evidence before the Magistrate: in all the cases but one he convicts the prisoners of having given false evidence *either* before the Magistrate or before the Sessions Judge.

When these cases came before Mr. Justice Hobhouse and myself on the first occasion, we thought that Section 381 of the Code of Criminal Procedure, which gives power, when it is doubtful under which of two Sections the offence falls, to come to a finding in the alternative form, did not apply to cases when the two charges are, as in this case, under the same Section. We thought, therefore, that an alternative finding was not legal, and sent the cases back in order that the Sessions Judge might come to a legal finding. As, however, the Judge had in the meantime left the country, that order could not be complied with. We must, therefore, deal with the cases as they stand.

I have had the advantage of reading the judgment which Mr. Justice Hobhouse will deliver in this case, and for the reasons he has so fully pointed out, the convictions of seven* out of these thirteen prisoners must fail, because the statements made in each case on the two occasions, though conflicting in the sense of one being favorable and the other unfavorable to the person

* Coolie Aurut.
Bener Aurut.
Felee Aurut.
Petor Aurut.
Ano Aurut.
Juhur Aurut.
Gobra.

accused, are not so absolutely contradictory so that it is impossible that both should be true. It is, of course, plain that, before a prisoner can be convicted of perjury, on the ground that he has made two contradictory statements without ascertaining which of the two is true and which is false, every presumption in favor of the possible reconciliation of the statements must be made. On that ground, therefore, apart from all other considerations, the convictions of these prisoners must be quashed.

With regard to the five prisoners, Shindooree, Gendee, Punchma, Heshur, and Bhurroo, who have been convicted of giving false evidence before the Magistrate, I do not find upon the record the evidence upon which the Sessions Judge relies as satisfying him that the statements on this occasion were false. He relies upon the opinion of the Medical Officer, and on something which passed before the Magistrate in an enquiry which took place on the spot. But neither the Medical Officer nor the Magistrate was called upon this trial; nor do I find any note by the Judge that the Medical Officer's deposition before the Judge was put in. There is nothing whatever, therefore, to support the finding against these five prisoners. But further, as Mr. Justice Hobhouse points out, even if the deposition of the Medical Officer may be looked at, it does not negative the statement of these prisoners before the Judge, that the death in question occurred by snake-bite. The convictions of these five prisoners must, therefore, also be quashed.

The remaining case is that of Bedoo Noshyo. He is a lad of 15. He maintains, like the rest, that the story told to the Magistrate was the untrue one, and that it was made in consequence of threats by the police.

The opinions of the Assessors in this case are not as fully recorded by the Judge as required by Section 324 of the Code of Criminal Procedure; but I gather that, whereas the Judge thought the statement made on the second occasion was the false one, the Assessors thought that that was true, and the statement made on the first occasion was false.

Now, apart from all questions of law, I consider that it was absolutely necessary clearly to ascertain in this case which of these two views was right. If the view of the Assessors was right, then it seems to me extremely probable that the rest of the boy's assertion is true, namely, that he made his first statement under the influence of the police; and, if he did so, it seems to me almost a perversion of language to call the making of this false statement a crime. It may be that, in strictness of law, it is so, but it is a crime which I should visit with no punishment. An investigation which leaves it uncertain whether a crime has been committed, which requires a year's rigorous imprisonment, or a crime which requires a punishment at all, whether legal or not, is to my mind highly unsatisfactory, and I am unable to affirm a conviction founded upon such an investigation.

Upon this view of the case, therefore, and differing, as regards this prisoner, with much regret, from Mr. Justice Hobhouse, I would quash this conviction also.

This being so, and all the convictions being disposed of on the merits, the point of law, whether the alternative finding is legal when the two charges are under the same section, does not strictly arise. But, as a judgment on this point has already been delivered by us, I would say that the words of the Section seemed to me so clear that I could not understand, nor did I understand, that the Full Bench decision reported in 6 Weekly Reporter, page 65, turned upon this point. As regards my interpretation of the Full Bench decision, I am inclined now to think that I was wrong. But, as regards my interpretation of the law, with the very greatest respect for the Judges who took part in that decision, I still think I am right. It is, indeed, a matter of regret that there should be any difference of opinion on such a point. But, so far as my expression of the opinions of Judges of this Court may serve as a guide to the Courts of original or inferior appellate jurisdiction, I think that no inconvenience ought to follow. It is clearly the right course to follow the decision of a Full Bench rather than that of a single Judge. I wish to repeat, however, that in my opinion this case most strongly shows how careful Judges ought to be in using the powers which Section 381 confers upon them. I believe every one would agree that that Section was only intended as a last resort, when it became impossible to ascertain the truth.

The convictions of all 13 prisoners will be reversed, and the prisoners released.

The 28th June 1869.

Present :

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Culpable Homicide—Right of private defence of property—Sections 97 and 104, and Exception 4, Section 99, Penal Code.

The Queen *versus* Mokee.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of culpable homicide not amounting to murder.

Where the accused, whose property had frequently been stolen, went out with a *lattee* to watch his property, and with the lattee struck a thief, who died from the effects of the blows, it was held (having regard to the nature of the injuries inflicted and to the subsequent conduct of the accused) that the case did not fall within the 4th Exception to Section 99, and that the prisoner was not guilty of culpable homicide not amounting to murder, but was protected by Sections 97 and 104 of the Penal Code, and had not exceeded the legal right of private defence of property.

Norman, J.—The prisoner has been convicted of culpable homicide not amounting to murder, and sentenced to 15 months' imprisonment.

He appeals.

The prisoner Mokee and one Joni had a field of chillies, the fruit of which had frequently been stolen. On the last Tuesday in December they had gone out to watch their chillies after midnight. At about 4 in the morning Mokee came to their uncle Rama, and told him that they had caught a thief, and beaten him so that he was at the point of death. He desired Mokee to go and get some restoratives. Mokee went back to the field, and together with Joni led the deceased Bodoo, the thief, to his own house. Bodoo died in the morning.

On the *post-mortem* examination it appeared that the deceased had two severe blows on the head which had produced extravasation of blood on the brain, and one blow on the body which had ruptured his lungs. No bones were broken. The Surgeon says that the wounds might all have been inflicted while the deceased was standing up. There is no evidence whatever against the prisoner except his own statement.

The whole conduct of the two prisoners—Joni remaining by the wounded man, Mokee going to their own house, consulting their uncle as to what was to be done, and then carefully helping the deceased man along to his own house—shows most plainly that the two prisoners had no intention whatever of taking the life of the deceased.

The Judge acquits Joni because the weapon he used was a *lattee* about three feet long and half an inch thick. He says that Mokee used a weapon likely to cause injury, dangerous to life, about 4½ feet long and more than an inch thick, and he says that, because he went out armed with that weapon to attack any one he might find stealing his chillies, he exceeded the right of private defence of property, yet inconsistently enough he goes on to say that the *lattee* was not a heavy *lattee*.

Before the Magistrate and the Judge Mokee says that they saw what they thought was some animal, and struck it. But, supposing this not to be true, the question remains—was the act of the prisoners one done in exercise of the right of private defence of property ?

First, I think it is the legitimate inference from the prisoner's conduct that the assault was one not committed with any malicious desire to injure or wreak vengeance on the deceased. They found the deceased plundering their chillies, and they attacked him. Why ? It seems to me that there is nothing to justify any other inference than that it was to protect their property. Then comes Section 104 of the Indian Penal Code, which enacts that, if the offence, the committing of which occasions the exercise of private defence, be theft, the right of private defence extends to the voluntary causing to the wrong-doers any harm other than death. The 4th Exception in Section 99 enacts that the right of private defence in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of defence. No man finding

a plunderer in his field by night in a place where others may be within call is to be expected to deal his blows very gently. The weapon used by Mokee was at least not a deadly weapon—one not loaded, iron-pointed, or iron-shod. It is not proved that the injury on the head which caused the death of the deceased was inflicted by the *lattee* of Mokee, who, if he had a big stick, is but a mere lad of 17. Even if this injury was inflicted by Mokee, the mere fact that he carried a heavy stick to defend himself and his property from plunderers by night does not seem to me to lead fairly to any other inference than that he carried with him, and used, such a weapon as a prudent man might reasonably carry, and use for the purpose of defence in such a case. It is a case in which, if the right of private defence was exceeded, a very light punishment would suffice to meet the ends of justice.

I think it is not proved that the prisoner Mokee inflicted more harm than it was necessary to inflict for the purpose of defence. I would, therefore, reverse the conviction, and order his discharge.

Jackson, J.—I also think that the prisoner should be released. He did not voluntarily cause death, and did not exceed the right of private defence of property.

The 28th June 1869.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Breach of the peace—Recognizance—Section 282, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Miscellaneous Case.

The Queen *versus* Deo Nundun Singh.

Baboo Onocool Chunder Mookerjee for the Prosecution.

Baboo Romesh Chunder Mitter for the Defence.

After calling upon a person under Section 282 of the Code of Criminal Procedure to show cause why he should not enter into recognizances to keep the peace, a Magistrate should not order the defendant to enter into such recognizances without taking evidence or making an enquiry whether the defendant had committed any act which might probably occasion a breach of the peace.

Kemp, J.—THIS is an application on behalf of Baboo Deo Nundun Singh under Section 404, Code of Criminal Procedure.

It appears that the Deputy Magistrate of Setamuree has bound down the aforesaid Baboo in recognizances to the amount of 10,000 rupees, not only to keep the peace for a period of one year, but also not to interfere with the 16-annas collections of Pergunnah Shéohur. The Deputy Magistrate has proceeded mainly on the construction put by the Revenue Commissioner in his letter to the Collector on a decision passed by this Court, dated the 1st August 1868.

The Revenue Commissioner has entirely misunderstood the purport of the decision of this Court. The Court did *not* intend, as supposed by the Revenue Commissioner, that the manager on the part of the Court of Wards was to collect the 16-annas rent on behalf of the minor. All that this Court decided was that the former Judge, Mr. Elliott, in deciding the case under Act XL. of 1858 on the application of the mother of the minor for a certificate, was right in not going into the question of whether the minor was entitled to the whole *raj* or only to a 10-annas share of the *raj*. The only question which the Judge had to decide under the aforesaid Act was whether the mother of the minor was entitled to obtain a certificate or not.

Another Judge, Mr. Pearson, put a wrong construction on Mr. Elliott's order, and attempted to define the shares of the minor and of his uncle Baboo Deo Nundun Singh, and that order this Court reversed by a decision of the 1st August 1868.

The Commissioner, therefore, was clearly wrong in his construction of the decision of this Court, and the Deputy Magistrate was wrong in relying and acting on such misconstruction.

It appears from the proceedings of the Deputy Magistrate that the Baboo persisted in collecting his rents, and that there had been a report received from the police-officer to the effect that the Baboo's people were endeavouring to collect the rents on behalf of their employer in a certain market in the estate, and that, in the opinion of the police-officer, a breach of the peace might have taken place.

The Deputy Magistrate also refers to an assault case, in which a servant of the Baboo, while endeavouring to collect the rents of the 6-annas share on account of his master, was punished by order of the

Deputy Magistrate. The Deputy Magistrate —on the Commissioner's letter, on the apprehension of the police that a breach of the peace might possibly take place, and upon the fact that one of the Baboo's servants had been fined for an assault—called upon the Baboo to enter into recognizances for the large sum of 10,000 rupees, and, in addition to that, he substantially prevented him from collecting the rents of the estate. The Judge so far modified the order of the Deputy Magistrate, that he struck out the words. binding the Baboo not to collect the rents.

We are of opinion that the order of the Deputy Magistrate should be set aside altogether. The Deputy Magistrate was right so far under Section 282 of the Code of Criminal Procedure in calling upon the Baboo to show cause why he should not be required to enter into a bond to keep the peace. But we think he was wrong in making the order which he has made without taking any evidence, or making any enquiry whether the Baboo had committed any act which might probably occasion a breach of the peace. It appears to us that all that the Baboo has done has been to attempt to exercise a legal right by collecting his share of the rents of the estate; and, before he could be called upon to enter into recognizances for the large sum of 10,000 rupees, there ought to have been some evidence and some enquiry to justify this order. We therefore quash the order of the Deputy Magistrate, dated 12th January 1869.

We would add that, in our decision of the 1st August 1868, and in our present decision, we carefully abstain from expressing any opinion as to the extent of the share of the Baboo and of the opposite party, the minor, in Pergunnah Sheohur, or as to whether the Baboo had or has any share in it at all.

The 29th June 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Sentence—Forfeiture of property—Section 62, Penal Code.

The Queen *versus* Mahomed Akhir *alias* Totah Meeah.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of wrongfully concealing or keeping in confinement a kidnapped person.

Baboo Gopaul Lall Mitter for the prisoner.

Where a zemindar was convicted of wrongfully keeping in confinement a kidnapped person, and was sentenced to transportation by the Sessions Judge, who added a sentence of forfeiture of the rents and profits of the prisoner's estates under Section 62 of the Penal Code, the High Court set aside the sentence under Section 62 as too severe. That sentence should be inflicted for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances.

Jackson, J.—It seems to me no sufficient ground has been shown for disturbing the conviction of the appellant, Totah Meeah. I think that the evidence on which the Judge has proceeded is quite sufficient to warrant that conviction. The facts which are deposed to are not of that improbable kind which they might appear to be if we looked at them from an English point of view. It seems to me, too, that the discrepancies relied on by the learned Counsel are really such as might be expected when ignorant and inexact witnesses give evidence after the lapse of several months from the commission of the offence.

The question which remains is as to the punishment which the Judge has inflicted. After a careful consideration of the circumstances of the case, I think that we ought not to interfere with that part of the sentence which condemns the prisoner to transportation. That is, no doubt, a sentence of great severity, but the offence of which the prisoner has been convicted in this case is also of great gravity. It is unfortunately the case that some zemindars in almost every district of Bengal take the law into their own hands, and exercise a system of severity, force, and intimidation against their ryots, and against persons whom they desire to make their ryots. It cannot, therefore, be too well understood that the law is strong

enough, and will be exerted to repress offences of that description. I think, therefore, it is our duty not to interfere with the sentence of transportation.

But the Judge has added to that another very severe punishment. He has ordered, under Section 62 of the Indian Penal Code, that the rents and profits of the estate belonging to the prisoner shall be forfeited to Government during the period of his transportation. It seems to me that this is a punishment of which the infliction should be reserved for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances. I do not think the present case is one of that description. I do not think that to the transportation of the prisoner should be added the impoverishment of his family. I think, therefore, that the sentence of the Judge is too severe, and that part of it, which is awarded under Section 62 of the Indian Penal Code, should be cancelled.

Markby, J.—I am of the same opinion.

The 1st July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Contempt of Court—Bail—Interruption to public servant—Procedure—Summons—Warrant—Sections 163 and 188, Code of Criminal Procedure—Section 228, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea.

The Queen *versus* Chunder Seekur Roy.

Where, in punishing for contempt of Court, the summary procedure sanctioned by Section 163 of the Code of Criminal Procedure is followed, the Court must sit as the Court before which the offence was committed, and not in any other capacity, and is bound to take cognizance of the contempt on the day on which it was committed. In such a case imprisonment cannot be added to fine as a punishment. In a case which is not dealt in a summary manner, the offence must, under Section 163, be tried by an officer other than the person before whom the contempt was committed.

An officer before whom, whilst acting in a particular capacity, an offence under Section 228 of the Penal Code is committed, cannot in another capacity take up and try the offence.

In a case of contempt, the Court before which the offence is committed is bound, under Section 163 of the Code of Criminal Procedure, to accept bail if sufficient bail is tendered.

Where a Deputy Magistrate has once made an order transferring a case for trial to the Magistrate, he has no power to cancel the order and re-place the case on his own file.

A Magistrate has no authority to issue simultaneously a summons and a warrant to a witness, nor can he issue a warrant under Section 188 of the Code of Criminal Procedure, unless he has reason to believe that the witness will not attend in obedience to a summons.

Norman, J.—THE prisoner was convicted by the Assistant Magistrate of Chooadangah of having intentionally insulted and interrupted a public servant sitting in a stage of a judicial proceeding, to wit, an Assistant Collector engaged in an Act X. case, and sentenced under Section 228 of the Indian Penal Code to simple imprisonment for 15 days.

The facts of the case having been brought to the notice of this Court by affidavit on the motion of Mr. Lingham on behalf of the prisoner, the case had been sent for under Section 404. In the meanwhile, the prisoner, having been sent in custody to the jail at Kishnaghur, applied by petition to the Judge of Nuddea, who sent up the case under Section 434. We have now before us the proceedings of the Assistant Magistrate, and some explanations which he has given as to his course of proceeding, in answer partly to the Judge's letter calling for explanation, and partly to the charges made against him in the affidavit on which Mr. Lingham's application was founded.

The public servant to whom the prisoner is charged to have intentionally offered insult is no other than the Assistant Magistrate himself.

The petition put in before this Court on behalf of Chunder Seekur Roy, verified by Banee Nath Gangooly, shows that, on the 1st of June, Chunder Seekur was employed by some Mahomedan ladies to register a deed before the Assistant Magistrate. After the preliminaries had been completed before a Head Clerk, Chunder Seekur went to a door of the Court which is usually kept closed, induced a constable to open it, and took the ladies into the Court that way. The Assistant Magistrate immediately ordered the ladies to return through the door through which they had entered, and ordered the prisoner to stand up near the bench, and detained him there for near two hours till the Assistant Magistrate rose to go home. The Assistant Magistrate then told the prisoner to take care not to do the like again, and released him. This state-

ment is corroborated by the evidence of Chunder Bhoosun Banerjee given before the Assistant Magistrate on the proceeding against the prisoner on the 10th of June.

The Assistant Magistrate in his explanation says simply: "I ordered the man to be "detained where he then was standing "in custody pending final orders. The "prisoner slipped away by himself. I "did not release him or tell him not to mis-"conduct himself again. This allegation is "a falsehood—no final order having been "passed on that day."

The Assistant Magistrate does not say that the prisoner was not detained for two hours. He says he ordered the man to be detained in custody. He does not say that the prisoner slipped away before he (the Assistant Magistrate) left the Court. Does he mean that he went away leaving the man to be detained in custody for an indefinite time?

It appears to me that, if there was any contempt at all, it was sufficiently, or more than sufficiently, punished by the detention of Chunder Seekur till the Court rose, and that, if the Assistant Magistrate made the order which the petitioner and Chunder Bhoosun Banerjee say that he did when he went to the Treasury, or even if he did not think it necessary to make, and did not make, any further orders at that time, the matter should have been considered as finally disposed of.

On the 8th of June the prisoner brought a suit in the Moonsiff's Court against the Assistant Magistrate. The petition alleges that, on the 9th of June, Chunder Seekur was in the Assistant Magistrate's Court, when the Assistant Magistrate ordered him into the dock, and asked him what answer he had to a charge of contempt. Chunder Seekur said he was not guilty of any such offence. The Assistant Magistrate took the depositions of some witnesses, whose evidence goes to show that the prisoner induced an officer of the Court to allow a door to be opened, which had been shut by order of the Assistant Magistrate, and the wind coming blew away the Assistant Magistrate's papers.

The Assistant Magistrate committed Chunder Seekur for trial before the Magistrate of the District.

In his grounds for committal he calls it a gross case of intentional insult and interruption to a Collectorate Court.

He says he should prefer not being Judge in his own cause if possible. In two places he calls the prisoner a low pettifogger. Says all the Chooadangah mookhtears received their certificates without examination, speaks of the prisoner's conduct as an act of impertinence calling for punishment other than imprisonment, and says if he were to punish him himself, he would give him 14 or 21 days' imprisonment.

The petition states that the Assistant Magistrate ordered Chunder Seekur to be taken, thannah by thannah, to the Magistrate under arrest; in other words, marched on foot from thannah to thannah from Chooadangah to Kishnaghur under arrest; that the Assistant Magistrate refused to accept bail or allow the prisoner to be sent at his own expense by rail to Buggoolah, and from thence by carriage to Kishnaghur.

The Assistant Magistrate says that he directed the application for bail to be sent for disposal to the Magistrate, and that he had no power to depart from the rule as to the mode of sending prisoners in for trial.

The refusal of the Assistant Magistrate to take bail was illegal, in direct violation of the provisions of Section 163 of the Code of Criminal Procedure, which directs the Court in which the offence is committed to cause bail to be taken; and it is only in case sufficient bail is not tendered that the accused person is to be forwarded by the Magistrate under custody. The refusal to permit the prisoner to be sent at his own expense by rail or carriage to Kishnaghur shows the bad and vindictive spirit by which the Assistant Magistrate must have been actuated.

On the following day, the 20th instant, instead of sending the prisoner in to Kishnaghur, the Assistant Magistrate took up the case himself.

The Judge in his letter properly points out that it was beyond the power of the Assistant Magistrate to cancel his order, and re-place the case on his own file.

The petitioner says he asked the Assistant Magistrate to summon certain witnesses on his behalf. He named four or five persons. The Assistant Magistrate summoned two only. His explanation is, that no more were summoned, because it did not appear that any additional facts could be disclosed by their evidence beyond those already apparent from the examination of the two summoned.

The Magistrate forgot that it was for the accused, not for the Magistrate, and most

certainly not for a prosecutor, to judge who were the witnesses who ought to be called for the defence.

Against the two witnesses, who were summoned on behalf of the prisoner, the Assistant Magistrate issued simultaneously summonses and warrants. There was apparently nothing before the Magistrate to lead to any inference that the witnesses would not attend in obedience to the summons, and therefore nothing to justify the issue of warrants under Section 188.

The Assistant Magistrate's judgment is as follows: "I had intended sending the "case to the Deputy Magistrate for disposal "as preferable to adjudicating it myself; "but the cyclone now going on, and ap-"parently not going to cease, renders this "course impossible. Looking at the words "of Section 163 of the Code of Criminal "Procedure 'it shall be competent,' and to "the words of Section 169, 'such sanction "may be given at any time,' it is placed be-"yond doubt that a Court may by the usual "*regular procedure* award imprisonment for "contempt before itself, though not under the "summary procedure under Section 163. "There probably never was any doubt on "this point; but, as the prisoner is a mook-"tar, and will raise every possible and im-"possible legal objection, it has seemed de-"sirable to notice the point.

"Fine has not been awarded, because it "would be no punishment at all; it would be "paid by subscription, and the offender snap "his fingers at the Court.

"The facts of the case as recorded in the "depositions are that, on the said day, I was "engaged in a Collectorate suit, when all of "a sudden my papers fled away, whisked to "the other side of the Court. Enquiring "into the cause of this, I found the door "opposite to my writing-table had been "opened contrary to orders: the prisoner had "ordered it to be opened to let some women "in for registry. The door is, in a south "wind, always kept shut, the two other "doors of the Cutcherry remaining open "for the public. The police-constable had "remonstrated when the prisoner told him to "open it, but prisoner procured the admission "of his clients by telling a lie, saying I had "directed it to be opened. That this was a "lie his own witnesses prove, for they de-"pose I immediately looked up, and asked "who had opened the door, which, had I "given permission, would not have been the "case. The prisoner is a low pettifogging "mookhtar. By his own admission he has "had 7 or 8 cases since I came last December. "The real reason of his opening the door "closed by the Court's order is, as he states, "to increase the *issut* of his female clients "that they might not come up the Court "through the *manush log*.

"Now, even assuming that there was no "provision in the Registry Act for a com-"mission to females who do not wish to "appear in Court, it would be no excuse for "opening a door closed by the Court's order. "Prisoner pleads also that he did not know "the door was to be closed, but he admits "having attended Court daily. The evi-"dence of his own witness, Sreenath Mookh-"tar, as well as of the police-constable and "chupprassee, prove this to be false.

"Again, he states in his examination un-"der Section 202, that he did not open "the door with his *own hand*. Whether "he did this, or by a lie induced another to "do so, is much the same. The witness "No. 2, Chunder Bhoosun Mookhtear, states "he heard me from the Treasury tell pri-"soner to go away, and never act so again. "Why he stayed behind the others when I "had gone into the Treasury he does not "explain, except that he was arranging his "papers. As a matter of fact, no final order "of any sort was passed: prisoner himself "does not even allege there was. By Sec-"tion 169 the law has specially provided "that sanction to a prosecution may be given "at any time. It is difficult to conceive "a greater act of impertinence than for a "low pettifogger, for his own ends and ob-"jects, to disobey the Court's order, thereby "causing considerable interruption to the "business; probably no respectable Mookh-"tear would have so done. It is worthy "of note that Pro unno Roy, named as wit-"ness by prisoner, was not in Court at all "that day."

Then come the conviction and sentence.

It seems clear that there is no evidence that the prisoner intentionally offered any insult to the Assistant Magistrate, or intentionally caused any interruption to the Assistant Magistrate sitting as Deputy Collector. According to the Assistant Magistrate's own finding, the object of the prisoner in opening the door was to procure convenient access to the Court for his clients, Mahomedan ladies of respectability, without taking them through the crowd of

men who were standing round the other doors. The prisoner may well have supposed that the Assistant Magistrate would have had sufficient humanity, courtesy, and good feeling to tolerate, if not gladly to permit, the approach to his Court of ladies of respectability through the door in question, even if he knew that the door was usually kept shut when the wind blew from a particular quarter.

On the general merits of the case there is, in my opinion, no evidence to justify the conviction.

The 163rd Section of the Code of Criminal Procedure empowers inferior Courts of Justice in certain cases of contempts committed in the presence of the Court to cause the offender to be detained in custody, and at any time before the rising of the Court, on the same day, to take cognizance of the offence, and adjudge the offender to punishment by fine not exceeding 200 rupees, or by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid.

The alleged offence was committed on the 1st of June. The conviction took place not on that same day, but on the 10th. The penalty imposed was not fine, but imprisonment. And lastly, in dealing with the case, the Assistant Magistrate does not profess to act as Assistant Collector as sitting in the Court against which that offence was committed, but as Assistant Magistrate.

There is, therefore, no ground on which the conviction can be supported as a punishment for contempt inflicted or intended to be inflicted under the 163rd Section. The 163rd Section provides that in all cases, except those dealt with summarily, the Court before which the offence is committed, after recording the facts constituting the contempt, and the statement of the accused person, shall forward the case to a Magistrate. It distinctly contemplates that the trial is to be by a judicial officer other than the person before whom the contempt was committed. There is nothing to warrant the inference that an officer before whom, while acting in a particular capacity, a contempt has been committed, punishable under Section 228, can, in another capacity, take up and try the offence, an offence committed against himself. If he could do so, it would be in violation of that fundamental rule in the administration of justice that no man can be a Judge in a cause wherein he is interested. "It is against reason that, if wrong be done to any man, he thereof should be his own Judge." —Littleton, Section 218.

The conviction by the Assistant Magistrate, being by a prosecutor who has taken upon himself to act as Judge in his own cause, is wholly illegal. The conviction must be quashed.

I think we should not do our duty if we did not express our strong disapprobation of the conduct of the Assistant Magistrate throughout all the proceedings in this case. The utter want of temper and discretion manifested by him in allowing himself to be annoyed by so trifling a circumstance as the opening of this door; the wanton abuse of the prisoner in which the Assistant Magistrate has indulged; the cruel and vindictive spirit in which he would have sent the prisoner to march on foot, a prisoner, to Kishnaghur at the very hottest time of the year, are most censurable; and any repetition of similar conduct must necessarily raise the question whether the Assistant Magistrate is a person fit to exercise any longer the powers which have been entrusted to him. I think the papers should be laid before His Honor the Lieutenant-Governor of Bengal.

Jackson, J.—I also am of opinion that the conviction and sentence of Chunder Seekur Roy by the Joint Magistrate of Chooadangah are illegal. No record appears to have been kept on the 1st June of the Joint Magistrate's proceedings on that day. A contempt of Court was in his opinion committed on the 1st June, and the petitioner, Chunder Seekur Roy, was taken into custody at the order of the Joint Magistrate, and was detained in custody for two hours, but no further orders were passed regarding him, and no record was made of what had occurred on that day. No further notice was taken of the alleged contempt for a week, that is, until the 9th. When, however, Chunder Seekur Roy had brought a civil suit for damages against the Joint Magistrate, he re-opened the charge of contempt, and finally committed Chunder Seekur Roy to prison for 15 days. The proceedings of the Joint Magistrate are marked by constant illegalities throughout. These have been detailed by my learned colleague, and it is not necessary that I should repeat them. I am of opinion that the act charged against Chunder Seekur Roy was not a contempt, and that it is not proved upon the evidence that Chunder Seekur Roy wilfully and in-

tentionally opened the door to insult, and interrupt the Joint Magistrate in his duties. It is clear to me that the Joint Magistrate did not on the 1st June intend to inflict any punishment for the alleged contempt. If he had intended to do so, he would not have allowed Chunder Seekur Roy to leave the Court without passing further orders upon him, or would certainly not have allowed a week to pass without passing some orders in his case. It was illegal, then, for him to re-open the case on the 9th June, and it is impossible to come to any other conclusion than that it was re-opened on the 9th, because Chunder Seekur Roy had on the 8th instituted a civil suit against the Joint Magistrate, and that the sentence passed upon him, though nominally passed on a conviction of contempt of Court, was in reality inflicted, because he had preferred the civil suit. The tone and temper of the proceeding in which the Joint Magistrate recorded the orders for imprisonment are improper in the extreme. He even demeans himself to calling Chunder Seekur Roy such names as a low pettifogger, and repeats the insulting expression.

The conviction and sentence passed upon Chunder Seekur Roy are set aside as illegal. He has been released on bail by the Sessions Judge, and will not undergo the remainder of his sentence.

I think the proceedings of the Assistant Magistrate in this case should be forwarded for the information of His Honor the Lieutenant-Governor of Bengal. It appears to me that it will not be in the interests of justice that the Assistant Magistrate should remain at Chooadangah, and it is a serious question how far the abuse of the high powers entrusted to him which these papers exhibit affects his fitness to be entrusted with such powers in future.

The 3rd July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Procedure—Witnesses for the defence—Section 372, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the Cooch Behar Division.

The Queen *versus* Mookun and others.

Under Section 372 of the Code of Criminal Procedure, the accused should be asked, at the end of the case for the prosecution, to produce his evidence; and it is at that point the duty of the Court of Session to ascertain who the witnesses are whom the prisoner desires to examine in his defence.

Jackson, J.—THE prisoner Shoobratri at the time of commitment named certain witnesses, who, by an oversight of the Magistrate, were not summoned, and therefore did not attend at the trial.

The prisoner drew attention to this fact after he had been convicted and sentenced.

This was not a case in which the Magistrate acted under Section 229, and we cannot assume that the witnesses are not material.

Section 372 of the Code of Criminal Procedure directs that, at the close of the case for the prosecution, the accused shall be called upon to enter upon his defence, and *to produce his evidence;* and it is at that point the duty of the Court of Session to ascertain who the witnesses are whom the prisoner desires to examime. If that had been done in the present instance, the omission would have been discovered, and the trial ought to have been adjourned.

The conviction and sentence of the case of the prisoner Shoobratri must be set aside, and the proceedings must be re-opened, so that he may have the opportunity of calling his witnesses, who, if necessary, must be summoned.

The 5th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Charge—Contradictory statements—Section 242, Code of Criminal Procedure.

The Queen *versus* Kala Khan.

Committed by the Magistrate, and tried by the Sessions Judge of West Burdwan, on a charge of giving false evidence.

Points out how the charge is to be drawn up in a case in which it is doubtful (Section 242 of the Code of Criminal Procedure) which of two statements made by the accused is false.

Jackson, J.—KALA KHAN, a constable of police, has been convicted by the Sessions Judge of Bancoorah of having given false evidence in the course of the trial of a case in which he was a witness, and has been sentenced to five years' rigorous imprisonment.

It appears to have been a case of extortion against a head-constable in which the prisoner was allowed to turn Queen's evidence. He deposed to the extortion before the Magistrate, but before the Sessions Court he deposed that he had not witnessed any money taken.

When put on his trial in the Sessions Court, he admitted to the Sessions Judge that what he stated before the Magistrate was true, and that what he deposed before the Sessions Court was false.

Under these circumstances, there can be no doubt of the guilt of the prisoner, but we think that the sentence of five years' rigorous imprisonment passed by the Sessions Judge is excessively severe, and, in lieu of it, we pass a sentence of one year's rigorous imprisonment.

We would point out to the Sessions Judge that the manner in which the charge in this case is drawn up is not in accordance with Section 242, Criminal Procedure Code.

It appears in this case that the facts which could be established in evidence showed the commission of one of two offences falling within one and the same Section of the Code, but it was doubtful which offence would be proved. It was doubtful whether the evidence was false before the Magistrate, or whether it was false before the Sessions Judge. Under such circumstances, the law lays down that the charge shall contain two or more heads charging respectively each of such offences accordingly.

The charge in this case has been drawn up, not in the way required by the law, but to the effect that the prisoner has given false evidence by deposing to a certain effect in contradiction to his deposition before the Magistrate.

We would also point out to the Sessions Judge that the charge should contain precisely the point on which the perjury is charged, and should not be a long rambling statement out of the defendant's deposition. For instance, in this case it would have been quite sufficient if the charge had been simply in these words: of giving false evidence before the Sessions Judge in stating that he did not see Bhyrub give money to any one; and a second count to the same effect, that, in his examination before the Magistrate, the defendant stated that he *did* see Bhyrub give money to the head-constable.

By taking long extracts from the evidence, the prisoner is prejudiced, as he does not know what particular point to answer, and on which point to adduce evidence. In this particular case the prisoner has not been prejudiced by those mistakes.

The 5th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

False evidence—Legally bound to give information—Section 177, Penal Code.

Criminal Appellate Jurisdiction.

The Queen *versus* Luckhee Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of giving false evidence.

Section 177 of the Penal Code does not apply to the case of *any person* who is examined by a police-officer making a false statement, but to cases when, by law, landholders or village-watchmen are bound to give information, and to other analogous cases of the same description.

Jackson, J.—IN this case the four prisoners have been convicted, *first*, under Section 193 of the Penal Code, of having given false evidence before the Joint Magistrate of Nowabad; and, *secondly*, under Section 177, with being legally bound to furnish information to the police and with having given false

information. The conviction has been alternative, namely, that the prisoners have been guilty of one or other of the two offences charged.

It appears that Section 177 by no means applies. The illustrations to that Section show that it does not apply to the case of *any person* who is examined by a police-officer making a false statement, but it evidently alludes to cases, when by law landholders or watchmen are bound to give information, and to other analogous cases of the same description. The prisoners have not been guilty of any offence under Section 177. We therefore set aside the conviction under that Section.

There remains, then, the conviction under Section 193 of having given false evidence. The false evidence with which the prisoners are charged is in deposing before the Joint Magistrate that one Chunder Kahar cut himself with a *hujjam's* knife, and thereby caused his own death. On the occurrence of this man's death, an enquiry was held to ascertain its cause, and the prisoners appear to have stated to the police, not that he cut himself, but that Bujoo Hujjam had attempted to perform an operation on the deceased which caused his death. The medical evidence is that it was impossible for Chunder Kahar to have inflicted the wound on himself. The inquiry by the medical man seems to have been very carefully conducted, and there is every reason to place confidence in his evidence, and supported as that evidence is by the corroboration which it receives from the statements of the prisoners before the police, we think that the charge of having given false evidence before the Joint Magistrate of Nowabad is sufficiently made out.

We sentence the prisoners, therefore, under Section 193 to six months' rigorous imprisonment.

The conviction and sentence under Section 177 must be quashed.

The 6th July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Nuisance—Sections 308 and 313, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

The Queen *versus* Alah Buksh and others.

Where persons who were served with notice under Section 313 of the Code of Criminal Procedure to remove a nuisance showed cause before the Magistrate, but did not ask him to take evidence or to summon a Jury, the High Court declined to interfere with the order passed by the Magistrate under Section 308 to remove the nuisance, as there appeared no illegality in the order. The Magistrate should, however, in these cases, fully record the grounds on which he acts, and his reasons for rejecting the objections made to the removal of the nuisance.

Jackson, J.—THESE four cases relate to four different tanneries situated in the town of Cuttack, which the Magistrate has ordered to be removed from the places where they are at present, on the ground that they are injurious to the health and comfort of the community.

The Magistrate took proceedings under Section 308 of Act XXV. of 1861. The proceedings appear to have been founded on a report of the Civil Surgeon of the District, who carefully examined each separate tannery, and made a report upon it.

He distinctly states that in his opinion the godowns in question, which he says are situate in a thickly populated part of the town, are offensive to those who live near them, and also those who have occasion to pass them, and that they must be the cause of illness and disease.

The Magistrate, acting upon these reports, served notices upon the several defendants to remove their trade, or to appear and show cause why the removal should not be enforced.

In accordance with the provisions of Section 313, these persons, to whom the order of the Magistrate issued, appeared and showed cause against it, and they attempted to satisfy the Magistrate that the order was not reasonable and proper. The Magistrate accordingly went himself to the spot, and was satisfied that these tanneries should be removed, and therefore confirmed his order.

The application before us is on the point that the proceedings of the Magistrate are not legal, inasmuch as he did not record evidence. But it appears to us that, if the defendants had asked him to have any witnesses examined, and had brought those witnesses before him, and applied to him to have them examined, the Magistrate would have been bound to examine them. But it does not appear that any thing of this kind was done in the present case.

The parties on whom the order was served had the option to apply to the Magistrate for a Jury to try whether such an order was reasonable and proper. The Magistrate in such cases is bound to be guided by the opinion of the majority of the Jury.

If the defendants were satisfied that their neighbours were in no way inconvenienced by the hide godowns and tanneries, they could easily have asked for a Jury, and could have obtained a verdict. But they did not take this step, but attempted between themselves to satisfy the Magistrate, and they failed to do so. Under these circumstances, looking to the report of the Civil Surgeon, we think that we ought not to interfere. There is nothing illegal in the order passed by the Magistrate, and we reject the applications of the petitioners.

Although there is nothing apparently illegal in the proceedings which would justify our interference, still the proceedings of the Magistrate should have laid down more fully the grounds on which he acted, and also what he saw in each godown which in his opinion rendered its removal necessary; and, in deciding on the objections of the parties, he ought to have recorded in each case the grounds of his rejection of such objections. The summary way in which he has dealt with the matter no doubt lead the parties to believe that they have not had justice done to them.

The 6th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Grievous hurt—Evidence—Opinion of Medical Officer—Sections 320 and 325, Penal Code—Sections 368 and 370, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of East Burdwan.

The Queen *versus* Kaminee Dossee.

There must be evidence to prove that hurt, as described in Section 320 of the Penal Code as grievous hurt, has been caused before a conviction can be had under Section 325 of that Code.

A letter of a Medical Officer expressing an opinion is not evidence under Sections 368 and 370 of the Code of Criminal Procedure.

Norman, J.—THIS is a case referred to the High Court by the Officiating Magistrate of Burdwan under Section 434 of the Code of Criminal Procedure.

Kaminee Dossee entered the service of Mr. Dillon as a *dhye* to suckle his child, binding herself that she would neither take leave of absence nor resign the service till the child should be 12 months' old. She adds: "Should I leave the service, and go away "without permission, I shall satisfy what-"ever claim you shall make against me." After the child had attained the age of 12 months, Kaminee left the service of Mr. Dillon without his permission. For this supposed offence, the Joint Magistrate of Burdwan convicted Kaminee, under the 325th Section of the Indian Penal Code, of causing grievous hurt to the infant child of Mr. Dillon, and sentenced her to one month's rigorous imprisonment.

It is clear that the conviction cannot be sustained. In the first place, there appears not to be the smallest evidence that the infant sustained any such hurt as is described in the 320th Section of the Indian Penal Code as grievous hurt, or in fact any hurt whatever of any kind.

I desire to note that the Joint Magistrate refers to what he calls the certificate of the Civil Surgeon. He says it goes to show that the sudden withdrawal of the *dhye's* milk in the child's present state is attended with danger.

Now, this so-called certificate is a mere letter of the Civil Surgeon, expressing an opinion upon what must be taken to be a purely supposititious case. Had it been a formal report, it would not have been evidence. The attention of the Joint Magistrate is called to Sections 368 and 370 of the Code of Criminal Procedure. It was most improper to refer to the Medical Officer's letter in any way.

Secondly, it is plain that Kaminee's engagement came to an end when Mr. Dillon's child reached the age of 12 months. In quitting his service at the end of that time, Kaminee committed no breach of contract, and did no wrong whatever to Mr. Dillon.

The agreement will not bear the construction put on it by the Joint Magistrate, *viz.*, that it was intended to bind Kaminee to remain in Mr. Dillon's service as *dhye* for an indefinite period after the child attained the age of 12 months till he chose to dismiss her.

On these two grounds the conviction must be quashed, and the prisoner at once released from custody. If the prisoner had quitted the service of Mr. Dillon within the 12 months, and thereby endangered the life of his infant, the charge should apparently have been framed under the 491st Section, unless it could be shewn that in so quitting the service the prisoner had actually intended to cause, and had caused, grievous hurt, as defined in Section 320, to the infant. The Joint Magistrate was to some extent misled by the Magistrate.

The 10th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Contracts—Domestic servants—Act XIII. of 1859.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judical Commissioner of Assam.

The Queen *versus* Soobhoi and others.

Act XIII. of 1859 does not apply to contracts to serve as domestic servants, but to contracts to serve as an artificer, workman, or laborer.

Jackson, J.—We are of opinion that Act XIII. of 1859 does not apply to contracts to serve as domestic servants, and that the proceedings of the Deputy Commissioner, sitting as Magistrate in the two cases before us, were erroneous.

To bring any person under the operation of the Act, it must be shown that he has contracted to serve as an artificer, workman, or laborer. This was not shown in either of the cases before us. On the contrary, the agreement produced was for "*chakri*," which usually means domestic or personal service, and not service of the kind referred to in the Act.

The accused Sookoora was sentenced to rigorous imprisonment for one month. The sentence must be reversed. The accused Soobhoi agreed to complete the remainder of his service, and a recognizance to that effect was taken from him. This recognizance must be quashed as taken without authority.

The 10th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Procedure—Wrongful confinement—Absence of prosecutor—Section 347, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Sylhet.

The Queen *versus* Bedoor Ghose.

A Deputy Magistrate has no power to dismiss in default of prosecution a charge laid, under Section 347 of the Penal Code, of wrongful confinement, for the purpose of extorting money.

Where the evidence of a prosecutor and his witnesses is taken in the presence of the accused, and the case is postponed by the Court for the evidence of witnesses for the defence, the case ought not to be dismissed for default of prosecution if, on the day to which it has been postponed, the prosecutor is not present.

Reference by the Magistrate.—One Dhan Chung, on 18th March, complained at the Chuttuck police-station that Bedoor Ghose, Sheik Adil, and others, had wrongfully confined his relative, Lochun Chung, for the purpose of extorting money. The police entered the case under Section 342, and, though they reported it true, sent it up in B form, as they said it was not proved. On April 1st, the Acting Magistrate ordered the paper to be filed; but, on April 2nd, Lochun Chung himself presented a petition, stating that he had been confined in various places to make him pay his rent, and, having been released by the police, now brought a charge under Sections 342 and 347.

The police-reports were examined, and on April 6th the sworn deposition of Lochun was taken, and summonses on five men, named Bedoor, Muthan, Naro, Adil, and Beparee, were issued, and April 15th fixed for the trial.

On that day, all the parties being present, the case was made over to the Deputy Magistrate, who, on the 17th and 19th, *took the evidence of the prosecutor and his witnesses,* and on the 19th, holding the accused to bail, postponed the case till May 13th for the evidence of two persons whose evidence was considered necessary *by the Court.*

On May 13th he dismissed the case, and discharged the accused, because the complainant was not present. On that same day (May 13th), the complainant, Lochun Chung, applied to the Joint Magistrate (who was in charge of the current duties of my office), stating that he had been present all day in the Deputy Magistrate's office, and that not his name, but that of *Dhan Chung* (the original informant at the police-station), had been called out, and because he had not answered it, the case had been dismissed.

There are three illegalities at least in the Deputy Magistrate's proceedings—

(1.) He had no power to dismiss in default of prosecution a charge laid under Section 347.

(2.) Having taken the evidence of a prosecutor and postponed the case for the evidence of other parties to a future date, he had no power to dismiss *any* case in default of prosecution: the prosecutor having given his deposition in the presence of the accused, and having produced his witnesses, the case should then have been decided on its merits.

(3.) The prosecutor's name, entered on the fly-leaf of the case, was Dhan Chung; the actual prosecutor was Lochun Chung; and Lochun's name ought to have been called out, not Dhan's. In the matter of calling the names, I fully believe Lochun's story, as it is corroborated by his subsequent behaviour and by the record.

Under these circumstances, I beg that you will submit the case to the High Court under Section 434, in order that the Deputy Magistrate's order of dismissal may be quashed.

The irregular proceedings of the Deputy Magistrate in delaying the examination of the witnesses from April 16th to 19th has been noticed.

Remarks by the Sessions Judge.—I am of opinion that the irregularities and illegalities pointed out by the Magistrate are sufficient to quash the order of dismissal passed by the Deputy Magistrate.

Judgment of the High Court.

Jackson, J.—We agree with the Magistrate and the Sessions Judge.

We quash the order of the Deputy Magistrate dismissing the complaint for default, and direct that he proceed therewith according to law.

The 10th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Nuisance—Obstruction—Jury—Section 310, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack.

The Queen *versus* Poholee Mullick and another.

Where a Jury is appointed under Section 310 of the Code of Criminal Procedure to try whether an order passed by a Magistrate for the removal of a nuisance or obstruction is reasonable or not, the Magistrate is bound under that Section to be guided by the decision of the Jury.

Reference.—The defendants in this case have constructed pucca buildings by the public road-side in the town of Cuttack, and have been ordered by the Joint Magistrate to remove the steps leading into the house, as they have been built on the public road.

The case appears to have arisen from a report sent by the Tehseeldar, stating that defendants had encroached on public *ground* by extending their steps beyond their own limits. A notice was thereupon served on the defendants, and at their request a Jury was appointed.

The Jury reported that the steps caused no obstruction, or harm, or loss to any one. Notwithstanding this opinion, the Joint Magistrate has ordered the defendants on the 24th April 1869 to remove the steps.

This order appears to me illegal for the following reason.:

A Jury was appointed, who in their report distinctly state that the steps were not an obstruction to any one.

The Magistrate under Section 310 was bound to accept this decision, and be guided by it; but, instead of doing so, he, against that decision, found the pucca steps in question to be an unlawful obstruction within the meaning of Section 308, and has ordered their removal.

I may perhaps mention that, as the place is close to my Cutcherry, I visited the spot myself. In my opinion, the steps in question are not an obstruction to any one, nor do they extend as far as the pucca *road* running past the house.

Judgment of the High Court.

Jackson, J.—The Joint Magistrate's order is clearly unwarranted by law.

The matter having been referred to a Jury, the Magistrate is bound, as pointed out by the Judge, to be guided by their decision, and it is only when the Jury find, as stated in Section 312, that the "order of the Magistrate is reasonable and proper," that he can proceed to enforce such order.

It is clear that the Jury did not think so in the present case, for they decided that the steps were not an obstruction or a nuisance, and suggested that the owner should pay rent for use and occupation of the land.

The Magistrate is not at liberty to take a part of their finding, *viz.*, that the steps were erected on public ground, and thence to infer that there must be an unlawful obstruction, though, doubtless, if their meaning were not clear, he could call upon the Jury to find expressly whether the order was reasonable and proper or not. Here it is obvious that they intended to find in the negative.

The order complained of must be quashed.

The 13th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Coolies—Cancellation of Contracts—Act VI. (B. C.) of 1865.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Assam.

In the Matter of the Northern Assam Tea Company.

The proceedings, under Sections 31 and 32 of Act VI. (B. C.) of 1865, for the cancelment of contracts entered into by coolies, are distinct proceedings by two distinct officers. Until the inquiry under Section 31 has been completed by the Magistrate, and it has been ascertained by him that the wages of the laborers are more than six months in arrears, the Protector of Laborers is not competent to act under Section 32. The inquiry under Section 31 must be conducted in accordance with Section 444 of the Code of Criminal Procedure.

Reference.— THIS proceeding is taken with reference to a case under Act VI. (B. C.) of 1865 of certain laborers in the employ of the Northern Assam Tea Company, who appear, though this is not directly stated by the Protector in his judgment, to have been released from their contracts with the Company, and to have been awarded in the aggregate Rupees 635-5-10.

In appeal it is contended that the Protector's proceedings were illegal; that there was nothing before him to have warranted a conclusion that the wages of the laborers had not been paid for a period of more than six months after they had become due; and that, owing to the decision of the Protector of Laborers, the Northern Assam Company have been subjected to loss, having been deprived of the valuable services of the laborers, and having had to pay Rupees 130. With reference to this appeal, the Court, having perused the proceedings held by the Protector of Laborers, is of opinion that the objections taken to them merit attention.

In the first place, in conducting his enquiry upon the complaint of the laborers of the Hoogreejan Tea Garden, the Protector has altogether ignored procedure. There is nothing in the record which can be deemed evidence; parties were not examined according to law on solemn affirmation; evidence was not taken in support of their representations; and, with reference to the list of laborers appended to the Protector's decision, there is nothing to prove that the entries therein made are correct according to the Factory books. As far as can be gained from the Protector's notes, in all 55 laborers made complaint to him, representing, with the exception of one man, that they were seven months in arrears of wages; but with reference to such statements there is nothing in the record to show what amount of wages the laborers were entitled to, or to demon-

strate the date on which they last received payment. All that is apparent is that the laborers had a running account from month to month with the Factory, and that, when the Protector held his enquiry, certain balances were due to them.

The Protector in his decision writes: "I am decidedly of opinion that 47 of them "have made out a good case, and that, I "believe, according to the simple and "natural reading of Section 32, Act VI. of "1865."

Now, though the Protector writes about "simple" and "natural" reading, yet he does not explain his impressions in connection with such words.

On referring to the law, Act VI. (B. C.) of 1865, Section 32, the Court finds that, in the matter of non-payment of wages, it enjoins that, if it shall be proved before a Magistrate that the wages of a laborer have not been paid for a period of more than six months after they shall have become due, it shall be lawful for the Protector, on the application of the laborer, to cancel the contract of such laborer, and to award him compensation not exceeding thirty rupees. Now, in respect to the provisions of this law, there would appear to the Court to be but one interpretation to the meaning; which is, that to meet it, it must be proved that a laborer has not received his wages, has not received payment on such account over a period of six months, that is to say, in common parlance, that he is six months in arrears of wages.

For reasons given, the Court, being of opinion that the proceedings held by Dr. Meredith; Protector of Laborers, are contrary to law, and that they did not warrant the conclusion he came to, would set aside his judgment; but as the Court does not consider that it has jurisdiction in the matter of this appeal, inasmuch as there is nothing in Act VI. (B. C.) of 1865 to show that an appeal will lie to the Sessions Court—under the circumstances, the Court is obliged, agreeably to the provisions of the Code of Criminal Procedure, Section 434, to submit this proceeding, together with the papers in the case, for the orders of the Hon'ble the Judges of the High Court of Judicature.

Judgment of the High Court.

Markby, J.—The Magistrate and Protector of Laborers appears to us to have proceeded in a manner which is altogether illegal, and to have made a wrong and illegal order.

The Act evidently contemplated two entirely distinct proceedings by two distinct officers in Sections 31 and 32. And the fact that the same officer is both Magistrate and Protector of Laborers does not enable him to merge these two proceedings into one. Until the inquiry under Section 31 has been completed by the Magistrate, and it has been ascertained by him that the wages of the laborers are more than six months in arrears, the Protector of Laborers is not competent to act under Section 32.

The inquiry by the Magistrate under Section 31 is also one which we think must be conducted in accordance with Section 444 of the Code of Criminal Procedure, that is to say, as near as may be in accordance with the ordinary procedure of a Magistrate's Court. A definite complaint must be made, the party complained against must be duly summoned, the witnesses sworn and examined, a formal order drawn up, and a full record kept of the proceedings. The Magistrate is not at liberty to enter into a correspondence with parties concerned as to the interpretation of the law, but must decide it for himself after hearing the arguments of the parties or their agents.

Even upon the merits, as far as we can gather from the memoranda sent to us, we think the order was wrong. We think that there was nothing to show that the wages of these laborers had not been paid for a period of six months. We do not say that, to support a conviction under this Act, six months' full wages must be due, but clearly there must be some wages due which have been more than six months unpaid. Here the coolies had received something on account every month less than the full amount of their wages; but it seems a strange mode of making up the account to appropriate these payments to the actual month in which they were made. The natural and ordinary course in an account current is to appropriate payments to the earliest debt due, and, unless some special arrangement was shewn to have been made to the contrary, that is how the accounts of these laborers ought to have been made up. No such arrangement was shewn, and we think, therefore, that the Magistrate's computation was incorrect.

Upon these grounds we set aside the order of the Magistrate; but, as the sums ordered to be paid to the coolies do not appear to exceed the amount actually due for wages, we do not consider it necessary to order these sums, if paid, to be refunded.

The 13th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Court of Session—Commitment — Contradictory statements—Section 172, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of
The Queen *versus* Moti Khowa.

The power of commitment conferred on a Court of Session by Section 172 of the Code of Criminal Procedure is confined to offences committed before itself.

Where a person is charged with making two contradictory statements, it must be proved by direct evidence that both statements were made, and there must be an enquiry as to which statement is untrue, and whether the accused wilfully made the statement which is supposed to be false, knowing it to be false.

Jackson, J.—THE papers of this case have been sent for on examination of the abstract statement. The prisoner has been convicted of the offence of perjury in the alternative, either that his statement before the Assistant Commissioner was false, or that his statement before the Judicial Commissioner was false. These depositions were made in the trial of one Puhutra for the murder of a child. Before the Assistant Commissioner the prisoner had stated that he had seen Puhutra taking a child with her, but did not know who the child was. Before the Judicial Commissioner he had deposed that he met Puhutra leading a child whom he knew to be the child of Gorai. The Judicial Commissioner thereupon committed the prisoner for trial. I understand that he acted under Section 172, Criminal Procedure Code, and the following Sections, as the charges against the prisoner are signed, not by the Assistant Commissioner, but by the Judicial Commissioner who holds the position of Sessions Judge. On the trial the deposition made before the Judicial Commissioner was fully proved, but there was no direct evidence to prove the deposition made by the prisoner before the Assistant Commissioner. The writer of the Judicial Commissioner's office merely deposes that the document shewn to him is a deposition taken before the Assistant Magistrate. It appears to have been taken in due form upon solemn affirmation, and is attested by the signature of the Assistant Commissioner. The Judicial Commissioner accepted this evidence, and upon it charged the Jury, who convicted the prisoner in the alternative. The prisoner pleaded guilty to having made a false statement before the Assistant Commissioner, but averred that his statement before the Judicial Commissioner was correct. The Judicial Commissioner sentenced the prisoner to five years' imprisonment, remarking on the lamentable indifference which witnesses manifested for the truth.

Upon the facts this Court has no power to interfere. But the committal of the prisoner by the Judicial Commissioner for a false deposition given by the prisoner before the Assistant Commissioner is illegal.

Section 172 gives the Sessions Court, that is, the Judicial Commissioner, power to charge a person for an offence committed before itself, but not for an offence committed before the Assistant Commissioner. The evidence also as to the prisoner's deposition before the Assistant Commissioner is in fact no evidence at all. Under such circumstances, the conviction as to the statement made before the Assistant Commissioner cannot be sustained, and it follows that the conviction on the alternative must equally fall.

Norman, J.—I entirely concur. There was no evidence before the Jury that the prisoner was examined before the Assistant Commissioner.

The mere production of a deposition purporting to be signed by the Assistant Commissioner is not enough. There is no evidence that what the prisoner said before the Assistant Commissioner was known or believed by him to be false. The prisoner says he made a mistake, and I think it quite intelligible that he may have done so, or not made his meaning clear. There is no doubt a contradiction between the statement made before the Assistant Commissioner that he saw Puhutra leading a child, and that he did not know the child ; and that before the Judicial Commissioner that she was leading a child, and that he knew the child to be the child of Gorai Dome.

But it is quite possible that, when he saw the child in the first instance, he did not recognize it, but afterwards, on reflection, satisfied himself it was the child of Gorai.

The prisoner seems to have made two contradictory statements, and without any enquiry as to which statement was untrue, without any satisfactory enquiry as to whether the statement supposed to be false was made wilfully and corruptly, whether the prisoner knew or believed it to be false, he has been convicted and sentenced to five years' imprisonment for giving false evidence.

As far as I can judge from the very short summary enquiry that took place, it was wholly, or almost, immaterial whether the prisoner knew or did not know the child to be the child of Gorai.

I agree that the conviction must be quashed, and the prisoner discharged.

I desire to add that I think it desirable that the question of alternative convictions in cases of perjury should be re-considered. I dissented from my learned brothers when the case on this subject was before the Full Bench, and subsequent experience leads me to think that I ought to have expressed my dissent in more unqualified terms than I did.

In the present case there was not before the Jury any evidence to show that the prisoner's statement made before the Judicial Commissioner was not quite true. This is the only statement in respect of the supposed falseness of which the Judicial Commissioner had authority to try the prisoner.

The 15th July 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

House-trespass—Section 452, Penal Code.

Criminal Appellate Jurisdiction.

The Queen *versus* Nund Mohun Sirkar.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of abetting the commission of house-trespass, &c.

Mr. W. Bourke and *Baboo Nil Madhub Sein* for Prisoner.

Where *A* goes with a forged warrant of arrest into a house, and takes away one of the inmates against his will under the authority of such warrant, he is guilty of house-trespass by putting such person in fear of wrongful restraint under Section 452 of the Penal Code.

Glover, J.—THE prisoner in this case has been convicted by the Sessions Judge of Mymensingh of abetment of two offences, one under Section 452, Penal Code, house-trespass, &c.; the other under Sections 466 and 471, forgery of a document purporting to be a record, &c., and fraudulently using as genuine a document which he knew to be forged. Nundo Mohun has been sentenced on the first charge to transportation for seven years (in lieu of rigorous imprisonment under Section 59), and a fine of 100 rupees, commutable to a further period of 1 year's rigorous imprisonment.

The circumstances are as follow: On a Sunday in December last, a man calling himself Ramnath Singh, police constable, went to the house of a prostitute named Kistomonee in Paguli Bazaar, and said that he had a warrant for the arrest of Indro Chandalinee, a young woman, also a prostitute, living in the house, on a charge of absconding from her natural guardians. Brij Mohun Malee has been convicted in this trial of having been the man who personated Ramnath; but he has not appealed. After some discussion, during which the so-called warrant was read by a neighbour, one Brijonath Acharj, the girl went off with the policeman, and was conveyed to Mymensingh, where she was found some three days afterwards in the house of a prostitute named Indromonee, living there under the protection of the prisoner Nundo Mohun. This is a fact admitted by the prisoner, and it has been proved on the part of the Crown that no warrant of arrest was ever issued against Indro Chandalinee, and that this document produced by Brij Mohun as the warrant he received is a clumsy forgery. The prisoner Nundo Mohun is alleged to have abetted both the forgery and the publishing of the false warrants under which Indro Chandalinee was arrested, and also to have abetted the criminal trespass by Brij Mohun, whereby the girl was taken out of Kistomonee's house. It is not denied that the girl was arrested and taken to Mymensingh as stated.

The learned Counsel for the appellant, Mr. Bourke, contends, *first*, that the conviction of abetting an offence under Section 452 is bad, inasmuch as no house-trespass was committed by Brij Mohun Malee; *secondly*, that the appellant cannot be convicted of abetment of offences under Section 466 or 471, the document said to have been forged not being on the record; and, *lastly*, that there is no sufficient evidence to show that Nundo Mohun ever accompanied Brij Mohun to the girl's village, or ever assisted in any way in bringing her to Mymensingh.

The *first* objection appears to us groundless. Brij Mohun is shown by independent and apparently trustworthy evidence to have entered the house of Kistomonee, and to have arrested and carried off, much against her will, the girl Indro Chandalinee. He put her, therefore, in the words of the Section, "in fear of wrongful restraint," and the result of his trespass was wrongful restraint.

"House-trespass" is defined in Section 442 to be criminal trespass by entering or remaining in a house, &c., and "criminal trespass" is the entering it with intent to commit an offence, or to intimidate, insult, or annoy. Now, it cannot be denied that Brij Mohun's entry into the house where Indro was living, for the purpose of dragging her away against her will under a false warrant of arrest, comes within the definition in these Sections, and therefore Brij Mohun undoubtedly committed the sort of house-trespass as defined in Section 452.

The *second* objection seems to us equally untenable. The prisoner has not been convicted of abetting the forgery, nor of the fraudulent use of a particular document, like the one marked A on the record, but of some document (which, in the Judge's opinion, has not been produced), on the strength of which the false arrest was made.

On the *third* point, we have gone very carefully over the evidence, and have given

every attention to the argument of the prisoner's Counsel, and can come to no other conclusion than that the conviction was substantially right, and should be affirmed.

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The only point left is the amount of punishment. The prisoner's Counsel has urged that the extreme penalty has been inflicted, and that this is not a case that calls for such rigour.

It must not be forgotten, however, that the prisoner has been convicted of two offences, and that sentence has only been recorded against him as one of them.

But we do not, under all the circumstances of the case, think that there was necessity for such a severe sentence as seven years' transportation with a fine of 100 rupees, and we accordingly reduce it to one of three years' rigorous imprisonment with a fine of rupees 25, commutable, if not paid, to three months' further rigorous imprisonment.

The 17th July 1869.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Lottery-tickets—Gaming—Sections 1 and 4, Act III., 1867.

Reference to the High Court by the Recorder of Rangoon, dated the 28th June 1869.

Anonymous.

Lottery-tickets, by reference to which it is to be decided whether the holder or purchaser wins the whole, or any part, of any stakes, are instruments of gaming within the 1st and 4th Sections of Act III. of 1867, and they are instruments of gaming of a nature similar to cards.

Reference.—PURSUANT to the provisions of Section 44 of Act XXI. of 1863, I have reserved a point of law arising on an appeal from a judgment of the Town Magistrate of Rangoon for the opinion of the High Court of Judicature at Fort William in Bengal.

The original charge before the Magistrate was made as to one of the defendants under Section 3, and as to the other defendants under Section 4 of Act III. of 1867, to which I beg to refer their Lordships. The appellants were convicted and fined. The grounds of the Magistrate's decision, as well as the nature of the evidence taken before him, are thus set forth in his judgment: "In this case the defendants are "brought before the Court charged under "Sections 3 and 4, Act III. of 1867. "From the evidence adduced, it appears "that a kind of gambling has been introduced in several houses in the town "amongst the Chinese community, and that "it has resulted into a regular gambling "spirit amongst them. Parties stake their "money in a kind of lottery, and money is lost "and won accordingly. It is clearly proven "in this case that Nos. 1 and 3 defendants "were sitting at a table distributing tickets, "and that defendants Nos. 4, 5, and 6, were "drawing tickets. The evidence against defendants Nos. 7 and 8 is not satisfactory, "and against No. 2 defendant not at all so. "He was arrested long afterwards in his own "house. A heap of tickets and lottery-papers "were found in No. 1 defendant's hand and "about his table. The question raised for the "defence is as to whether lotteries of this "nature come within the definition of gaming, "and whether the house in which such lotteries are carried on comes within the definition of a 'common gaming-house' under "Act III of 1867. The definition in that Act "is to the effect that a 'common gaming-house "means any house, walled enclosure, room, or "place, in which cards, dice, tables, or other "instruments of gaming, are kept or used "for the profit or gain of the person owning, "occupying, using, or keeping such house,' "&c. The Court considers that this kind "of gaming is included in this definition. "It is desirable that these lotteries should "be checked altogether: much money is lost "and won, and disturbances take place, such "as one did a few days ago of a serious "nature, in which a man nearly had his head "broken. To encourage the gaming would "only be to give a *carte blanche* to the "gambling spirit of the Chinese, and then "every other house would be the resort of "numberless idlers and others for the purpose of trying their luck. The Burmese "and natives of India would in time join, "and then scenes that must be avoided would "take place."

The main question raised upon appeal, and that upon which their Lordships' opinion is desired, was whether lottery-tickets are instruments of gaming within the meaning of the 1st or any other Section of Act III. of 1867. As the decision of that point in favor of the appellants would probably lead to

legislative action, I deem it expedient that it should be referred to the High Court, and, pending the reference, I have, as matter of form (the fines having been paid), confirmed the sentence of the Magistrate.

The advocate for the appellants referred to Act V. of 1844 (which has not been extended to British Burma) to show by implication that lotteries are not within the provisions of Act III. of 1867, and urged that *other instruments of gaming* to be within the provisions of the latter Act must be instruments *ejusdem generis* with those specified, and that Act, being a penal one, must be construed strictly.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that lottery-tickets, by reference to which it is to be decided whether the holder or purchaser wins the whole or any part of any stakes, are instruments of gaming within the meaning of the 1st and 4th Sections of Act III. of 1867, and that they are instruments of gaming of a nature similar to cards.

The Recorder has not sent up the names of the parties, and therefore we cannot pass any regular judgment under Section 45, Act XXI. of 1863. If it become necessary, the Recorder must send up a supplementary case stating the names of the parties.

The 22nd July 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Charge to Jury—Culpable homicide not amounting to murder—Punishment—Section 304, Penal Code.

Criminal Appellate Jurisdiction.

The Queen *versus* Ameer Khan and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of culpable homicide not amounting to murder, &c.

Baboo Rashbeharee Ghose for Ameer Khan.

In charging a Jury in a case of culpable homicide not amounting to murder, a Judge should call upon the Jury to state which description of culpable homicide they consider the accused to have committed, Section 304 of the Penal Code prescribing different punishments for that offence. Where the Judge omitted to require the Jury to do this, the High Court held that the conviction was for the lighter description of the offence.

Jackson, J.—It has not been shown that there was any misdirection to the Jury on any point of law which could in any way vitiate the proceedings of this trial.

The pleader for the appellant Ameer Khan urges several points which he says amount to a misdirection, but he has not satisfied us that there has been any error in law in the course of the summing up by the Judge to the Jury.

The Jury found the prisoner Ameer Khan guilty of culpable homicide not amounting to murder under Section 304 of the Indian Penal Code, and the Judge has sentenced this prisoner to transportation for life.

The pleader for the prisoner has referred us to Section 304, and has pointed out very correctly that the punishment laid down in that Section for culpable homicide not amounting to murder differs in different cases. The sentence may be one of transportation for life, or imprisonment of either description for a term which may extend to ten years, and also fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death; —or imprisonment of either description for a term which may extend to ten years, or fine, or both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death. The Judge should therefore have called upon the Jury to state which description

of culpable homicide the Jury considered proved against the prisoner; and, as the Judge did not do so, we think it must be held that the conviction was for the lighter offence. Looking also to the circumstances of the case, it does appear that the sentence passed is more severe than the offence warranted.

There seems to have been only one blow struck, and the blow was inflicted in a moment of passion and anger, and although there was no real provocation, there was some cause to excite the prisoner's rage.

But the prisoner's conduct after he struck down Madhub Mundul was extremely bad. He made no attempt to raise him up or restore him, but only thought of how he was to get rid of the body. After finding that Madhub was dead, he, with the assistance of others, carried off the corpse, cut off the head, and threw both the head and body into a neighbouring tank.

The sentence we would pass on the prisoner is rigorous imprisonment for ten years. The Judge will see that a warrant to that effect is issued.

The two other prisoners, Nekra Dome and Narain Dome, have also appealed, and the pleader for the prisoner Ameer Khan was allowed to address the Court on their behalf. But we see no reason to interfere with the conviction and sentence in their case. They were chowkeedars, and, as they assisted the first prisoner in trying to escape from justice, they have been very properly severely punished. Their appeal is therefore rejected.

The 26th July 1869.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Order to prevent obstructions—Cattle-trespass—Section 62, Code of Criminal Procedure—Act III. of 1857.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Assam.

The Queen *versus* Ameeruddeen and others.

The order contemplated by Section 62 of the Code of Criminal Procedure is a particular and specific order addressed to a particular person or particular persons to do or abstain from a particular act or particular acts. That Section does not empower a Magistrate to pass a general order to persons not to allow their cattle or horses to run at large on the public roads; nor can such an order be passed under Act III. of 1867, which applies only to injury done by cattle to crops, &c., and to the sides of public roads and embankments.

Norman, J.—THESE cases have been sent up by the Judicial Commissioner of Assam.

It appears that the Deputy Commissioner of Seebsaugor, finding that great inconvenience and mischief were caused by cattle found straying on the high roads about the station and in the bazar, on the 13th of March last issued an order warning owners of cattle to take proper care of them, and that, if they let loose their cattle without any one to look after them, and caused such mischief, they would be punished under Act V. of 1861 and other laws and regulations relative to contempt of orders. Notwithstanding this order, people continued to allow cattle and horses to run at large on the roads. The Deputy Commissioner ordered that such cattle should be seized and impounded, and on the owners claiming their cattle, caused proceedings to be taken against them for disobedience of the order of the 13th of March. The parties now before the Court have been fined in divers small sums from one rupee to five rupees.

The Judicial Commissioner, there being no appeal, sent the proceedings before this Court under Section 434.

And the main questions appear to be, *first*, whether that order was one which under Section 62 of the Code of Criminal Procedure the Magistrate was competent to pass; and, *secondly*, whether the parties now before the Court can legally be punished under Section 188 of the Indian Penal Code for disobedience of that order.

The Judicial Commissioner supposes that the defendants were punishable under Act III. of 1857. But that is not so. The preamble of that Act recites that loss and injury is suffered by *cultivators* and occupiers of land for damage *done to crops* and other produce by the trespass of cattle, and that damage is done to the *sides* and *slopes of public* roads and embankments by cattle trespassing thereon, and that it is expedient to make *provision* for the *disposal of cattle found straying*, and it makes provisions for such cases. But it contains no enactment providing for the punishment of persons causing nuisance to the public and interruption of traffic by allowing cattle to stray in public roads and bazars.

On a careful consideration of the 22nd Section, we have come to the conclusion that the order of the 13th of March is not one which a Magistrate is competent to make under the provisions contained in it.

The order in question is of the nature of a bye-law, an attempted exercise of a supposed power of legislation on the part of the Deputy Commissioner. The Code of Criminal Procedure was passed, as appears by its preamble, to simplify the procedure of certain Courts of Criminal Judicature. It certainly would be very extraordinary to find in such a Code powers given to Magistrates to make regulations or bye-laws for the government of municipalities. It is clear that the order contemplated by Section 62 is a particular and specific order addressed to a particular person or particular persons, to do or abstain from a particular act or particular acts—an act, in short, of the nature of an injunction or command which the Magistrate is to make in a judicial capacity as the Judge in a Criminal Court; not a regulation or bye-law.

We think, therefore, that the parties in question could not be convicted under Section 188 of the Indian Penal Code of disobedience of the order of the Deputy Commissioner by allowing their cattle to stray about the roads.

We therefore quash the conviction.

The Deputy Commissioner seems to have supposed that he could have proceeded against the offenders under Section 34, Act V. of 1861. That seems to be a mistake. But probably some of them might have been properly punished under Section 283 of the Indian Penal Code.

The 26th July 1869.

Present :

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

False claim—Execution of decree—Sections 209 and 210, Penal Code.

Criminal Revisional Jurisdiction.

Revision of proceedings in the case of The Queen *versus* Beegun Mahtoon.

Baboo Nulleet Chunder Sein for the Prisoner.

Where a person applies for the execution of a decree which has already been executed, his offence falls, not under Section 209, but Section 210 of the Penal Code. Section 209 relates to false and fraudulent claims in a Court of Justice, and is confined to the Civil Court in which the original suit was brought.

Norman, J.—The prisoner, a mahajun, has been convicted under Section 209 of the Indian Penal Code of dishonestly making a false claim in a Court of Justice, and sentenced to one year's imprisonment and a fine of Rupees 200.

On a petition of the prisoner, this Court sent for the papers under Section 404, Code of Criminal Procedure.

The facts, as found by the Deputy Commissioner of Lohardugga and the Judicial Commissioner of Chota Nagpore on appeal, are, that the prisoner, who had a decree against one Chunda Coraon, applied by his vakeel Bonomali Lall for execution of that decree. Chunda Coraon appeared and produced a receipt signed by the prisoner, shewing that the decree had been fully satisfied. This the prisoner at first denied, but eventually admitted to be the case. The decree was never executed.

The prisoner's vakeel amongst other things contended before us that, the settlement having taken place between the prisoner and Chunda Coraon out of Court, and payment not having been made through the Court, and not being certified to the Court by the prisoner, the settlement and payment could not be recognized. But Section 209 relates solely *to the Civil Court* in which the original suit was brought. It does not

say that the settlement shall not be given in evidence in *any Court* of Justice, or in any Court, Civil or Criminal; and therefore we are of opinion that the objection to the reception of evidence of the settlement in the Court of the Deputy Commissioner fails.

But we think that the prisoner could not be convicted under Section 209. That Section relates to false and fraudulent claims in a Court of Justice. An attempt to execute a decree cannot correctly be described as a false claim. There is, in fact, a distinct Section which provides a punishment for fraudulently causing a decree to be executed after it has been satisfied, *viz.*, 210. The defendant did not cause this decree to be executed, but merely attempted to do so. He is therefore punishable, not under Section 209, but under Sections 211 and 210. The conviction therefore upon Section 209 cannot be sustained. We therefore reverse it, and, in modification thereof, order that the prisoner do stand convicted under those Sections of fraudulently attempting to cause a decree to be executed against Chunder Coraon, the prisoner then well knowing that the same decree had been fully satisfied; and for such his offence we direct that he be imprisoned for the period of six calendar months, to be computed from the date from which the former sentence of imprisonment ran, and that the fine of 200 rupees as imposed upon the prisoner by the Lower Court do stand.

The 27th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Order to prevent breach of the peace—Section 62, and Chapter XXII., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

The Queen *versus* Goluck Chunder Gooho.

The power of issuing orders to prevent breaches of the peace, &c., conferred on a Magistrate by Section 62 of the Code of Criminal Procedure, extends only to immoveable property of the description set forth in Chapter 22 of that Code.

Jackson, J.—I AM of opinion that the view taken by the Sessions Judge in this reference is correct, and I think that the order of the Magistrate and the previous order of the Deputy Magistrate relating to the custody of this large sum of money were quite unwarranted by law.

Baboo Kali Mohun Doss appeared to support the order of the Magistrate. He took two points. The first of these points was that Section 62 justified the Magistrate in interfering with money in the hands of one person to which another person laid claim, and in respect of which it was thought likely that a quarrel was about to take place which might lead to a breach of the peace. It appears to me as clear as anything can be that the Section referred to could have no possible bearing on this point. The Legislature has sufficiently indicated the purposes and the extent for which and to which the interference of the Magistrate of property when adverse claims to that property are set up may take place. That interference is expressly restricted to immoveable property of the kind set forth in the 22nd chapter of the same Code.

The second point taken, and one which surprised me coming from Baboo Kali Mohun Doss, was that this Court ought deliberately to commit an illegality in keeping in force an order which we felt and knew to be warranted by law, in order that his client may avail himself of the circumstance of that order to keep a hold on that property till he could bring a suit for the possession of it.

So far as any question arises as to the necessity for the preservation of the property, it is quite sufficient to say that the case in which some measures for the protection of it became necessary arose some six months ago; that Baboo Kali Mohun Doss's client has been now for some time in the possession of a certificate enabling him to administer the property of the minor, on whose death the succession to that property is claimed; that the certificate at once enables him to commence the suit; that, even without the possession of the certificate, the Court would have had a discretion to allow him to commence the suit, upon his own case being made out; and that, consequently, there is no reason whatever why we should do that which we know to be illegal, and do that simply in order to the preservation of his property, because the party chose to take an irregular course, and apply to the Magistrate when the Civil Court is entrusted with full powers to take measures for the protection of property. I think, therefore, we are bound to declare those orders to be illegal, and to order them to be set aside.

The 27th July 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Criminal Misappropriation—Section 404, Penal Code.

Miscellaneous Criminal Case.

Revision of proceedings in the case of The Queen *versus* Nobin Chunder Sircar.

Mr. J. W. B. Money and *Baboo Khettur Mohun Mookerjee* for the prisoner.

HELD, that it is not necessary for a conviction for dishonest misappropriation of property possessed by a deceased person at the time of his death, under Section 404 of the Penal Code, that the accused should misappropriate to his own use.

HELD, by *Markby, J.*, that under Section 404 all the elements are required to constitute the offence which would be required to constitute the offence of criminal misappropriation in respect of a person who is alive.

Jackson, J.—IT appears to me that no sufficient grounds have been made out for disturbing the conviction or sentence passed by the Magistrate in this case. The prisoner has been convicted under Section 404 of the Indian Penal Code. The Magistrate's conviction is in these words: "That he misappropriated to his own use certain property "knowing that such property was in the "possession of a deceased person."

The case set up by the learned Counsel who appeared for the petitioner was that there was no dishonesty in this case; that the petitioner acted in good faith in the prosecution of a *bond-fide* reasonable claim of right on behalf of the zemindar, his employer. He took this property, and set up a claim to this land, not in any case for his own benefit, but solely on behalf of the zemindar, and in the exercise of his functions as the zemindar's gomastah. Mr. Money told us that this was a proceeding to which gomastahs exercising their ordinary functions had recourse to every day, and that they had done so from time immemorial.

It seems to me that we cannot disturb the conviction unless we find the fact. That I think we are not competent to do. The Magistrate has found, I think upon very fair grounds, that there was a dishonest intention on the part of the prisoner, and that he took this property, and claimed to appropriate the land on behalf of the zemindar, not under any honest or *bond-fide* claim of right, but rather knowing that the land was lakheraj, alleging falsely that the zemindar had previously bought it: not alleging that it fell to the zemindar on the death of the holder, but that the zemindar had a title to it by purchase: that rent was due in respect of the land; and that the ryot had, in his last hours, directed that his moveable property should be appropriated for the payment of the arrears of rent. The Magistrate found, and I do not think we can say he was wrong in finding, that the land was lakheraj; that there was no arrear of rent; and that the allegation of the ryot's admission in this respect was false. In this point of view, I do not think it matters whether the gomastah took this property for his own; because if we find he took moveable property under the circumstances described in the case, it is quite sufficient for the purpose of maintaining the conviction.

But then, it is objected that the Magistrate has used the words "misappropriated to his own use." No doubt, that is probably a mistake. It is not necessary for the purpose of conviction under this Section that the prisoner should misappropriate to his own use. The words of the Section are in the alternative—"misappropriate *or* convert to his own use." It would, therefore, quite answer the meaning of the Section if it was found that he misappropriated this property to the use of the zemindar. There is no evidence that this property was actually converted to the use of the zemindar. The prisoner at any rate took it and misappropriated it, and whether he did so convert it to the benefit of the zemindar or himself is not very material; at any rate, the error, if it be an error, is not such as should induce us to set aside the conviction.

As to the observation that this is an act continually done by zemindars and their gomastahs, I can only say that if it be moral for zemindars or their gomastahs to set up a fraudulent claim to the property of deceased persons who have no heirs, the sooner such a practice is discouraged, and the sooner the parties are brought under the criminal law, the better. I think there is no reason for interfering with the conviction and sentence.

Markby, J.—I am of the same opinion. When the application was made in the first instance that this record should be sent for, it struck me at the time that there would be great difficulty in making out any question of law on which we could interfere. But as the case was one a little out of the ordinary course, and somewhat peculiar in its circumstances, I thought it better to send for the record. But I must say that now that I have seen the evidence and the record of the proceedings, I am satisfied this question is one entirely of fact for the Magistrate before whom the case came. The offence charged is one commonly known as that of robbing a dead man. I go all the length of saying that under Section 404, all the elements are required to constitute the offence which would be required to constitute the offence of criminal misappropriation in respect of a person who is alive. It seems to me that in this case all the elements of this offence were established, all except one were undisputed, and that one was whether the misappropriation of the property by the gomastah was or was not a dishonest misappropriation.

The Magistrate has drawn the charge somewhat more narrowly than the Section requires. The charge as drawn by him is "misappropriation by the prisoner to his own use." It appears to me necessary that there should be evidence to establish the charge as it is drawn, and I think the evidence does establish (if it is believed) the charge as framed. The gomastah said: "The appropriation of this property by me was not a dishonest appropriation to my own use. It was not an appropriation to my own use at all. It was taken by me for the use of the zemindar under the direction of the dead man who was in debt to the zemindar for rent." The Magistrate, I think, was perfectly justified in disbelieving that; and having disbelieved it, it seems to me quite in accordance with the ordinary course of criminal trial to infer, from his having given an untrue account of how he came by the property (as, in fact, the Magistrate did infer), dishonesty on the part of the prisoner.

It also seems to me open to the Magistrate to infer that it was a dishonest misappropriation to the use of the gomastah himself. An inference from the same facts that the property was dishonestly appropriated for the use of the zemindar would have been an inference of a dishonest misappropriation, and would have been sufficient for conviction under the Section, but not sufficient under the charge. The Magistrate, however, chose rather to infer from these facts that it was a dishonest misappropriation to the use of the gomastah himself, which on this evidence, in my opinion, he was justified in doing. I do not think we are empowered under the Code of Criminal Procedure to interfere with this finding, which is one entirely of fact.

The 3rd August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Complaint—Procedure—Sections 62 and 308, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnahs.

Kalidass Bhuttacharjee *versus* Mohendronath Chatterjee.

Baboo Issur Chunder Chuckerbutty for Kalidass Bhuttacharjee.

Baboo Rajendronath Bose for Mohendro Nath Chatterjee.

A Magistrate is not bound to adhere to any particular Section of the law which may be mentioned by a complainant in his complaint, but may apply any Section which he thinks applicable to the case so long as the parties are not misled and the proper procedure is observed. He may re-call an order which he finds to be wrong, and substitute any other which he may think right under the law.

Where a Magistrate dismissed a complaint under Section 308 of the Code of Criminal Procedure, it was HELD that it was competent for him to pass an order under Section 62 of that Code in the same case, provided he called on the defendant to show cause why Section 62 should not be applied.

Kemp, J.—THIS was a reference under Section 434 of the Code of Criminal Procedure by the Sessions Judge of the 24-Pergunnahs in a case in which he is of opinion that the order of the Cantonment Magistrate of Barrackpore is illegal, and ought to be quashed. It appears that in this case Kalidass Bhuttacharjee petitioned the Magistrate that the defendant Mohendro Nath Chuttopadhya was erecting a wall which obstructed the drain of his (the plaintiff's) house. His petition was presented on the 8th of June, and Kalidass was examined briefly. He stated that the drain

was an old one, and that Mohendro Nath, in erecting a wall, was obstructing that drain. The Magistrate directed the police to stop the erection of the wall, and intimated his intention of visiting the spot in person. This was on the 8th of June, and on the 11th of June the Magistrate took up the case, and held that Section 308 of the Procedure Code did not apply to the case; but, as there was no apprehension of a breach of the peace, he referred the plaintiff to a Civil Court for redress. On the same date, the Magistrate states that, after writing the above order, Section 62 of the Code of Criminal Procedure was brought to his notice as one under which he could dispose of the case, and that, as he was of opinion that the plaintiff was in possession of the drain, and the defendant's building a wall would cause an obstruction of the drain and an inconvenience and annoyance to the persons living in the house, he should be prevented from doing so. He therefore made an order under Section 62 that the defendant was to leave the drain open, and to cease building the wall.

It has been contended before us that, having passed the first order, the Magistrate was not competent to pass any orders at all under Section 62, and that, even if he was competent to do so, he ought to have given the defendant an opportunity of being present and of being heard, so as to enable him to show cause why such an order should not be passed. We think that, on the first contention, the Magistrate was competent, when he found that the plaintiff's case did not come under the Section under which he had put it, namely, Section 308, to apply any other Section of the Code of Criminal Procedure which applied to that case; but we think that, before proceeding to apply Section 62, the Magistrate ought to have given the defendant, Mohendro Nath, an opportunity for showing cause, either by giving evidence or in any way in his power, why the provisions of Section 62 should not be applied to the case. Not having done so, we think that the decisions of the Magistrate are irregular, and that they must be set aside.

This order will not prevent the Magistrate from taking up the case again on a formal application from Kalidass Bhuttacharjee, and, after hearing both parties, and making necessary enquiries, from passing such orders as he may deem right and proper.

Markby, J.—I am of the same opinion. There is a good deal of what was said by the Sessions Judge in his order of reference with which I am not at present prepared to concur; nor am I at all prepared to say that this was not a case in which the Magistrate could pass an order under Section 62, or that there was not evidence before him sufficient for that purpose. Moreover, my opinion at present is that a Magistrate is not bound to adhere to any particular Section which may happen to be mentioned by the complainant in his complaint, but he may apply any Section of the law which he thinks applicable to the case as long as the parties are not misled, and as long as the proper procedure prescribed for the purpose has been observed; nor do I doubt that a Magistrate who has made an order which he finds to be wrong may recall that order, and in its stead substitute any other order he may think right under the law. But my ground in concurring to set aside the orders of the Magistrate in this case is that the alteration made by the Magistrate was made in the absence of the parties after they had left the Court, and there is nothing in this record which could satisfy us that it was brought to the notice of the parties that that order was about to be recalled, or that they had any opportunity of showing cause why it should not be so recalled and altered. The order passed under Section 62 is thus illegal, being passed *ex parte* by the Magistrate without the knowledge of the parties, and in a manner behind their backs after they had left the Court, thinking that the case had been finally disposed of by the Magistrate under another Section, and having no idea that the first order passed by the Magistrate was going to be set aside. On that ground, and on that ground alone, I think that the Magistrate's orders should be set aside.

The 3rd August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Civil Court—Commitment—Section 193, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

The Queen *versus* Jan Mahomed.

Where a Civil Court sends an offence under Section 193 of the Penal Code to a Magistrate for investigation and commitment, if necessary, the Magistrate cannot

return the case to the Civil Court, nor can the Civil Court, after it has sent a case to the Magistrate, commit it to the Sessions. The Magistrate should himself proceed with the case, and take evidence therein.

Reference.—FROM a proceeding of the Moonsiff of Bhotmaree as detailed in English, it appears that one Jan Mahomed, along with his brother Pan Mahomed, was sued before him upon a bond alleged to have been executed by them to one Durbaroo Sircar. On the 4th June, the defendants, through their vakeel, filed a written statement containing the usual verification, and denied the execution of the bond. Afterwards the case was postponed to the 22nd June, when Jan Mahomed alone presented a petition to the effect that he alone did execute the bond, and wanted to settle the matter by agreement. Upon this, oath was administered to Jan Mahomed, and he swore to the same effect. As there was thus found by the Moonsiff a variance between his statements made on both these occasions, the Moonsiff thought it proper to send the record to the Magistrate in order to the completion of the preliminary investigation, if necessary, and the commitment of Jan Mahomed before the Court of Session. This was on the 26th June, and the record was accordingly transmitted to the Magistrate; but the Magistrate, without completing the enquiry himself, and committing the accused to the Sessions, sent the case back to the Moonsiff, fixing the 14th July as the day for trial before the Sessions.

The Moonsiff accordingly, on receiving back the record after correction, framed a charge under Section 193 of the Indian Penal Code, and committed it to the Sessions on the — June last.

The committing order of the Moonsiff, if such it can be called, is illegal. When the Moonsiff did once make over the case to the Magistrate for investigation on a criminal charge, his order of commitment, after the case was illegally made over to him by the Magistrate, is contrary to law.

Now, it appears to me that the case is not properly before the Court, and I think the irregularity is of such a serious nature that the whole proceeding should be quashed.

My reasons are, *1st*, that, when once a Civil Court makes over a case to the Magistrate for investigation, it must be disposed of by the Magistrate either by the discharge, acquittal, conviction, or commitment of the accused. It cannot be returned to the Civil Court (3 Agra 21, Prinsep's Criminal Procedure Code, page 64, first edition). In this also, when the case was once made over to the Magistrate, it was clearly beyond the power of the Magistrate to refer it to the Moonsiff again for correction or drawing up a charge.

2nd.—From the proceedings of the Moonsiff, dated 26th June, it seems as if he was referring the case to the Magistrate for investigation; but the record shows that he did not administer oaths to the witnesses, so that his proceedings take the shape as that of a committing officer.

3rd.—Nothing can be made out from a charge as has been framed by the Moonsiff—what was the stage of the judicial proceeding, and what were the statements which constituted the offence on which the accused has been committed by the Moonsiff. From all this it is evident that the proceedings throughout the case from beginning to commitment are illegal.

As the accused is up to this time in *hajut* in default of bail, I send up the case to the Honorable Court without calling for an explanation from the Lower Court, as delay would subject the parties to more vexation and trouble.

Judgment of the High Court.

Kemp, J.—In this case the offence was one against public justice (Section 193). It can be entertained in the Criminal Court with the sanction of the Civil Court before whom the offence was committed.—(*Vide* Section 169, Code of Criminal Procedure.)

The Moonsiff sent the case for investigation to the Magistrate under Section 171, Code of Criminal Procedure: the Magistrate returned the case to the Moonsiff, who has committed the accused to the Sessions on a charge under Section 193 of the Indian Penal Code.

The Moonsiff, as the case was triable in the Sessions Court, was competent to commit, instead of sending the case to the Magistrate for investigation (Section 173, Code of Criminal Procedure), and we think it was perhaps irregular in the Moonsiff committing the case himself after sending it to the Magistrate for investigation and commitment. We direct the Judge to instruct the Magistrate to proceed according to law after taking the evidence. The papers of the case are returned to the Judge.

The 3rd August 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Mischief—Unlawful assembly—Right of defence of private property—Clause 4, Section 105, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnahs.

The Queen *versus* Raj Kisto Doss and others.

Where land in the possession of *A* was encroached on by the servants of *B* who committed mischief on the land, and the servants of *A* assembled and resisted the encroachments, the High Court declined to interfere with the Magistrate's order convicting the servants of *A* of unlawful assembly, as there was no error in law in the order of the Magistrate, who found, as a fact, that the right of defence of private property has ceased under Clause 4, Section 105 of the Penal Code.

Reference.—It appears from the evidence in the case that the people of Goluck Chunder Haldar were excavating a khal, and in doing so they encroached on the lands of Issur Chunder Mundul, and committed mischief by cutting the land, and throwing earth on it. The defendants, on behalf of Issur Chunder Mundul, assembled and opposed the encroachment, and the Deputy Magistrate has convicted the people of Issur Chunder Mundul of the charge of unlawful assembly. It seems to me that the conviction is wrong on two grounds. In the first place it appears from the evidence that the land was in the possession of Issur Mundul, and that the people of Goluck Chunder were the aggressors: the present defendants, therefore, were justified in resisting the acts of Goluck Chunder, and protecting their property.

In the second place, the right to excavate the khal was not disputed, but the defendants opposed the appropriation of Issur's land for the purpose of the khal. Their object, therefore, could never have been one of those contemplated in the 3rd, 4th, and 8th Clauses of Section 141. They were not going to commit mischief, or seeking to deprive any person of property or right, or to compel any one, by criminal force, to do what he ought not to do, or to omit what he ought to do. They were exercising the right of private defence of property under Section 104, and it is not found that they exceeded these limits, and therefore they had no such common object, nor did they commit any such act, as would convert their assembling, which was at first for a legal purpose, into an unlawful assembly.

Under these circumstances, I think that the order of the Deputy Magistrate as regards the petitioners should be set aside.

Judgment of the High Court.

Markby, J.—We do not think there is any error in law in the decision of the Deputy Magistrate. He finds as a fact that there was an assembly, the members of which were punishable under Section 143. He disposes of the defence set up, that the prisoners acted in the exercise of their right of private defence, by finding that the mischief, which the prosecutor's party were alleged to have committed at all, had been completed before the assembly, nor does it appear to have been suggested that the mischief was likely to be renewed. From that the Magistrate infers that the real object of the assembly was to prevent the cutting of the khal; at any rate, he finds the right of private defence had ceased under Clause 4 of Section 105 of the Indian Penal Code. We see no error in law in this conclusion, and therefore decline to interfere.

The 7th August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Evidence of prisoners—Certificate—High Court—Postponement of trial—Sections 199, 205, and 367, Code of Criminal Procedure.

Revision of proceedin gsunder Section 405 of the Code of Criminal Procedure in the case of

The Queen *versus* Radhoo Jana and others.

Baboo Juggadanund Mookerjee for the Government.

Section 199 of the Code of Criminal Procedure relates to the examination of witnesses, and does not apply to the examination of prisoners.

HELD that, where the provisions of Section 205 of the Code of Criminal Procedure are not observed, and there is no certificate by the Magistrate that the examination of the accused was taken in the hearing and in the presence of that officer, and there is no statement that that examination contains the whole statement of the accused, a Sessions Judge acts rightly in rejecting the evidence, and not allowing it to go to the Assessors.

The High Court, as a Court of revision, cannot say that a Sessions Judge is wrong in point of law, because he does not, in the exercise of his discretion under Section 367, postpone a case for the evidence of a witness.

This case arose out of the following petition of the Government of Bengal:—

THAT, in a case of dacoity, the prisoners noted in the margin were committed for trial before the Sessions Judge of Midnapore. It appears that they were released on the 14th June last by the said Sessions Judge on the ground that their confessions before the Deputy Magistrate were not properly recorded, and the certificate had been omitted. The Sessions Judge remarks: "After the close of "the case, the prosecutor applied for an ad-"journment to summon the Deputy Magis-"trate. After some conversation, this was "refused, because, although the Deputy Ma-"gistrate's examination might possibly supply "the defective certificate, it could not cure "the fact that the questions asked the ac-"cused had not been included in the examin-"ation, or the impression left in the mind of "the Court by the carelessness with which "the duty of recording the said confessions "in their faces."[1]

1. Radhoo Jana.
2. Nitye Joge.
3. Lukhy Jana.
4. Madhoo Doss.

[1] *Sic.* in *orig.*

The Sessions Judge further remarks that "the Court further directs that, as the ver-"dict is in the nature of 'unproven' rather "than 'not guilty,' because, morally speak-"ing, the Court entertains no doubt that some "of the property is stolen property, that the "articles be disposed of as follows."

From the above it is clear that the prisoners have been acquitted, simply because, in the opinion of the Sessions Judge, the confessions were inadmissible, because the Deputy Magistrate had committed some irregularities in recording them and certifying them in the manner he had done.

That in a letter No. 77, which the Sessions Judge wrote to the Magistrate of Midnapore after the above trial, there appeared the following passage:—

"There should always be a judicial re-"cord by the Magistrate of the special cir-"cumstances under which confession was "received, showing in whose custody the "prisoner was, and how far he was quite a "free agent. [*Note.*—The points to look to "chiefly are the custody, the demeanour of "the accused, and nature of his replies; his "apparent motive for confessing, and whe-"ther that motive has been induced by any "improper influence and by an improper "person.]

"The proceeding had better be a roobo-"karree to be drawn up and prefixed to the "confession, not a quasi-certificate at the "foot in the case."

Your petitioner submits—

First.—That the confessions were admissible in evidence, and that the Judge should have laid them before the Assessors, and the objection urged by the Judge affected the credibility, not the admissibility, of the confessions; and, further, that, if the Judge distrusted the confessions, he should have taken the evidence of the Deputy Magistrate himself.

Second.—That the Sessions Judge has no authority by law to issue general orders which are not warranted by law.

Your petitioner, therefore, prays—

That, after calling for the records of the case, your Lordships will be pleased to set aside the order of the Sessions Judge, and direct a new trial of the prisoners.

Your petitioner further prays that your Lordships will be pleased to direct the Sessions Judge to withdraw the instructions contained in his letter No. 77.

Judgment of the High Court.

Peacock, C. J.—We have heard this case in the absence of the accused. I am not sure that we could make an order for a new trial in their absence, but it is unnecessary to consider that question now, because it appears to me that we ought not to set aside the judgment of acquittal, and order a new trial.

Section 199 of the Code of Criminal Procedure, to which reference has been made, relates to the examination of witnesses, and does not apply to the examination or confession of prisoners. The Section applicable to this branch of the subject in the old Code of Criminal Procedure, which was in force when these prisoners were tried, are Sections 202 to 208 inclusive.

Section 205 enacts that the examination "shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person."

The examination in this case did not follow the directions of that Section. There is no certificate that it was taken in the hearing and in the presence of the Magistrate (although, no doubt, it was so), nor is there any statement that it contains the whole of the statement made by the accused person.

It was admitted by the learned pleader for the Government that the examination was not strictly accurate. It appears to me that it was wholly wanting in the requisites of Section 205.

Section 366 enacts that "the examination of the accused person before the Magistrate shall be given in evidence at the trial. The attestation of the Magistrate shall be sufficient *primâ-facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it, unless the Court shall see reason to doubt its genuineness."

That Section makes the examination of an accused person taken before the Magistrate admissible in evidence, but that is when the examination is taken down and certified by the Magistrate in the manner required by the Act. The attestation mentioned in this Section must mean attestation in conformity with Section 405. There was no certificate in compliance with the requirements of Section 205, and therefore the confession was not admissible in evidence, and the Judge was right in rejecting it, and not allowing it to go to the Assessors, or acting on it himself.

But it is said that the Judge was wrong in not postponing the trial, and sending for the Deputy Magistrate to make good by his evidence that which was deficient in the record of examination. Whether the Judge exercised a sound discretion or not in not postponing the trial, and not sending for the Deputy Magistrate, it is not necessary for the Court to decide.

Section 367 enacts that "it shall be in the discretion of the Court" (that is, the Court of Session) "at any stage of a trial to summon and examine any witness whose evidence it shall consider essential to the just decision of the case."

But the fact of the Judge not having postponed the case, and not having summoned the Deputy Magistrate, is not an error in point of law, but an error, if it is an error at all, in the exercise of his discretion. This Court, as a Court of revision, cannot say that the Sessions Judge was wrong in point of law in not postponing the trial, or in the exercise of his discretion in not summoning the Deputy Magistrate. Under these circumstances, it appears to me that this Court, as a Court of revision, has no power to interfere with the decision of the Judge passed in accordance with the opinion of the Assessors.

It is said that the Judge simply says that the case was in the nature of 'unproven' rather than 'not guilty;' but still there was a verdict of acquittal. The parties were put on their trial, and were acquitted. There is no point of law on which we can say that the Judge was wrong in acquitting the prisoners, and therefore, as a Court of revision, we cannot set aside the acquittal.

With reference to the general suggestions of the Judge to the Magistrate, it appears to me that that is not judicial matter which can be decided by this Court judicially, but it is a matter which ought to be referred to the English Department of the Court, in order that they may give such directions with reference to that order, and with reference to what the Magistrate may have done under it, as they may think just and proper.

The application is refused, and the letter of the 17th day of June 1867, containing the general suggestions of the Judge to the Magistrate, is referred to the English Committee for orders.

The 19th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

High Court—Section 434, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.

The Queen *versus* Joykishen Lall, Head Constable.

The High Court can only interfere under Section 434, Code of Criminal Procedure, when there is some illegality in the proceedings of a Lower Court.

Glover, J.—We are unable to interfere in this matter under Section 434, Code of Criminal Procedure. That Section refers only to cases in which there has been some illegality in the proceedings of the Court below.

In the present case it cannot be said that there was anything illegal in the Deputy Magistrate's order. He chose to disbelieve the evidence in support of the accused's innocence, and to punish him with a fine. His decision may have been against the weight of evidence, but it was not an illegal one, and therefore this Court has no jurisdiction to amend it.

The 19th August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure—Court of Session—Commitment—Section 435, Act VIII. of 1869.

Criminal Revisional Jurisdiction.

Reference in the case of

The Queen *versus* Wazur Singh.

The power of commitment conferred on a Court of Session does not extend to a case which is triable by a Magistrate. Section 435, Act VIII. of 1869, refers only to cases not triable by a Magistrate.

Glover, J.—We think that the Sessions Judge's order for commitment should be quashed.

The offence of which the accused had been convicted by the Magistrate was, as is admitted by the Sessions Judge, one triable by a Magistrate, and therefore it was beyond the power of the superior Court to annul the conviction and order a commitment.

Section 435, Act VIII. of 1869, refers only to cases which are not triable by a Magistrate, and in which, therefore, he had exercised a jurisdiction that did not belong to him.

The 21st August 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Procedure—High Court—Suspension of sentence—Imprisonment—Section 405, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of proceedings under Section 404 of the Code of Criminal Procedure.

In the matter of Kishen Soonder Bhuttacharjee and another, *Petitioners.*

Baboos Ashootosh Chatterjee and *Sreenath Banerjee* for Petitioners.

The High Court, as a Court of revision, cannot interfere with any finding of fact unless it arrives at a conclusion that there was no evidence whatever to support it, nor can it interfere in the case of a sentence passed by a Magistrate upon the ground that it is too severe, Section 405 applying only to cases coming from a Court of Session.

A sentence of imprisonment cannot be suspended to take effect at a future period, but must commence from the time that the sentence is passed. Where a Deputy Magistrate postponed the execution of a sentence of imprisonment for a stated period, at the request of the accused, to allow the accused to appeal, it was held that the sentence was bad in law, and could not be carried into execution.

THE following order was passed on the 31st July 1869, calling on the opposite party to show why the order passed by the Deputy Magistrate ought not to be set aside.

Peacock, C. J.—We cannot say that there was no evidence in this case, as it appears to us at present, to justify the Deputy Magistrate in finding that the defendants were guilty of an offence under Section 504 of the Indian Penal Code, though it certainly appears to me that, had I to determine the question of fact, I should not have found that defendants intentionally insulted the prosecutor, knowing it to be likely that such provocation would cause him to break the peace. The Deputy Magistrate appears to have considered that defendants called prosecutor *salah.* But I do not think that the evidence went to that extent. The prosecutor made some remarks to the effect that Brahmma was created like other creatures, and, when asked whether he was a learned man or had any authority for his position, he said that he had heard that there was a *bechun* to that effect. Upon which defendant said, not, "You are a *salah,*" but that such persons as these *salahs* who professed such doctrines as these ought to be beaten with shoes. He used that term, not as imputing it to the prosecutor that he was a *salah,* but as a general term of abuse applicable to persons who entertained such doctrines as those which the prosecutor had propounded.

As a Court of revision, we cannot interfere with any finding of fact unless we arrive at a conclusion that there was no evidence whatever to support it, nor can we, in the case of a sentence passed by the Deputy Magistrate, interfere with it upon the ground that it was too severe. Under Section 404 of the Code of Criminal Procedure, this Court, as a Court of revision, can only interfere upon the ground of there being an error in the decision on a point of law. Under the 405th Section, they can interfere on the ground of the sentence being illegal or improper, but that Section applies only to cases coming from the Courts of Session.

At the same time, we should very much regret that an old man in the position of the defendant should have to undergo imprisonment. Under these circumstances, we think that the record should be called for in order that the evidence may be carefully examined.

This case was not one which was appealable to the Sessions Court, nor to any other Court; but, upon petition on the part of the defendant, the Deputy Magistrate has suspended the execution of the sentence. I am inclined to think that the Deputy Magistrate had no power to suspend that sentence, and I very much doubt whether it can now be carried into effect.

Under Section 421 of the Code of Criminal Procedure, "in any case in which an appeal is allowed, the Appellate Court may, pending the appeal, order that the sentence be suspended." But that gives no power to the Court of original jurisdiction, or to the Court in which no appeal is pending, to suspend the sentence. I think that that point should also be considered after argument, and that the record of the trial, as well as the record of suspension, should be sent for in order that it may be considered.

This being a case of a private prosecution, the prosecutor should have notice that the record has been sent for, and that this Court will hear the case on this day fortnight. It is a great pity that discussions of this kind should be made the subject of criminal prosecutions. There certainly was great provocation to the defendant, considering the

religious views which he entertained, especially in the prosecutor's remarks with regard to Bhugobutty.

The final order of the Court was as follows:—

Peacock, C. J.—I am of opinion that the order made by the Deputy Magistrate for suspension of the sentence of imprisonment was not warranted by law, and consequently that the sentence of imprisonment cannot now be lawfully carried into effect. It appears to me that a sentence of imprisonment ought to commence from the time that the sentence is passed, unless there is some lawful reason for ordering it to commence from some future period. One of those cases is provided for by Section 46 of the Code of Criminal Procedure, where a person is convicted at the same time of two or more offences punishable under the same or different Sections of the Indian Penal Code, and by which it is enacted that it shall be lawful for the Court to sentence the offender to the several penalties prescribed by the Code, which penalties, when consisting of imprisonment, are to commence the one after the expiration of the other.

Another instance is in Section 47, where sentence is passed on an escaped convict, and a third in Section 48, in which sentence is passed on a person already under sentence of imprisonment or transportation for another offence. A sentence of imprisonment, therefore, in an ordinary case, to commence at a future period, would, in my opinion, be bad. If postponed for a long period, the imprisonment might never take effect at all, as the person sentenced might die before the period fixed for the commencement of the imprisonment.

If a sentence would be bad where the commencement is postponed for a long period, it would also be equally bad in law if the postponement is for a short period. It may be inferred from Section 70 of the Penal Code that a sentence of imprisonment in an ordinary case is to commence forthwith. That Section enacts that, in a case in which fine is awarded as a punishment, the fine or any other part thereof which remains unpaid may be levied at any time within six years after the passing of the sentence; and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period, the intention evidently being that the fine must be levied either within the period of six years or before the expiration of the imprisonment.

In this case, no doubt, the Deputy Magistrate acted out of consideration for the persons accused and at their request, the persons accused contending that, under the new Code of Criminal Procedure, the Deputy Magistrate had no power to hear the case, and asking that the execution of the sentence might be postponed to give them an opportunity of appealing. This, however, as it appears to me, makes no difference. Section 421 of the Code of Criminal Procedure authorizes an Appellate Court in cases where an appeal is allowed to suspend the sentence, and, if the appellant be in confinement for an offence which is bailable, to order his release on bail. The fact that this power is expressly given to the Appellate Court shows that it does not exist in cases in which it is not given.

It may be said that the imprisonment awarded (three days) was for so short a period that it would have expired before the accused could obtain relief under that Section of the Code of Criminal Procedure. The law, however, has not provided for the case, and therefore the Deputy Magistrate had no power to suspend the sentence.

The only remaining question is, was the suspension valid, it being at the request of the accused. I apprehend it was not valid, even though ordered at their request. If a criminal asks a Magistrate or a Judge to do that which he has no power to do under the law, the request would not justify the Court in acting in accordance with such request. If a criminal were to ask the Court to pass a sentence upon him not allowed by law instead of the sentence which the law warrants, the sentence would not render valid a sentence otherwise unlawful. If the accused had asked the Deputy Magistrate to pass a sentence of imprisonment upon them to commence at the expiration of six years, and the Deputy Magistrate had passed such a sentence, that sentence would have been invalid. If an original sentence to commence at a future period would be bad, then I apprehend that the suspension of a sentence to commence immediately would also be bad.

For the above reasons, it appears to me that the sentence cannot now be carried into effect, and I am glad to say that, in my opinion, looking at all the facts of the case, no evil consequences will result from the mistake of the Deputy Magistrate.

These remarks will be communicated forthwith to the Deputy Magistrate.

Mitter, J.—I concur.

The 21st August 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Confession—Evidence—Conviction.

Criminal Appellate Jurisdiction.

The Queen *versus* Bhuttun Rujwun and others.

Committed by the Magistrate, and tried by the Sessions Judge of Gya, on a charge of dacoity.

The properly-attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court.

Glover, J.—In this case the prisoners all confessed before the Deputy Magistrate, and their examinations were taken as evidence against themselves under Section 366, Code of Criminal Procedure. No other evidence was recorded at the Sessions trial, except that of the plundered person, to prove the factum of the dacoity.

The properly-attested confessions of prisoners before a Magistrate are sufficient for their conviction without corroborative evidence, and notwithstanding a subsequent denial before the Sessions Court. We, therefore, think that the Judge's finding was correct, and that these appeals should be rejected.

The 28th August 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Order by public servant—Section 188, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge.

The Queen *versus* Ramtonoo Singh, peon.

Before a conviction can be had under Section 188, Penal Code, it must be proved that the accused knew that an order had been promulgated by a public servant directing such accused person to abstain from a certain act.

Kemp, J.—The conviction by the Deputy Magistrate cannot stand. Under Section 188 of the Indian Penal Code, it is necessary that the person convicted of an offence under that Section should be proved to have known that an order had been promulgated by a public servant, directing such person to abstain from a certain act. No evidence whatever was taken in this case to bring home the knowledge of the order to the accused. The conviction is quashed, and the fine must be refunded to Ramtonoo Singh, peon.

The 1st September 1869.

Present:

The Hon'ble F. B. Kemp and W. Markby, *Judges.*

Procedure—Complainant—Section 273, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Bhugoban Chunder Poddar *versus* Mohun Chunder Chuckerbutty and others.

Baboo Kalee Mohun Doss for the Prosecution.

Baboo Romesh Chunder Mitter for the Prisoners.

The various modes in which civil proceedings can be instituted under the Code of Criminal Procedure pointed out.

Where a Civil Court makes over a case to a Magistrate for investigation, the Magistrate ought to examine the complainant, and reduce the examination into writing, which should be signed by the Magistrate and the complainant.

Section 273, Code of Criminal Procedure, only empowers a superior Magistrate to refer cases to a Subordinate Magistrate when the complaint is made to himself or before a police-officer, but not cases where he himself takes cognizance of an offence.

Kemp, J.—This is an application under Section 404 on the part of the prisoners, who have been sentenced to various sentences under Sections 183, 323, 347, and 384 of the Indian Penal Code. The papers were sent for by Justices E. Jackson and Dwarkanath Mitter, and the case has been argued today before this Bench. It appears to me that the proceedings in the case have been illegal, and that the conviction must be quashed. A complaint may be made either under Section 66 of Act XXV. of 1861 to the Magistrate of the District or to a Magistrate in charge of a Division of the District by complaint, or under Section 135 by either complaint or information to any officer in charge of a Police Station. In the latter case, under Section 139, the complaint shall be reduced into writing, and the substance thereof entered into a diary. In the former case,

the procedure laid down is that the complainant shall be examined by the Magistrate, the examination shall be reduced into writing, and shall be signed by the complainant, and also by the Magistrate.

In the case before us the Judge of the Small Cause Court of Backergunge, Baboo Gunga Churn Shome, wrote to the Magistrate of Backergunge, informing him that certain peons attached to his Court had been resisted by the prisoners, Mohun Chunder Chuckerbutty and others, in the discharge of their duty, that they had been beaten, and that both the peons and the plaintiff had been confined by the prisoners and their people, who also extorted a sum of Rupees 500 from the plaintiff. The Judge of the Small Cause Court requested the Magistrate to take cognizance of the offence, and to inform his Court of the results of the case. On this, on the back of the letter, Bhugoban Chunder Poddar, the plaintiff in the case, appears to have made a statement, but this statement is not signed by him, and it is not a complaint coming within the meaning of Section 66 of the Code of Criminal Procedure, that is to say, it is not an examination reduced into writing, and signed by the complainant, as required by the law. The police was then directed to make a local enquiry on this illegal complaint, and the case was made over to the Deputy Magistrate for trial. Now, under Section 273 of the Code of Criminal Procedure, criminal cases brought before the Magistrate on complaint may be referred by him to any Magistrate subordinate to him. In this case no complaint having been made within the meaning of Section 66, the reference by the Magistrate of the case to the Subordinate Magistrate for trial was illegal. The proceedings of the Deputy Magistrate, therefore, being without jurisdiction, must be quashed, and the prisoners discharged.

Markby, J.—I am of the same opinion. It seems to me that there are but three modes in which criminal proceedings can be instituted under the Code of Criminal Procedure. The first one is pointed out by Section 66, and in that case the complainant is to be examined by the Magistrate, and the examination reduced into writing, and signed by the complainant and by the Magistrate himself. The next mode is under Section 68, which gives power to the Magistrate himself to take cognizance of any offence which may come to his knowledge, and initiate proceedings himself in the same manner as if a complaint had been made. The other is under Section 135, which allows of a complaint being made before a police-officer, and under Section 139 that complaint must be reduced into writing, although it need not be signed: that complaint is reported by the police to a Magistrate. It appears to me that there was in this case neither of these proceedings, the matter having been brought to the notice of the Magistrate by the Judge of the Small Cause Court. The deposition of a person named Bhugwan was taken, but this was not a complaint under Section 66, as Bhugwan did not sign the deposition; so that there was no complainant, neither was there any complaint made before and reported by the police, nor can it be supposed that the Magistrate took cognizance of this offence without complaint under Section 68, because in that case, as was admitted in the argument before us, he could not have referred the case for trial before the Deputy Magistrate under Section 273. That Section only empowers a superior Magistrate to refer cases when the complaint is made to himself or before a police-officer, but not cases where he himself takes cognizance of an offence. It appears to me, therefore, that there was nothing upon which these proceedings could be founded, and that the conviction must be quashed.

It has been contended for the prosecution that, under Sections 426 and 459, we ought not to interfere with the sentence passed on account of a mere irregularity or defect which does not affect the amount of punishment awarded, but I do not think it can be contended that either of these two Sections applies to a case like the present, where the complaint, which is laid down in the Procedure Code as the commencement of a prosecution, is altogether absent. I do not think one ought to say that the conviction must stand good, because the punishment awarded would probably have been the same had the proper proceedings been observed. I think it never was intended that these Sections should be used to the extent of doing away altogether with the procedure laid down by the Code, and to rendering convictions valid when the proceedings prescribed as preliminary to the institution of criminal prosecutions are altogether omitted, and the jurisdiction of the Court which passed the sentence is affected by the omission. If carried to this extent, Magistrates might altogether desert the Code of Procedure. The prisoners will, therefore, be discharged.

The 2nd September 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Magistrate's attestation—Evidence—Jury—Abetment.

Criminal Appellate Jurisdiction.

The Queen *versus* Rasookoollah and others.

Committed by the Magistrate, and tried by the Sessions Judge, of Hooghly on a charge of rioting, &c.

Mr. C. Gregory and *Baboo Roopnath Banerjee* for the Prisoners.

The attestation of a Magistrate stating why he could not proceed with the further examination of a witness is *primâ-facie* proof of that fact, and may be laid before a Jury.

Where, of several persons constituting an unlawful assembly, some only are armed with sticks, and *A*, one of them, is not so armed, but picks up a stick, and uses it, *B* (the master of *A*), who gave a general order to beat, is guilty of abetting the assault made by *A*.

Glover, J.—The ground of appeal taken by Mr. Gregory for the appellants in this case is that the Judge misdirected the Jury, and two instances have been pointed out to us in which such misdirection is said to have greatly prejudiced the prisoners. The first is with regard to the omission of the witness Eshan in his deposition before the Magistrate to mention more than two of the accused, namely, Jadub and Bhugowan, and to the Judge's pointing out to the Jury the reason given by the Magistrate for that omission, that reason being that, at the time the witness's deposition was being taken, he was in such a weak state that the Magistrate was unable to proceed with his examination, and had only asked him two questions when the excessive weakness of the witness obliged him to stop. It is contended for the appellant that this was not evidence which ought to have been laid before the Jury, and that, to make it evidence, the Magistrate's deposition ought to have been taken as to the truth of the fact testified by him on the deposition of Eshan.

This objection appears to me untenable. The attestation of a Magistrate in all parallel cases, such as the evidence of a witness or the statement of an accused person, is considered *primâ-facie* proof of the fact of that deposition, unless the Court trying the case has reason to suppose that the attestation was improperly attached to the document. In this case, therefore, the Magistrate's attestation, under his own seal and signature, that the reason why he had not been able to proceed with the examination of the witness Eshan was because that witness was in too weak a state to answer the questions put to him, was evidence of that fact, and was, therefore, very properly put to the Jury. The Jury might form their own opinion upon it, but it cannot be said that the fact was not receivable as evidence.

The next misdirection complained of is in respect of the prisoner Rasookoollah. It is objected that the prisoner, who is proved to have struck the blow on Eshan's head (the only blow inflicted), did so with a piece of burnt bamboo which happened by chance to be on the ground where the parties were assembled. It is contended, therefore, that Rasookoollah could not have supposed or imagined that his servant would have found or used this bamboo wherewith to assault Eshan, and that, therefore, he cannot be said to have had a common object with the servant in causing the injury so inflicted with the bamboo.

It might be that in a case when a number of men sufficient to constitute an illegal assembly had determined to assault a certain party with their hands, and in accordance with that intention had carefully abstained from arming themselves with sticks, that if one member of such assembly picked up a stick by accident, and struck the object of their attack with it, the other members could not be said to have been carrying out a common object with the person who used the stick. In this case, however, there was evidence to show that several of the parties constituting the unlawful assembly were armed with sticks, and, as Rasookoollah gave a general order to beat, it must be assumed that he ordered the whole of these men, and so had cognizance of the fact that, in carrying out that order, they would use the weapons they had come armed with. Therefore, even supposing that the man Jodoo was not himself provided with a stick, but picked up one lying by chance on the ground, I think that Rasookoollah made himself liable for the act of Jodoo as

much as if Jodoo had been armed with a stick from the beginning.

Another objection has been taken by Baboo Roopnath Banerjee with the object of showing that the charges on which the prisoners had been acquitted by the Jury neutralised in effect those on which they had been convicted, and that, therefore, the conviction was *ipso facto* bad. Now, the prisoners have been convicted on the *first* and *fourth* heads of charge, *viz.*, of rioting under Section 147, and voluntarily causing grievous hurt without grave and sudden provocation under Section 325. The charges of which they have been acquitted are rioting armed with a deadly weapon, voluntarily causing grievous hurt by means of an instrument which, used as a weapon, was likely to cause death, without grave and sudden provocation, voluntarily causing hurt by means of an instrument which, used as a weapon, was likely to cause death without grave and sudden provocation, and voluntarily causing hurt without grave and sudden provocation. It is perfectly clear that the prisoners might very well have been acquitted on the *second*, *third*, *fifth*, and *sixth* heads of the charge without in the least degree affecting their guilt on the *first* and *fourth* heads, inasmuch as the *first* and *fourth* heads differ most essentially from the others. It might have been said that the prisoners could not have been convicted on the *third*, *fourth*, *fifth*, and *sixth* heads all together, inasmuch as they all refer to hurt, either simple or grievous, inflicted on one person, and were parts of the same offence. But in this case the prisoners have been convicted of rioting under Section 147, which is an entirely different offence from, and results in much less punishment than, rioting armed with a deadly weapon. They have further been convicted of voluntarily causing grievous hurt without grave and sudden provocation, which is quite a different offence from voluntarily causing grievous hurt by means of an instrument which, used as a weapon of offence, would be likely to cause death. There is, therefore, no ground whatever for this objection of Baboo Roopnath Banerjee. I reject the appeal.

Mitter, J.—I concur in rejecting this appeal.

The 3rd September 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Abetment—Section 107, Penal Code.

Criminal Appellate Jurisdiction.

The Queen *versus* Eshan Meah and Bedoo Meah.

Committed by the Magistrate and tried by the Sessions Judge of Sylhet, on a charge of voluntarily causing grievous hurt.

Baboo Grish Chunder Ghosh for the Prisoners.

HELD that, where *A* gave a *daó* to *B*, who had given out his intention to coerce the party against whom he was acting, and who inflicted grievous hurt on such party with the *daó*, *A* was guilty of abetment within the second head of the 3rd Clause of Section 107 of the Penal Code.

Glover, J.—WE have heard the pleader for the appellants in this case, and we have gone through the evidence, and see no reason whatever for interfering with the finding of the Court below. With regard to the first prisoner, Eshan, it has been contended that there is no evidence sufficient to convict him of the crime of abetment. But we find, on turning to the record, that the witnesses state that on Bedoo calling out, "See, these coolies" (the wounded man being one of them) "refuse to obey the order of the Chow-"keedars; Eshan bring me a *daó*," Eshan

did bring a *daó*, and Bedoo immediately inflicted a severe wound, from which the witness is now suffering. The explanation given in the second head of the 3rd Clause of Section 107 of the Penal Code is that: "Whoever, either prior to, or at the "time of, the commission of an act, does any-"thing in order to facilitate the commission "of that act, and thereby facilitates the com-"mission thereof, is said to aid in the doing "of that act." It is quite clear, therefore, that a person who, under the circumstances detailed by the evidence, gives a *daó* into the hands of another person, who has already given out his intention of coercing the party against whom he is acting by using the words, "I will see to this man," must be presumed to be intentionally doing something in order to facilitate the commission of the subsequent act, and, therefore, in the words of the law, he abets in the commission of that act.

With regard to the other prisoner, Bedoo, we think that the evidence is conclusive as to the fact of his wounding Takoo in the way stated. It has been argued that it was improbable that such a severe wound should have been inflicted for no sufficient motive. It has been argued also that it was improbable that, if the case were as stated by the witnesses for the prosecution, the wounded man would have given no notice of the affair till six days after its occurrence, and it is also argued (somewhat faintly) that the evidence is sufficient to prove that the wound was self-inflicted.

As to motives, that is a question with which we have nothing to do. The point is whether the evidence supports the case of the Crown. We have not to enquire what motives actuated the prisoner Bedoo in doing what he did, but whether he did it.

As to the self-infliction of the wound, the medical evidence states that the wound was of a formidable and dangerous character, cutting to the bone through the deltoid muscle. The medical officer states that the only way in which this wound could have been self-inflicted would have been by the wounded person using a sharp knife, and moving it backwards and forwards with considerable force till it got down to the bone. That anybody would inflict on himself such a severe wound with such coolness and deliberation simply for the purpose of bolstering up against others a false case, is beyond all reasonable belief. The appeal is rejected.

The 16th September 1869.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure—Case transferred by Magistrate—Section 36, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

The Queen *versus* Mrs. Belilias.

Baboo Umbica Churn Bose for the Prisoners.

Where a case has once been made over by a Magistrate to a Deputy Magistrate for trial, the Magistrate has no jurisdiction to do anything more in the matter so long as the transfer to the Deputy Magistrate is in existence. The Magistrate may withdraw the case under Section 36 of the Code of Criminal Procedure from the files of the Deputy Magistrate.

Glover, J.—The Sessions Judge of Hooghly objects to certain orders passed by the Magistrate as illegal, and requests this Court, under Section 434 of the Code of Criminal Procedure, to reverse that order.

It appears that a charge of theft was preferred to the Magistrate, and the case made over by him to Mr. Deputy Magistrate Godfrey. The Deputy Magistrate, after taking the deposition of the complainant, considered that there ought to be a police-enquiry, and requested the Magistrate to order that enquiry. The Magistrate did so, and the result was an opinion on the part of the Police Superintendent that the charge of theft was false. There was also a recommendation by that officer that the party complaining should be summoned for preferring a false charge. The Magistrate, in his order upon this report, came to no decision on the question of the original complaint, but merely declared that he would not encourage the bringing of charges of "false complaint," but that the

injured person might appear and swear on information, if she chose, under Section 212.

The complainant, a day or two after this, again petitioned, asking that her witnesses might be summoned to prove the charge of theft. She also objected to the police-proceedings as irregular, and asked that the police-report, together with the other papers in the case, might be sent back to the Deputy Magistrate by whom the case was first entertained. On this the Magistrate passed the following order: "This case has been dis-"missed as false, and the accused, Mrs. "Belilias, has received permission to prose-"cute this woman, Shanto Tearnee, for false "charge. The present petition may be put "in in defence in that case."

In the first place, it appears to us that, as the case had once been made over by the Magistrate for trial, the Magistrate's jurisdiction to do anything more in the matter ceased so long as the transfer to the Deputy Magistrate was in existence. If the Magistrate wished to take any further steps in the matter, or to decide the case himself, he ought formally to have withdrawn the case from the Deputy Magistrate's hands under Section 36 of the Criminal Procedure Code. Not having done so, the only person who could deal with the case was the Deputy Magistrate to whom the trial of that case had been referred.

In the next place, we do not find on the record any judicial order on the part of the Magistrate dismissing the plaintiff's charge of theft. It is certainly stated in one part of the record that the case "has been dismissed," but we can find no order on the record to that effect; and, that being so, there seems to be no reason why the complainant should not be permitted to produce her witnesses before the Deputy Magistrate, and to have the case tried on the merits, unless the Deputy Magistrate considers himself justified under the provisions of Section 180 of the Criminal Procedure Code in dismissing the case at once as false after taking the examination of the complainant.

We think, therefore, that the Magistrate's order is wrong in law, and should be quashed, and that the case, as brought by Shanto Tearnee against Mrs. Belilias, should be returned to the Court to which it was originally made over for final disposal.

The 21st September 1869.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Procedure—Recognizance—Evidence.

Criminal Revisional Jurisdiction.

Application under Sections 404 and 405 of the Criminal Procedure Code to revise the proceedings of the Magistrate of Dacca.

Kalikant Roy Chowdhry, *Petitioner.*

Baboo Kalee Mohun Doss for the Petitioner.

Baboo Anund Chunder Ghosal for the Opposite Party.

There must be a regular judicial trial and legal enquiry before an order to forfeit recognizances can be passed, and the evidence taken should be recorded in the presence of the accused, or in the presence of an agent of the accused duly authorized to appear in such enquiry.

Jackson, J.—THIS is an application to this Court to revise the proceedings of the Magistrate of Dacca passed against the applicant, Kally Kant Roy Chowdhry. Both the orders passed by the Magistrate are dated 14th of June 1869. In one of them the applicant was ordered to forfeit his recognizances for 1,000 rupees, which he was ordered to pay, or, on failure, to suffer imprisonment for a period of six months. By the other, he was required to furnish security to the extent of 5,000 rupees to keep the peace for 20 months. The period of 20 months appears from a proceeding of the Sessions Judge to have been since changed to one year.

The Magistrate recorded in his decision the grounds upon which he has passed these

orders. It is enough to say that from that decision it is quite clear that no evidence was recorded in the presence of the accused before those orders were passed upon him.

The accused was called upon to show cause why his recognizance should not be forfeited. He appeared, and did show cause. If the Magistrate still considered that the recognizances should have been forfeited, it was his duty to record the evidence upon which it was proved, that the accused had acted in such a way that it became necessary to forfeit that recognizance for 1,000 rupees. There must be a regular judicial trial and legal enquiry before such punishment can be inflicted. Similarly, it has been lately held by a Full Bench of this Court that, even before recognizances are required from any person from whom a breach of the peace is apprehended, there must be some evidence before the Magistrate that such breach of the peace is likely to occur.

It may be that a defendant may make certain admissions upon which the Magistrate can assume that a breach of the peace is likely to occur, and, in such a case, the Magistrate might act upon such admission. But, where the accused denies the charge, it is incumbent upon the Magistrate to record the legal evidence, proving that he was about to do something which would cause a breach of the peace, before recognizances or security can be taken from him.

In this case the Magistrate has taken certain depositions out of another trial, and has placed those depositions on the record of this trial as evidence against the accused. But they are manifestly no legal evidence against him. They were not taken in his presence, or in the presence of any mooktear duly authorized by him on this trial. The Magistrate states that they were taken in the presence of mooktears employed by the defendant. But they were taken long before the defendant was called upon to answer the charge, and not taken upon this trial. Such deposition, therefore, cannot be any evidence whatever against the accused.

If the defendant has really forfeited his recognizances, the Magistrate must take evidence upon the point, and pass orders upon him. He must proceed in the same way if it is necessary to take further recognizances from the defendant.

The orders now passed by the Magistrate, dated 14th June 1869, are reversed.

The 22nd September 1869.

Present:

The Hon'ble J. P. Norman and F. A. Glover, *Judges.*

Contagious Diseases Act, Act XIV. of 1868.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of the 24-Pergunnahs.

The Queen *versus* Sukhimonee Raur.

The mere possession of a registration ticket under Act XIV. of 1868 does not necessarily make the holder of it a registered public prostitute under that Act, or the rules framed by the Government of Bengal under the Act. The registration must be voluntary, and the mere fact that a woman appears in answer to a summons issued by the police, and answers questions put to her, is not sufficient to bring her within the Act or the rules.

Norman, J.—THE defendant has been convicted under the provisions of the 11th

Section of Act XIV. of 1868 for not having presented herself for medical examination, as required by her registration-ticket and Rule No. 23 made by the Government of Bengal in pursuance of the provisions of Section 10th or 11th of that Act, and sentenced to 15 days' imprisonment, and a fine of 25 rupees, or 15 days' further imprisonment.

The defendant contended before the Deputy Magistrate, Kumar Hurendra Krishna Bahadoor, that she was not a public prostitute, and that she was not duly registered. The Deputy Magistrate considered that he had no power to go into these questions, and that, under the rules made by the Government of Bengal, the Commissioner and Deputy Commissioner of Police are the proper persons to enquire into them.

The case was sent up to this Court by the Judge of the 24-Pergunnahs under Section 434 of the Code of Criminal Procedure. Now, the 11th Section of Act XIV. of 1868 enacts that any *registered woman* disobeying any rule made under this Section shall, on conviction before a Magistrate, be punished with simple imprisonment for a term which may extend to one month, with fine, &c. The question is whether the defendant is a registered woman within the meaning of that Clause.

The 5th Section provides that the Local Government may make rules for the registration of *common prostitutes*, and that every woman *complying with such rules* shall be deemed to be *registered* under that Act, and the registering officer is to furnish her with such evidence of registration, as the Local Government shall from time to time direct. Rule No. 3 provides that, when a woman desires to carry on the business of a common prostitute, she shall present herself at the Police Section in which she resides, and state her name, age, caste or religion, place of birth, residence, *and proximate date when she commenced a life of prostitution, and, in the event of her living in a brothel, she shall further state the name of the owner of the house*, &c. By Rule 4, the Inspector of Police shall, on receipt of this information, forthwith record it in a register (Form A) to be kept up at each Police Section; he shall then fill up the columns of the registration-ticket (Form B), and forward it for signature to the office of the Commissioner of Police. By Rule 5, it shall be the duty of the Commissioner of Police to have *such woman* entered in a general register, &c. The registration-ticket is to be signed by the Commissioner or Deputy Commissioner of Police, and returned to the Inspector, who, after noting the serial number in his register, is to deliver it to the woman to whom it belongs.

The defendant is in possession of a registration-ticket, dated the 7th of May 1869. Except her own admission, there is no evidence to show how she became possessed of it. She says herself: "I did not attend for examination twice a month, as I have not been a prostitute." She says: "I had my name registered at the thannah. The Inspector registered my name. I did not voluntarily register my name at the thannah." In a petition presented by the defendant to the Commissioner of Police on the 9th of August, she says that she is not a common prostitute, but works at Mr. Angelo's factory, and lives under the protection of one Mataoh, who is also employed in the same factory. She says that, in the beginning of May last, she was informed by the police that they had orders to arrest her, and take her to the thannah, if she did not go. She accordingly went, and was asked her name, father's name, &c. By answering which questions she did not know that she was rendering herself liable to registration under Act XIV. of 1868, and certainly never intended to register her-

self as a common prostitute. She says that, on the 3rd of June last, she was served with the registration-ticket of a common prostitute, and the next morning appeared before the Deputy Commissioner with a petition, requesting that her name might be removed from the list; but, in consequence of the delay in serving her with the ticket, her petition was rejected, and she was made to appear before the Deputy Commissioner on the next morning.

It is clear that neither the Act nor the rules empower the police to put women on the register against their will. If a woman carries on the business of a prostitute without having been registered, she incurs the penalty provided by Section 4, and alluded to in Rule 10. Mr. Wingrove's evidence shows that notices were served on women to appear at the thannah. He says: "If any "woman fails to appear at the thannah, she "was to be summoned. No compulsory "measures were adopted against any woman "in my jurisdiction." But he adds what is a matter of more significance: "They were "brought to the thannah by the police-offi-"cer; at least the police accompanied each "woman."

The register was in Court. By reference to it, if kept in proper form, it would have shown whether the woman who appeared and was registered as Sukhimonee Raur, No. 153, stated from what date she commenced a life of prostitution. But the register-book does not appear to have been put in evidence, and this, though the police-authorities knew that, on the day following that on which she says the registration-ticket was served upon her, she had protested by appealing to the Commissioner of Police, and by letter to the Government of Bengal through Mr. Angelo, that she was not a prostitute, and that her name had been improperly placed on the register. If she merely appeared in obedience to a summons or order from the police, and answered questions put to her, without stating or showing that she desired to be registered as a prostitute, the officer had no right under the Act or rules to register her name as such.

The delay in forwarding the registration-ticket from 9th May to the 30th of June is uncontradicted and unexplained. In my opinion, the Magistrate was bound to have tried the question whether the defendant's name was legally placed upon the register; and, as I am satisfied that, on the evidence, there is not any sufficient proof of that which is a necessary ingredient in the offence, I would quash the conviction.

Glover, J.—The only point which has been referred to this Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge is whether or not the Deputy Magistrate was wrong in refusing to adjudicate on the defendant's objection that she was not a duly-registered prostitute in the terms of Act XIV. of 1868.

The Deputy Magistrate considered that, as the woman was in possession of a registry-

ticket, she must be presumed to have been properly registered, and he, therefore, refused to decide on the evidence whether the woman had voluntarily registered herself, or whether she was, in fact, a common prostitute or not.

In this I think he was wrong. The mere possession of a registry-ticket would not necessarily make the holder of it a duly-registered prostitute under the Act, for registration must be voluntary, and this is a condition precedent.

Section 4 of the Act prescribes penalties in case of non-registration, but a woman may, if she pleases, elect to pay those penalties over and over again, and refuse to register herself, and the Act cannot make her do so.

In this case the defence of Sukhimonee Raur was that she did not *voluntarily* register herself, but was compelled to take the registry-ticket, and as corroborative of this declaration she averred that she had no reason to take out a registry-ticket, not being, and never having been, a common prostitute, and she offered evidence to make out her plea.

If Magistrates are not competent by reason of Act XIV. of 1868 to take cognizance of and to determine pleas of this description, the result will be that every woman of a certain class will be at the mercy of the police, and will be called a common prostitute or not, as it suits their will and pleasure. There is nothing in the Act that gives the police this irresponsible power, and their possession of it would be in every respect most objectionable.

I think that Sukhimonee was entitled to prove, if she could, that she had not *voluntarily registered* herself as a common prostitute, and that the Deputy Magistrate ought to have adjudicated on the plea. Her further plea, that she was not a common prostitute at all, could only have been taken in connection with her special defence, for if she were proved to have voluntarily registered herself as a common prostitute, I do not think that she could be allowed afterwards to give evidence that she did not, as a matter of fact, belong to that class, in order to avoid the effects of a previous voluntary registration.

Her remedy in that case would, I suppose, be under Section 21 of the Act. I concur, therefore, so far with Mr. Justice Norman in that I would quash the Deputy Magistrate's conviction. I do not, however, think it necessary to give any opinion on the merits of the case, nor does the Sessions Judge ask it. They ought to be considered and disposed of by the Court below.

The 6th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, F. B. Kemp, A. G. Macpherson, and F. A. Glover, *Judges.*

Compromise—Chapter XV., Penal Code—Section 271, Code of Criminal Procedure.

On a Letter No .100, dated 29th May 1869, from the Officiating Sessions Judge of Jessore to the Registrar of the High Court.

HELD that bribery and other offences punishable under the Indian Penal Code with imprisonment exceeding six months are not triable under Chapter XV. of the Code of Criminal Procedure, and cannot, therefore, be compromised under Section 271 of the latter Code.

THIS was a reference to the Full Bench by a Division Bench consisting of Peacock, C.J., and Loch, J.

Memorandum by Loch, J, dated 26th June 1869.

I REQUEST the Registrar will lay before the Chief Justice the accompanying record of a criminal case, in order to its being submitted for the consideration of a Full Bench, should the Chief Justice think such a course advisable.

The circumstances which have led me to place the case before the Court are as follow: The charge is one of inflicting a severe wound on the head of the complainant's mother, and is brought under Section 325 of the Indian Penal Code. It was, however, entered in the criminal statements for the fourth quarter of 1868, under heading 35, "Hurt, other Cases, Sections 323 and 324," and was disposed of by compromise.

The Judge in the English Department, on examining the quarterly statements, required the Magistrate to explain how this case had been admitted to compromise, as the punishment assigned to offences under Sections 323 and 324 was imprisonment for a period exceeding six months; and, in reply, he referred to a case disposed of by a Division Bench of the Court of the 15th January 1866 (Jackson and Glover, JJ.*), in which it was held that a case of bribery is triable under Chapter XV. of the Code of Procedure, and is therefore withdrawable.

*5 W. R., Crim., 4.

Chapter XV. of the Criminal Procedure Code is headed: "Of cases triable by the Magistrate in which a summons on complaint shall ordinarily issue." Section 257, which is the first Section in the Chapter, sets forth: "Whenever a complaint is made before a Magistrate having jurisdiction in the case that any person has committed or is suspected to have committed any offence triable by such Magistrate, and punishable, under the Indian Penal Code, with imprisonment for a period not exceeding six months, it shall be lawful for such Magistrate to issue his summons directed to such person," &c., &c.; and Section 271 of the same Chapter provides that: "If a complainant, at any time before a final order is passed in any case under this Chapter, shall satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit such complainant to withdraw such complaint."

It is clear, therefore, by what is recited in Section 257, that only those offences which are punishable with imprisonment for a period not exceeding six months fall within the scope of this Chapter; that, though, according to the schedule annexed to the Code of Criminal Procedure, a summons is the first process issued in regard to other offences punishable with imprisonment for a longer period than six months, they do not fall within Chapter XV., but such process is issued under the provisions of Chapter IV., and is permitted in the majority of bailable offences, though they do not come under complaints brought under Chapter XV. It appears to me, therefore, that the ruling of the learned Judges who passed the decision of 15th January 1866 (reported in Vol. V., W. R., page 4) is not correct; for, if it be, then all cases in which a summons is issued as the first process, whether the punishment for the offence charged be punishable with imprisonment for a period above or below six months, would be open to withdrawal under the provisions of Section 271, which is the only Section in the law which treats of withdrawals, but limits the privilege to cases coming under the 15th Chapter of the Criminal Procedure Code.

Peacock, C. J.—I concur. Let this case be referred to a Full Bench.

The judgment of the Full Bench was delivered as follows by

Peacock, C. J.—We are of opinion that offences punishable under the Indian Penal Code with imprisonment exceeding six months are not triable under Chapter XV. of

the Code of Criminal Procedure; and consequently that such cases do not fall within the provisions of Section 271 of that Code. We do not think that we can add anything to what has been stated by Mr. Justice Loch in his memorandum, dated the 26th of June 1869.

The 13th September 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, F. B. Kemp, A. G. Macpherson, and F. A. Glover, *Judges*.

Procedure—Breach of the peace—Security-bond—Onus probandi—Section 282, Code of Criminal Procedure.

(Criminal Revisional Jurisdiction.)

A. D. Dunne *versus* Hem Chunder Chowdhry and another.

Beharee Lall Brojobassee *versus* Daurick Mozoomdar.

HELD (*Glover, J., dissenting*) that, on the appearance of a party summoned under Section 282 of the Code of Criminal Procedure, it is incumbent on the Magistrate, before taking a bond from him for the preservation of the peace, to adjudicate judicially on evidence given before him as to the necessity for taking security. The *onus* in such case is on the party on whose complaint the summons was issued.

Referring order in the first case.

THE Judges of the second Bench (Loch and Glover, *JJ.*) having been divided on the following question, it was referred by Loch, J., for the opinion of the Full Bench.

A Divisional Bench* decided that, on the appearance of a party summoned under Section 282 of the Code of Criminal Procedure to show cause why he should not enter into a bond to keep the peace, the Magistrate cannot make the order that defendant shall enter into the bond until he has adjudicated judicially, upon evidence properly given that he is satisfied that it is necessary for the preservation of the peace to take such bond from the defendant.

* Phear and Hobhouse, *JJ.*—Case of Nursing Narain, page 1, Vol. X., W. R.

In the case of Maghun Misser *versus* Chummun Telee,* referred to the Court under Section 434 of the Code of Criminal Procedure, Mr. Justice Loch thought that the above course should be followed; Mr. Justice Glover held that it was not incumbent on a Magistrate, on the appearance of the person summoned, to adjudicate judicially as to the necessity for taking security on evidence given before him.

* Dated 14th September 1868, Loch and Glover, JJ.—page 46, Vol. X., W. R.

Referring order in the second case.

L. S. Jackson and *Markby*, *JJ.*—As there appears to be a difference in the construction put upon Sections 282, 287, and 288 of the Code of Criminal Procedure by Mr. Justice Glover and Mr. Justice Hobhouse in the case of Tarinee Kant Lahoory Chowdhry (8 Weekly Reporter, Criminal, page 79), and by Mr. Justice Phear and Mr. Justice Hobhouse in the case of Nursing Narain (10 Weekly Reporter, Criminal, page 1), we refer the following question, which turns upon the construction of those Sections, to the consideration of the Full Bench:—

Whether, when a Magistrate has issued a summons upon credible information under Section 282, calling upon a party to show cause why he should not be required to enter into a bond to keep the peace, he may, upon the party appearing and failing to satisfy the Magistrate that there was no occasion to bind him over, without taking further evidence, act upon his previous information, and make an order under Section 288.

The judgments of the Full Bench were delivered as follow:—

Glover, J.—This reference involves the consideration of two somewhat different questions.

The *first* (referred by Mr. Justice Loch) is "whether, when a party is summoned to "show cause, under Section 282 of the Code "of Criminal Procedure, why he should not "be called upon to enter into recognizances "to keep the peace, the Magistrate can make "an order directing him to enter into the "bond, until he has adjudicated judicially, "*upon evidence properly given*, that he is "satisfied that it is necessary for the pre-"servation of the peace to take such bond."

The *second* (referred by Jackson and Markby, J.J.) is "whether, when a Magis-" trate has issued a summons upon credible " information under Section 282, calling " upon a party to show cause why he should " not be required to enter into a bond to " keep the peace, he may, *upon the party* " *appearing and failing to satisfy the Ma-* " *gistrate* that there was no occasion to " bind him over, *without taking further* " *evidence, act* upon his previous informa-" tion, and make an order under Section " 288."

I am of opinion (an opinion come to with much diffidence, for it is, I understand, opposed to that of my Hon'ble colleagues) that the Magistrate can make such an order, that is, that he can call upon a defendant to enter into a bond to keep the peace, *without recording evidence* in support of the charge in the defendant's presence. I do not contend that the Magistrate need not "adjudicate judicially," nor does my opinion in the case of Tarinee Kant Lahoree (8 Weekly Reporter, p. 79)—an opinion the propriety of which is called in question by this reference—go to that length. On the contrary, I think that the Magistrate's action would, in all cases, amount substantially to a judicial adjudication, even though no evidence were recorded by him at the time of coming to such adjudication. He would adjudicate, that is, on the "credible information," on the strength of which he had already summoned the defendant to show cause.

I understand Chapter 18 of the Code of Criminal Procedure to give Magistrates exceptional powers for exceptional purposes requiring, from their very nature, to be carried out promptly without the delays that accompany the ordinary forms of procedure, and on this ground to sanction some departure from the ordinary rules of evidence; and I can find nothing in this Chapter, either directly or by implication, that makes it incumbent on a Magistrate to record the evidence on which he intends to proceed in the presence of the party accused, or to do more than state the grounds on which the accused has been summoned, and to declare judicially that those grounds are sufficient to put the accused on his defence. The defendant already knows the case he has to answer, for the summons under Section 283 would have set forth the substance of the credible information on which the Magistrate was prepared to act.

Section 282 says: "Whenever a Magis-" trate shall receive 'credible information' " that any person is likely to commit a " breach of the peace, he may summon " that person to show cause why he should " not be required to enter into a bond to " keep the peace." The accused, that is, is not summoned until the Magistrate has come to an *ex-parte* decision, on "credible information," that he is a person who ought to be put upon his defence, and to show cause why he should not enter into recognizances. The *onus* appears to be laid wholly upon him. The Magistrate is not to show cause why he has summoned him, but the defendant is to show cause why he should not be declared a person likely to commit a breach of the peace.

I cannot find any Section in Chapter 18 which directs a Magistrate to take evidence in the usual way in support of the information when disposing of charges of this description. Section 287, no doubt, supposes a case where the Magistrate shall not be satisfied that there is occasion to bind over a defendant, but I understand this to refer to the whole proceedings, and not only to evidence supposed to have been taken on the part of the Crown. I understand it to apply to cases where the credible information on which the Magistrate acted has been invalidated by the accused showing that it is not so credible as it at first appeared, or where it had been directly rebutted by evidence still more credible.

In support of my view, I would instance the case of a party the period of whose security-bond has been extended under Section 290. It seems to me clear that, in such cases at least, the accused is ordered to give security for such further period as the Court of Session thinks fit (not exceeding one year) without being allowed to have a voice in the matter, and yet it might very well be that the accused might, during the first year for which security had been taken, have seen the folly of his ways, and have determined to keep the peace for the future. But, in such cases, the Magistrate first, and the Sessions Judge afterwards, act, not upon evidence (unless they choose to take it), but simply upon their own impressions, not even supported by "credible information," that a further security-bond is necessary, and the accused has to give that bond or go to jail. He is not called upon to show cause, nor is he given any opportunity of showing that the Magistrate's "impressions" were erro-

neous. Now, if a party called upon to show cause under Section 282 is entitled to have evidence on which the Magistrate proposes to act recorded before him, why should not the party under Section 290 have the same privilege? And yet it is clear that he has not.

Again, if no security-bond can be taken without evidence for the Crown being recorded in the presence of the party summoned, what would be the procedure in cases where the information on which the Magistrate acts consists of a report of a Subordinate Magistrate, or of a police-officer, both of which reports have been declared by this Court to be "credible information" under the Section? Is the police-officer to be summoned to swear to the truth of his reports, and would the accused have the right to insist upon all the persons through whom the police-officer derived his information being sent for and their evidence recorded before him? The police-officer might be, and frequently would be, 50 miles away, and, whilst he and the witnesses were coming, the breach of the peace might take place. The Subordinate Magistrate's report also—must that be supported by independent testimony, and must that officer prove by witnesses the way in which he got his information?

Suppose, again, a not unfrequent case, the case where a Magistrate derives his "credible information" from his own sense of sight. He sees himself circumstances which give him an assured impression that such and such a person is likely to commit a breach of the peace: is he to give evidence of his belief?

Another reason—though I admit a slight one—for supposing that the recording of evidence is not necessary under Chapter 18, is to be found in the wording of Section 307, which says that *any* evidence taken under Chapter 18 is to be recorded in the usual way (Section 267). The word "any" seems to suppose cases under that Chapter where there would be no evidence recorded at all.

I admit that, if the opinion I have expressed above be correct, a Magistrate under this section would act without the observance of the ordinary procedure, but his powers under Chapter 18 have always seemed to me to be purposely exceptional, and after all they do not involve a very great relaxation of the rules of evidence.

I think that both questions submitted to the Full Bench should be answered in the affirmative.

Peacock, C. J.—It appears to me that substantially there is only one question before us, *viz.*, whether, when a Magistrate has issued a summons upon credible information under Section 282, calling upon a party to show cause why he should not be required to enter into a bond to keep the peace, he may, upon the party's appearing and failing to satisfy him that there was no occasion to bind him over, act upon his previous information, and make an order under Section 288, without taking further evidence. That is the question which is propounded by Mr. Justice L. S. Jackson and Mr. Justice Markby. The question raised by Mr. Justice Loch and Mr. Justice Glover appears to me to involve the same point.

It has been decided by a Division Bench, consisting of Mr. Justice Phear and Mr. Justice Hobhouse, that a Magistrate cannot order a defendant to enter into such a bond until he has adjudicated judicially upon evidence properly taken before him. Mr. Justice Loch in the case referred by him, and Mr. Justice Glover, thought that the decision of Mr. Justice Phear and Mr. Justice Hobhouse was correct. Mr. Justice Glover, however, was of a contrary opinion. No precise question has been referred to us by Mr. Justice Loch and Mr. Justice Glover, and the only question which it appears to me we have to answer is that which I have stated. That question, I think, must be answered in the negative.

Section 282 enacts that "it shall be lawful for the Magistrate of the district or other officer exercising the powers of a Magistrate, whenever he shall receive credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace, with or without sureties, as such Magistrate shall think fit."

I understand my Hon'ble colleague, Mr. Justice Glover, to say that a report of a police-officer would be sufficient credible information to authorize a Magistrate to call

on a person to show cause why he should not enter into a security-bond. The question is not whether that would be sufficient information to justify the Magistrate in calling upon the person to show cause; but whether it would be sufficient without further evidence to justify the Magistrate in adjudicating upon the case, and ordering the party to give security.

Section 285 points out what is to be done if the person summoned to show cause does not attend. It enables the Magistrate to issue a warrant for such person's arrest; and it further provides that, if it appears to a Magistrate, upon the report of a police-officer, or upon other credible information (the substance of which report or information must be recorded), that there is just reason to fear the commission of a breach of the peace which may probably be prevented by the immediate arrest of any person, it shall be lawful for the Magistrate at any time to issue a warrant for the arrest of such person.

Section 287 provides that, if upon the appearance of the person or of his agent, if he is permitted to appear by agent, the Magistrate shall not be satisfied that there is occasion to bind such person to keep the peace, he shall direct his discharge.

Now, it appears to me that the meaning of this Act was that, when the person summoned appears, the Magistrate is to proceed judicially, and that he is not to be satisfied without evidence that there is occasion to bind him over. He is not to take the report of a police-officer upon which he may have issued the summons as evidence when he adjudicates upon the case. If no evidence is given upon the subject when the person summoned appears, the Magistrate cannot, under Section 287, be judicially satisfied that there is occasion to bind him over, but is bound to order his discharge.

My Hon'ble colleague, Mr. Justice Glover, has put the case of a Magistrate's having issued a summons on the report of a police-officer, and he says that the police-officer may be 50 miles away when the case comes on. But it would be contrary to every principle of natural justice to adjudicate and order a man to enter into a bond to keep the peace on the mere report of a police-officer, who, when the case comes on to be adjudicated, is 50 miles away, and cannot be cross-examined by the party called on to give the security. It is not always sufficient for the person summoned to enter into his own recognizance; but he is bound, if the Magistrate requires him, to find sureties; and, if he disobeys the order of the Magistrate, he may be committed to jail, and may be detained there in custody for a year, unless in the meantime he complies with the order. Thus, according to my Hon'ble colleague's view of the case, a European or other person may be called on to give a bond to keep the peace, and find sureties, upon the mere report of a police-officer, without any further evidence, although the police-officer on whose report the summons to show cause was issued may be 50 miles away. If that view is correct, a Magistrate may act upon a report made behind the back of the accused by a person who fails to come forward and submit himself for cross-examination. A person may not always be able to find security. The sureties, if they become bound, or if their bonds are forfeited, are liable to be sent to the Civil Jail for six months unless they pay the amount.

It appears to me that, before a person can be called on to give a bond to keep the peace, the Magistrate must adjudicate on the question as to whether there is reasonable ground for believing that he is likely to commit a breach of the peace, and that he must adjudicate on that point in the way in which he must adjudicate in all other cases—after taking evidence in the presence of the person charged, and giving him an opportunity to cross-examine the witnesses. It appears to me that it would be most unreasonable to suppose that the Legislature could have intended to allow a man to be sent to jail for a year for not finding sureties, merely on the report of a police-officer. If sent to jail for one year for not finding sureties, he may be kept in jail for a further year after the Magistrate has submitted a report to the Sessions Judge.

My Hon'ble colleague has referred to Section 307, which says that "any evidence taken under Chapter XVIII. or this Chapter shall be taken in the manner prescribed by Section 267, subject to the provision contained in Section 268 of this Act."

My Hon'ble colleague seems to think that an argument may be adduced from this Section, in which the words "any evidence" are used, to show that the Legislature intended that the Magistrate might, if he pleases, in cases falling within Chapter 18 or Chapter 19, act without any evidence; but, when we come to look at those Sections, I think it is very clear what

was intended. Under Section 265, "if the accused person" (that is, on a trial of an offence) "admit the truth of the complaint, and show no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly." So, in a case under Chapter 18, if the party accused comes in and admits that he is going to commit a breach of the peace, and so admits the charge, there would be no necessity for calling for evidence. It appears to me that the Legislature never could have intended that a man should be imprisoned for a year, and probably for two years, simply on the report of a police-officer who may be absent when the man appears to answer the summons.

The question, as propounded by Mr. Justice Louis Jackson and Mr. Justice Markby, may possibly raise the question as to whether the *onus* is upon the person called on to show cause, or upon the person who calls upon him to show cause to enter into a bond to keep the peace. It is quite clear that the *onus* lies on the person who calls upon the party to show cause, to prove the affirmative.

Section 287 says that, if, on the appearance of the person, the Magistrate shall not be satisfied that there is occasion to bind him to keep the peace, he shall direct his discharge. What is the meaning of the words "if the Magistrate shall not be satisfied"? The meaning is, if he shall not be satisfied by evidence given in the ordinary way. He is not to be satisfied by any idle gossip which he may have heard, nor by the mere report of a police-officer, but by evidence taken judicially before him in the presence of the person summoned, who must have an opportunity given him of cross-examining the witnesses adduced by those on whose complaint the charge against him is brought forward.

Bayley, Kemp, and Macpherson, JJ., concurred with the Chief Justice.

The 1st October 1869.

Present:

The Hon'ble J. P. Norman and F. B. Kemp, *Judges.*

Procedure—Insult to public servant—Section 228, Penal Code.

Criminal Appellate Jurisdiction.

Prokash Chunder Dass, *Petitioner.*

Baboo Gopal Lall Mitter for the Petitioner.

In a conviction under Section 228 of the Penal Code, it ought to be stated that the Judge was sitting in a stage of a judicial proceeding, the nature of which should also be stated.

Norman, J.—THERE is no ground whatever for interfering in this case. It appears that Prokash Chunder Dass, a Mooktear, attending in the Moonsiff's Court in Sylhet, on the 10th of August, went to the serishtah of that Court to get a copy of a decree which had been passed by the Moonsiff for money due from Prokash Chunder on a bond, and in the presence of the amlah he made use of some expressions reflecting on the Moonsiff. The amlah reported what had taken place to the Moonsiff. The Moonsiff sent for him, and asked him if it was true that he had made use of those expressions. He said he had, and that he knew that, when Bharut Churn managed the case, it would be decreed against him, and that the Moonsiff, in writing down the deposition of the witnesses, had shown partiality to the plaintiff. The Moonsiff ordered him to be detained, recording his statement under Section 163 of the Code of Criminal Procedure, and adjudged him to pay a fine of 200 rupees, or to be imprisoned in the civil jail for one month unless the fine was sooner paid. From that decision Prokash Chunder appealed to the Judge, who, after carefully inquiring into the facts of the case, expressed his opinion that he had been properly punished for the contempt, and that the fine was not too large.

Prokash Chunder now applies to us by his Vakeel, and contends that the case does not fall under the provisions of the 163rd Section of the Code of Criminal Procedure, and consequently that the Moonsiff had no jurisdiction to inflict the fine and sentence the complainant to imprisonment under that Section. The question turns upon this, whether the offence committed by the prisoner is such an offence as is described in Section 228 of the Indian Penal Code. No doubt,

the conviction does not state as clearly as it should have done that the Moonsiff was sitting in a stage of a judicial proceeding. The conviction ought to have stated that the Moonsiff was sitting in a stage of a judicial proceeding, and what the proceeding was in which he was so sitting. The conviction states that he was sitting in Court, and from the conviction and from the finding of the Judge one must take it that he was sitting in Court transacting the ordinary business of the Court. Prokash Chunder himself was the defendant in the suit on the bond, and the decree of which he was applying for a copy was a decree against himself. While making that application, he made use of improper language in the serishtah. It seems to me that it may be fairly considered that the Moonsiff, in sending for him and questioning him as to his improper conduct, was sitting in a proceeding connected with the suit in which Prokash Chunder was the defendant. It was a matter arising out of and connected with Prokash Chunder's application for a copy of the decree. Therefore, it probably may well be said that the Moonsiff, who sent for him with reference to his conduct in the serishtah, was then sitting in a stage of a judicial proceeding connected with that very suit. We do not feel called upon to interfere with a conviction which is apparently correct, even if it is not quite so precise in form as it should be; and, as for the punishment awarded, I think it was abundantly deserved.

Kemp, J.—I am of the same opinion. I think it necessary and proper that judicial officers of all Courts should be protected from insult in the discharge of their duty. At the same time, I would point out to the Moonsiff through the Judge that he brought the insult upon himself by his own act. The remarks derogatory to the Moonsiff were made in the Court's serishtah, and not in the presence of the Moonsiff, and one of the amlahs appears to have reported the circumstance to the Moonsiff. I think it would have been more dignified if the Moonsiff had not taken any notice of what happened in the serishtah, the remarks not having been made in his own presence; but, as he thought proper to send for the Mooktear and to question him on the subject, and the Mooktear not only repeated the insulting remarks made by him in the serishtah, but added further insulting remarks in the presence of the Moonsiff, I think the Moonsiff was justified in fining the Mooktear. I therefore concur with Mr. Justice Norman in rejecting this application.

The 4th October 1869.

Present:

The Hon'ble J. P. Norman and F. B. Kemp, *Judges.*

Charge—Acquittal—Discharge—Committal—Sections 250, 251, and 255 of Act XXV. of 1861—Section 435, Act VIII. of 1869.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Midnapore.

The Queen *versus* Goburdhun Bera.

HELD that, where a Magistrate released an accused person without drawing up a formal charge against him, or requiring him to plead or to make any defence to the charge under Section 251 of the Criminal Procedure Code, there was no trial before the Magistrate or acquittal under Section 255, but simply a discharge under Section 250. The Sessions Judge is competent in such a case, under Section 435, Act VIII. of 1869, to direct the committal of the accused.

Norman, J.—THIS case is referred to this Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Midnapore.

It appears that Juggobundhoo Mytee, the servant of Obhoynarain Bhooyah Doss Mohapattur, sent a sloop loaded with a cargo of 1,000 maunds of paddy from Balasore to Calcutta. The sloop, with which were two small *dinghis*, and the cargo, were in charge of Goburdhun Bera, Manja Pudda Lochun, Bera Dharee, and Shobba Doss Chundur. The sloop was wrecked in a storm on the Rangafulla Sands, and a considerable portion of the paddy floated out. The wreck of the sloop, with the boats and the paddy which remained, was sold by the persons above named to one Rajnarain.

The Deputy Magistrate of Contai, Moonshee Dubeerooddeen Ahmed, after taking the evidence of the complainant and certain witnesses, called the complainant, and examining the accused, for reasons which we concur with the Judge in thinking wholly insufficient, discharged the accused persons.

On looking through the papers in the record, it appears that, though the nature of the charge was explained to the accused, no formal charge in writing was drawn up against the accused persons in the manner required by the 250th Section of the Code of Criminal Procedure. They were not required to plead guilty or not guilty, or to make their defence to any charge, as

required by the 251st Section. They were not *tried* by the Magistrate on any such charge, and, therefore, the order for their release by the Magistrate does not amount to an acquittal under the 225th Section, but simply to a discharge under the 205th Section.

Under such circumstances, it appears to us that the Sessions Judge is competent, under the power vested in him by Section 435 of Act VIII. of 1869, by which Section 435 of the Code of Criminal Procedure is amended, to direct the committal of such of the accused as he may think ought to be tried, notwithstanding that they have been discharged, as to which he must exercise his own judgment.

With these observations we send back the case for disposal to the Judge.

The 8th October 1869.

Present :

The Hon'ble J. P. Norman and F. B. Kemp, *Judges.*

False evidence.

Criminal Revisional Jurisdiction.

The Queen *versus* Kola.

In a case of giving false evidence by making contradictory statements, one of which the accused knew to be false, it is not sufficient to support the falseness of either story by the other deposition, but there must be *independent* evidence of the falseness of either story.

Norman, J.—THIS was a case sent for by this Court under Section 403 on a revision of the abstract statement. The prisoner was convicted by Jury, at a trial held before the Judicial Commissioner of Assam, of the offence of giving false evidence either on the 12th of May, by stating before the Deputy Commissioner of Nowgong on solemn affirmation, "Both houses had evidently been "set fire to by means of lighted rags which "had been thrust into the thatch; we found "these rags in the thatch of both houses;" or by stating, on the 22nd of June, before the Court of Session, "After the fires were put "out, we found on the ground amongst the "fallen straw some burnt rags; these rags "were found on the ground at both houses; "it was not daylight at the time, and, one "Bhoobun Borah having brought a light, we "made search, and found the rags;" and, the statements being opposed to each other, he knew one of them to be false. The only evidence of the falseness of either story is the other deposition. In that before the Judicial Commissioner, the prisoner had said: "We "threw water on the roof, and pulled out the "straw, and so put out the fire."

No witness would be safe if conviction on supposed contradictions such as those now before us could be allowed to stand. To describe the finding of the burnt rags amongst the straw which had formed the thatch which had been pulled off from the roof of a burning house as "finding the rags in the thatch" is hardly even an inaccurate expression. It is clear that neither the Judge nor the Jury had any right to assume that, if the prisoner had been asked to explain before the Assistant Commissioner the time and manner of his finding the burnt rags in the thatch, he would not have given an explanation which would have been entirely consistent with the statement before the Judge.

In our opinion, there is no evidence to support the conviction, which must be quashed, and the prisoner released.

The 27th October 1869.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Disputes about land—Nuisances—Section 62, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Magistrate of Moorshedabad.

Rajbullub Addhya *versus* Gobindo Chunder Moitro and others.

Section 62 of the Code of Criminal Procedure does not apply to disputes connected with lands, but refers specially to nuisances and other similar matters in which immediate action is necessary in order to avoid the risk of illegal consequences.

Reference.—To the extreme north of the Khugra Bazar in Berhanpore is a bridge, through which, when the River Bhagirutty is full, the river flows, and enters the old channel of the river, and overflows the neighbouring lands. In this place are situate the claims of the parties to this suit. It is the object of one party to bund up the water to prevent its spoiling the rice-crops; it is the object of the other party to allow the water

to pass freely in order to enjoy a fishery he holds there. In 1866 an order was passed by Deputy Magistrate Brijo Lall Chowdry under Section 320, allowing the bund to be opened on the 7th August; and, on the 15th August of the following year, there is another order of the Joint Magistrate enjoining Rajbullub not to open the bund until 4th September.

The Joint Magistrate, acting on a petition of Gobindo Chunder Moitro's ryots, has proceeded under Sections 62 and 309 of the Criminal Procedure Code, and enjoined Rajbullub, the other party to the suit, to abstain from opening the bund. I consider the Joint Magistrate was in error in proceeding under the afore-mentioned Sections, first because they are inapplicable to the dispute in point, having special reference to nuisances. The Joint Magistrate should have proceeded, if he could act at all, under Section 320, but, inasmuch as the matter in dispute has been already adjudicated upon, and the order not having been reversed by the Civil Court was still in force, it was only competent to the Joint Magistrate to take measures to prevent a breach of the peace, and not to issue any new order on the subject.

Since the Joint Magistrate's order, the river has broken through the bund, and, therefore, the object of appellant is to get the order reversed, not for the present, but for next year.

The order of the Joint Magistrate being illegal should be set aside, the effect of which order would be to leave the order of the Deputy Magistrate referred to in force. This order is, in my opinion, also bad, inasmuch as a specific date for opening the bund owing to the differences of seasons cannot in justice be fixed without the contingency of inflicting injury on the party owning the crops. I consider that all the orders should be set aside, and a fresh order passed under Section 320, leaving the injured party to his redress in the Civil Court.

The explanation of the Joint Magistrate is submitted, with reference to which it is only necessary to remark that, if I am right in assuming that an order passed under Section 62 cannot set aside an order passed under Section 320, the fact of such an order having been issued by Mr. Joint Magistrate Kelly on the 13th August 1867 could not legalize the order now appealed against, and both orders would be equally illegal, although no appeal was preferred to the former order. The decision of the Civil Court apparently did not set aside the order passed under Section 320, as it merely dismissed a claim that the bund might always remain open.

Judgment of the High Court.

Glover, J.—We think that the Magistrate has come to a correct judgment in this case, and that the decision of the Joint Magistrate ought to be set aside.

The orders passed by the Deputy Magistrate and Joint Magistrate respectively, in 1866 and 1869, had reference only to those particular years, and were influenced doubtless by circumstances. They were not intended, as it seems to us, to apply to other years, or to have any reference to what might, from a difference of seasons, be a very altered state of affairs. Nor did the decision of the Civil Court settle anything more than that the bund could not always be left open under all circumstances. It left matters regarding subsequent years to be dealt with as they arose, the object, no doubt, being to avoid passing a prospective order which might be inapplicable to the position, and by which much injury might be done to one or other of the parties.

It appears to us that the former orders passed between the contending parties on the

subject of the bund are not now in force, and that (no order of the Civil Court having decided the question of title) there is no reason why the case should not again be brought under Section 320, Code of Criminal Procedure, should the Joint Magistrate consider that there are sufficient grounds for proceeding.

Section 62 does not apply to cases of this description, but refers specially to nuisances and other similar matters in which immediate action is necessary in order to avoid the risk of illegal consequences. In this case, it appears that the river had carried away the bund altogether, and that, therefore, there is no immediate danger of any such contingency as is mentioned in the latter part of the Section.

The 28th October 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Whipping—Act VI. of 1864.

Criminal Appellate Jurisdiction.

The Queen *versus* Udoy Putnaick and others.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dacoity.

A sentence of whipping under Section 4, Act VI. of 1864, can only be inflicted in addition to other punishment on a second conviction of the offences specified therein, when the first offence was committed some time previous to the second conviction, though after the passing of the Indian Penal Code.

Glover, J.—We have gone through the papers in this case, and see no reason to differ from the conclusion arrived at by the Sessions Judge as to the guilt of all the prisoners.

With reference, however, to the sentence of whipping inflicted on the prisoners Udoy and Khettro, in addition to that of imprisonment, under Section 4, Act VI. of 1864, we think that the Sessions Judge's order cannot be sustained.

No doubt, both these prisoners had been previously convicted of dacoity, but these convictions took place at the same Sessions, and one day only before the present sentences were passed, and we understand the meaning of the law to be that a sentence of whipping can only be inflicted in addition to other punishment on second convictions of the offences specified in Section 4 of the Act, which have taken place at some time previous, although after the passing of the Indian Penal Code.

The object of the law we take to be that, when a person, notwithstanding a previous conviction of dacoity and consequent punishment, and after having a locus pænitentiæ afforded him, again after completing a previous sentence commits the same offence, he shall be liable to whipping in addition to any sentence of imprisonment awarded. He has, that is to say, been undeterred by imprisonment, and, therefore, may be punished on the second occasion with stripes in addition.

In a case like the present, the prisoners have had no opportunity of showing what effect a sentence of imprisonment could have had upon them, inasmuch as the two convictions took place at one and the same time, and the two sentences were to commence one after the other.

With this alteration we confirm the sentence passed by the Sessions Judge, and reject the appeals of all the prisoners.

The 23rd November 1869.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Culpable homicide—Murder.

Criminal Appellate Jurisdiction.

The Queen *versus* Yasin Sheik.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of culpable homicide not amounting to murder.

To take the offence of homicide out of the category of murder by reason of grave and sudden provocation, the act must be done whilst the person doing it is deprived of self-control by the grave and sudden provocation.

Loch, J.—We have read the evidence in this case, and see no reason whatever to doubt the fact that the deceased met his death at the hands of Yasin.

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As the Sessions Judge and Assessors have acquitted the prisoner of murder, this Court cannot interfere, but we think it necessary to point out to the Sessions Judge that, to take the offence of homicide out of the category of murder by reason of grave and sudden provocation, the act must be done whilst the person doing it is deprived of self-control by the grave and sudden provocation; and, if Yasin had killed the deceased when he found him with his (prisoner's) wife, the offence would have been culpable homicide not amounting to murder; but, after beating the deceased, it is proved that the prisoner carried him off still alive and groaning, and, on arriving at the banks of the river, cut off his head, throwing afterwards head and trunk into the river. This was done after the first excitement had passed away, after the prisoner had time to cool, and to know the precise consequences of his acts. In a word, the act was not done under the immediate influence of the excitement. There was time for the prisoner's passion to subside, and the offence committed was, therefore, murder.

The 26th November 1869.

Present:

The Hon'ble J. P. Norman and F. B. Kemp, *Judges.*

Procedure—False evidence—Contradictory statements—Commitment—Court of Session—Section 172, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

The Queen *versus* Nomal.

In a case of giving false evidence by making contradictory statements, a Court of Session cannot, without making further enquiry, commit a person for trial under Section 172 of the Code of Criminal Procedure, when both contradictory statements are not made before it. By the words "under its own cognizance" in that Section it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him.

Norman, J.—This is one of four cases sent for by myself and Mr. Justice E. Jackson under Section 403, on a review of the abstract statements of cases tried before the Court of Session by the Officiating Judicial Commissioner of Assam. The prisoners are all convicted for giving false evidence on alternative charges based on supposed contradictions.

In two cases the prisoners have been already released, there being, in our opinion, no ground for saying that there were any real contradictions between the two depositions.

In the present case the prisoner has been tried and convicted by the verdict of a Jury of giving false evidence either before the Assistant Commissioner of Nowgong in a preliminary enquiry at a Court of Session before the Officiating Judicial Commissioner, stating on solemn affirmation that, "just before "we saw a light outside, and went out to "see what it was; we then saw the complain-"ant's brother's house was on fire, and by the "light of that fire we saw a man named "Tahiram putting his hand into the roof of "Lebas's house, which is close to complain-"ant's. When I saw accused putting his hand "into the roof of Lebas's house, I saw there "was something in his hand which was "smoking. The fire broke out in Lebas's "house almost immediately afterwards;" or, as specified in the second head of the charge, namely, that he, on or about the 22nd of June 1869, intentionally gave false evidence at Nowgong before the Court of Session in a stage of a judicial proceeding at the trial of a case, by stating on solemn affirmation that, "when I first came out and saw the fire "through the light of the flame, I saw the "accused at the dung-shed," and that, the said statements being opposed to each other, he knew one of them to be false. The prisoner was sentenced to two years' rigorous imprisonment.

The evidence against the prisoner consisted solely of the two depositions which are supposed to be contradictory.

In both these depositions he charges, or means to charge, Tahiram with having set fire to the houses of Kaminohola and Lebas; and, of course, the really important question was whether the charge made by him in those two depositions against Tahiram was false. If, in making a charge which is in substance true, a witness, in giving accounts at different times of what he saw, makes contradictory statements, such contradiction is not *per se* proof that the witness is intentionally giving false evidence.

The Judicial Commissioner, assuming to act under the powers conferred on Courts of

Session by the 172nd Section of the Code of Criminal Procedure, on the same day on which the prisoner had given evidence against Tahiram, charged, and then and there forthwith tried, the prisoner on two charges, one of having given false evidence before the Deputy Commissioner, and the other of having given false evidence before himself.

By Section 359 it is provided that, except in the cases referred to in Section 172, a Court of Session, as a Court of Original Criminal Jurisdiction, shall not take cognizance of any offence, but upon a charge preferred by a Magistrate or other officer empowered to make commitments to such Court.

The 172nd Section empowers a Court of Session to charge a person for an offence committed before it, or under its own cognizance. As I understand the expression "under its own cognizance," it is meant to provide for a case where it is brought under the notice of the Court of Session in the course of a judicial proceeding that the crime with which the party is to be charged has been committed by him. If, on a trial of a prisoner before a Court of Session, a witness gives evidence which contradicts that given by the same witness before the committing officer, and there is no evidence whatever to show which statement is true, it appears to me that it cannot be said to be *within or under the cognizance of the Sessions Judge* that the witness has given false evidence before the committing officer. What is brought under the cognizance of the Judge is that the witness *may have given* false evidence before the committing officer. It appears to me that, without further inquiry, the case is not ripe for commitment.

To apply a simple test. If the Judge in making out a commitment of the prisoner for trial before himself on a charge of giving false evidence before the Assistant Commissioner had attempted to recite the facts which are necessary to give him jurisdiction, he could not have written that it had come *under his cognizance* that the prisoner has committed an offence punishable under Section 193 of the Indian Penal Code by giving false evidence in the Court of the Assistant Commissioner, and, therefore, he would at once have been stopped if he had attempted to draw out a commitment on such a charge. I did not fully explain my views on this subject in the Queen *versus* Motee Khowa, 12 W. R., page 31.

The Judicial Commissioner put the prisoner on his trial on the same day on which he had given evidence in the case against Tahiram. This seems to have been undue haste. I fear that the Judicial Commissioner did not give himself time for reflection, or the prisoner a fair opportunity to prepare his defence. Though the substantial question was whether the prisoner saw Tahiram set fire to the houses or not, the Judicial Commissioner did not examine Tahiram or any other witness to show that the charge was false. There is not on the record any contradiction of the prisoner's statement that Tahiram did set fire to the houses. If the prisoner saw Tahiram set fire to the houses, his story is in the main true, and neither the Judge nor the Jury, in the absence of evidence, had a right to assume as against the prisoner that Tahiram did not set fire to them.

But suppose that the variance between the story told by the witness before the Assistant Commissioner of Nowgong and that before the Judge shows that both cannot be true, it would follow that one must be false or at least inaccurate. But it is one thing to show that a particular statement made by a witness is inaccurate or even false, to say that a Judge cannot safely act on, or ought to disbelieve the evidence of that witness, because part of it cannot be true; and another to say that the witness has intentionally given false evidence. Every judicial officer knows from experience that, if a person speaks from memory of a transaction which he has witnessed, and repeats the story after the interval of a few weeks, he will not, on the second occasion, relate what he has seen in the same words, nor, unless he is assisted or his memory refreshed, will he probably give the same details on each occasion. At one time, one fact, on another occasion, another fact, will present itself more prominently to his memory or imagination. Such variances will occur between statements made at different times by honest people intending to tell nothing more than the exact truth, speaking entirely at their ease, and having the full command of their faculties. Such variances become more considerable if the speaker is in any way deprived of his self-possession or hurried, or confounded by questions which he understands but imperfectly. To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the

infirmities of human memory, to fail to understand how slow are the intellects and how imperfect the powers of expression of uneducated peasants, how readily the fears of such people are excited in Courts of justice, how completely they lose nerve and presence of mind when frightened. I firmly believe that, if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes subjected to cross-examination by an adroit and perhaps not over-scrupulous advocate would be safe.

I now come particularly to the facts of the present case: I may presume that the house of Dabhagoo, from which the prisoner says he came out and saw the fire, is close to the house of Kaminohola. Beyond Kaminohola's house is a dung-shed, and beyond that is the house of Lebas. Before the Assistant Commissioner the prisoner said: "Just before day-break "we saw a light outside, and went out to "see what it was. We saw that complain-"ant's brother's (Kaminohola's) house was "on fire, and by the light of that fire we "saw a man named Tahiram putting his "hand into the roof of Lebas's house, which "is close to complainant's house. When I "saw the accused putting his hand into the "roof of Lebas's house, I saw there was some-"thing in his hand which was smoking. "The fire broke out in Lebas's house almost "immediately afterwards." The statement which has been treated by the Judicial Commissioner as opposed to that given by the witness before the Assistant Commissioner is this: "When I first came out and saw the fire "through the light of the flame, I saw the "accused at the dung-shed."

Now, it must be observed that before the Judicial Commissioner the prisoner states *when he first saw* Tahiram at the time of the fire. Now, the prisoner's statement on that subject before the Judge is not *directly contradicted* by any statement made by him before the Assistant Commissioner. The prisoner was not asked, and did not state before the Assistant Commissioner, *when he first saw* Tahiram. It is not impossible that Tahiram may have been at the dung-shed, which was close to the house of Lebas when the prisoner *first* saw him, and may have then put his hand into the thatch of Lebas's house, because the dung-shed appears to be close to Lebas's house. Before the Assistant Commissioner the witness's mind was directed specially to the point as to *what Tahiram was doing*. Suppose it had been intended to contradict the witness's statement, that he saw Tahiram put fire in the roof of Lebas's house, if the witness were being cross-examined in a civil suit, it would have been only common fairness on the part of the cross-examining counsel to direct the witness's attention to the point, and ask him what Tahiram was doing at the dung-shed. The last answer given by the witness in what is called the cross-examination was: "I have deposed to all I know." He had said nothing about Tahiram's putting his hand into the thatch of Lebas's house. The omission was most important. But, before coming to the conclusion that the witness was swearing falsely, the Judicial Commissioner should, without alarming him, have drawn the witness's attention directly to the subject, on which no explanation had been given before him, by quietly putting some question, direct or indirect, to ascertain what the witness would say that Tahiram was doing.

Did you see Tahiram's face or his back? Instead of putting any question of that sort, the Judicial Commissioner asked the witness, How came you to state before the Assistant Commissioner (reading what the witness did say)? The reply is: "I cannot say what I "said before the Magistrate. I may have "made a mistake." The Judge does not follow it up by a question—Then do you mean to say that you did not see Tahiram put his hand into the thatch?

No doubt, from the omission by the prisoner of all mention before the Judicial Commissioner of so remarkable a fact as that he himself saw Tahiram put fire into the thatch of Lebas's house, a strong suspicion arises that the charge may have been a false one.

But it is one thing to suspect the truth of evidence, and refuse to act upon it, and another to come to the conclusion that it must be certainly false. The strongest suspicion that a witness has spoken falsely will not justify his conviction for giving false evidence. Such an offence must be proved by the clearest and most conclusive testimony.

Now, there is a fact which appears on the deposition of the prisoner, as recorded, which goes in some degree to confirm his statement as to Tahiram's presence at the fire. Tahiram on his trial seems to have put a question which he would hardly have put if he had not been fully aware that there was a fire,

and that he himself was not far from the scene on the night of the fire. The question is not recorded, but the answer to the question is: "I never went in company with Dabhagoo on the night in question to beat the accused," *i. e.*, Tahiram. If the Judge thought the evidence against Tahiram was false, he should have tried the prisoner on that charge, and called Tahiram and confronted him with the prisoner to prove that it was so. Tahiram might then have been cross-examined. As the case stands, I am of opinion that there is no evidence to support the finding of the Jury. There is no such conflict between the prisoner's two statements as, taken by itself, shows that he intentionally gave false evidence on either occasion. The conviction must be quashed, and the prisoner released.

Kemp, J.—I concur generally in the remarks of Mr. Justice Norman, and think the prisoner ought to be released. There is to my mind no sufficient evidence that the prisoner intentionally gave false evidence.

The 30th November 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Rioting—Unlawful assembly—Affray—Punishment.

Application to the High Court, under Section 404 of the Code of Criminal Procedure, against the order of the Sessions Judge of Shahabad.

The Queen *versus* Phoollee Misser and others.

Baboo Onookool Chunder Mookerjee for Government.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Petitioners.

Where the evidence in a case failed to establish anything like an unlawful assembly, the conviction was reduced from rioting and being members of an unlawful assembly to one for affray, although grievous hurt from which death resulted was caused to one of the persons.

The insufficiency of the punishment allowed by the law in cases of affray pointed out.

Jackson, J.—THE petitioners for whom Mr. Twidale appears, Phoollee Misser, Unmol Misser, and Bakharee Misser, with several other persons, have been convicted by the Magistrate at Buxar of rioting, and also of unlawful assembly and grievous hurt committed in prosecution of the common object of such assembly, and they have been sentenced to be rigorously imprisoned on the 1st charge for two years, and on the 2nd charge for 1 year.

The parties appealed to the Court of Session, and, that Court having confirmed the conviction and sentence, the parties applied to this Court, and the record has been called for under Section 404 of the Criminal Procedure Code.

Mr. Twidale has contended, and I think has rightly contended, that whatever suspicion we may entertain as to the facts of this case, there is really nothing in the evidence which establishes anything beyond a common affray. No doubt, it appears that grievous hurt took place during that affray, and there is reason to believe that it was attended with the death of one of the persons concerned; and, if there had been anything establishing the fact of an unlawful assembly, the persons composing that assembly would have been liable to be dealt with under the terms of Section 149, and would have been liable for any offence found to have been committed in prosecution of the common object which they had in view. But it appears to me that there is nothing in the evidence which shows anything like an unlawful assembly. On the contrary, the Magistrate himself rather suggests that the object for which the parties went to the place where the affray occurred was that of performing the ordinary ceremonies of the *holee* festival. Apparently on that occasion, some sudden quarrel took place, and the result was the affray, the grievous hurt, and the loss of life, which I have adverted to. I think, therefore, that the conviction must be reduced to one under Section 159 for committing an affray. I certainly think that the extreme punishment which the Section permits in cases of this kind is inadequate. It certainly is inadequate in a case where the circumstances are such as they are in this case. If we had to deal with the case originally, we should not hesitate to pass the severest sentence which the law allows. This is imprisonment for one month and a fine of 100 rupees, and the law only permits the fine to be commuted to imprisonment to the extent of one-fourth of the maximum period of imprisonment, which in this case would be one week. Now, it appears that the

parties have been in prison since May last. We should not be right, therefore, in sentencing them now to imprisonment for one month, and ordering a further imprisonment of one week on their failing to pay the fine. The result, therefore, is that the parties convicted, both petitioners and the others concerned, must be discharged.

I think it right to call attention to the great waste of public time on this occasion, and in like cases, from the want of proper arrangements for representing the Government. After hearing Mr. Twidale for the petitioners, we called upon the Government Pleader to show anything on the record upon which he could support the conviction, that is, anything in the shape of evidence upon the Sections under which the Magistrate has convicted the prisoners ; but the learned Government Pleader informed us that he had not been instructed, had received no papers, and had had no opportunity of reading the evidence, and that in such cases, generally, he did not receive instructions unless the Magistrate had written to the Legal Remembrancer. Now, I think it very desirable that some system should be followed, and that the Government Pleader should have instructions in such cases, so as to obviate the necessity of the Court going through the whole of the record in order to discover whether there is any evidence to support the conviction or not.

The petitioners and the other parties must be immediately discharged.

The 4th December 1869.

Present :

The Hon'ble L S. Jackson and Sir Charles Hobhouse, *Bart., Judges.*

Examination of witnesses—Procedure—Records of previous trial—Section 363, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

The Queen *versus* Jumdem Sing and others.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of murder and culpable homicide not amounting to murder.

Mr. Montriou for the Appellants.

Where it was not shown that there were any witnesses forthcoming for examination other than those whom the Sessions Judge did examine, the Court refused, with reference to Section 363, Code of Criminal Procedure, to interfere with the Sessions Judge's proceedings.

The power granted to the Civil Courts of calling for and inspecting the records of a previous trial is one that ought to be exercised with the greatest caution, and does not extend to criminal proceedings.

Jackson, J.—The learned Counsel has observed, and with very great reason, that this is a serious case, and one that imposes on him as well as upon the Court serious responsibility. His argument divides itself into two parts. The one relates to an alleged error of investigation on the part of the Sessions Judge, and the other tended to show that the evidence taken in the Court of Session is not such that this Court would be justified in giving credit to it, and affirming the conviction arrived at below.

The objection to the proceedings is one on which Mr. Montriou has insisted with great force, namely, the unexplained omission on the part of the Court of Session to call and examine a large number of witnesses who appear (by their depositions taken in the Magistrate's Court) to have been examined in the earlier stages of the proceedings. Now, it is provided by Section 363 of the Code of Criminal Procedure that, "if the accused "person shall refuse to plead or shall claim "to be tried, the Court shall proceed to try "the case, taking all the evidence that is "forthcoming." There is nothing to show (taking it simply as a matter of form) that the Court has done otherwise than the law prescribes. There is nothing to show whether any witnesses other than those examined by the Sessions Judge were forthcoming, or were in attendance or not. But then, under Section 367, it is " in the discretion of the

"Court at any stage of a trial to summon "and examine any witness whose evi- "dence it shall consider essential to the "just decision of the case." Now, I have not been satisfied that it was the duty of the Court to call and examine the witnesses. The depositions have not been read to us, and I have not felt it to be our duty to look at the depositions for the purpose of ascertaining whether the witnesses were such as the Court ought to have called on its own motion. No case, therefore, has been made out to my satisfaction to show that the Judge was bound in his duty to insist on the production of these witnesses, and to take their evidence.

There is another objection to the Judge's conduct in this case, namely, that he has taken into consideration, and drawn improper inferences from, and allowed his mind to be influenced by, a certain record of a previous trial in the Sessions Court, in which one of the plaintiffs was implicated. The production of these papers appears to have been brought about by the Counsel who defended the prisoner on the occasion. If is unfortunate that the Judge did not stop so irregular a proceeding as the production of the record of that previous trial. Possibly, the Judge considered that he was acting under the discretion vested in Civil Courts, which enables them to call for the record of other cases or other public papers, and inspect them. But, even in civil cases, that is a power which, as it appears to me, ought to be exercised with the greatest caution, and it does not extend to criminal proceedings. Still, although the Judge has inspected those papers, and has made use of them in a way which is irregular, it does not appear to me that what he has done has really influenced his mind, or that he has come to any conclusion which he would not equally have come to on hearing the evidence produced at the trial.

Then we come to the consideration of the evidence itself. Is that such evidence that we ought not to give credit to it, and should not be justified in affirming the conviction which has been come to upon it? I am bound to say, after giving every consideration to what the learned Counsel has observed, that I do not find any *à priori* improbability in it. Looking at the occurrences that every day take place in this country, especially in that part of the country from which this case comes, I do not find any difficulty in believing that the deceased man met with his death in the way described by the witnesses for the prosecution. In that part of the country, natives of certain classes are extremely excitable in connection with trespasses on their fields, and in such cases, upon the slightest provocation, a resort to lattees and other lethal weapons takes place instantaneously, and, violence having once commenced, the parties hardly know where to stop. It seems to me, therefore, quite conceivable that the trespass described having taken place, whether there was an altercation, whether abuse was interchanged or not (the witnesses state with, perhaps, doubtful truth that the deceased man did not return the abuse, but submissively said he was in fault), I can easily conceive that a struggle resulted, the parties became excited, and in that excitement they resorted to the brutal violence which has brought about the death of the deceased. I have seen so many cases of this kind in my judicial experience that I really feel no difficulty in believing the evidence. I think, therefore, that this is a case in which we are not called upon to disturb the conviction arrived at by the Sessions Judge, and I think the sentence must be affirmed.

Hobhouse, J.—I concur.

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The 10th December 1869.

Present:

The Hon'ble J. P. Norman and F. B. Kemp, *Judges.*

Unlawful assembly—Riot—Liability of owner of land—Procedure—Trial—Right to cross-examine—Sections 141 and 154, Penal Code.

Criminal Revisional Jurisdiction.

The Queen *versus* Surroop Chunder Paul and Heera Lall Paul.

Mr. W. Bourke and *Baboo Rash Beharee Bose* for Petitioners.

HELD that the owner or occupier of land on which an unlawful assembly is held cannot be convicted under Section 154 of the Penal Code, unless there is a finding that the riot was premeditated.

Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, inasmuch as they do not have "one common object" within the meaning of Section 141 of the Penal Code.

The right of an accused party to cross-examine witnesses is limited to a right to cross-examine the witnesses for the prosecutor or for the Crown called against him. If he wishes to avail himself of evidence which has been given, or which can be given, by a witness called for another of the parties accused, he must call him as his own witness.

Norman, J.—THIS case was sent for under Section 404 of the Code of Criminal Procedure upon a suggestion by Mr. Bourke, Counsel for Baboo Surroop Chunder Paul and for Baboo Heera Lall Paul, that there was error in the decision of the case by the Lower Court upon a point of law.

The defendants, Surroop Chunder Paul and Heera Lall Paul, were convicted by the Magistrate under Sections 154 and 155 of the Indian Penal Code—the charge under Section 154 being that they were owners of land on which an unlawful assembly was held, whose agent or manager, Baboo Rakhal Doss Roy, knowing that an unlawful assembly or riot was about to take place, did not use all lawful means in his power to prevent it, and, when it did take place, did not take all lawful means in his power to disperse or suppress the riot.

The Judge on appeal reversed the decision of the Magistrate under Section 155, and allowed the conviction to stand under Section 154, and under that Section the defendants were sentenced to pay a fine of Rupees 1,000 each.

The Judge in appeal finds that the riot was not premeditated; and on the question whether their agent used all lawful means in his power to disperse or suppress the riot, he says: "Now, it is not attempted "to be shown that their agent, Rakhal Doss "Roy, did anything more towards dispersing "or suppressing the riot than telling the "Chowkedar Seboo to see that there is no "row, and make haste to give information to "the police. Giving him the full benefit of "this evidence, I cannot believe that this "was all that he could do. Undoubtedly he "might have taken active steps to stop the "disturbance, and, if he had done so, the seri-"ous results which followed might probably "have been avoided. I, therefore, reject this "appeal so far as regards the conviction un-"der Section 154. It is of the utmost import-"ance that all persons should understand "that they are bound to use all lawful means "to prevent a breach of the peace on all "occasions."

For my part I fully concur in that observation, and it is not without some regret that I feel myself compelled to reverse the decision of the Judge, because, where riot and bloodshed take place as the result of a stand-up fight between the partisans of two rival zemindars, where, as is too often the case, and as the Magistrate has found was the case here, *lattials* are employed on both sides, there can be little or no doubt that the riot is, if not for the benefit of, at least mainly instigated by, the zemindars or their agents.

If the finding of the first Court had stood, namely, that hired *lattials* retained by each party were members of the unlawful assembly, some of them actively engaged as combatants on the side of the Paul defendants' party, there could be no doubt of the propriety of the conviction under Section 154. There would be no doubt that the finding that such men were retained would have been quite sufficient to justify the inference that the zemindars and their agents, so far from using all lawful means in their power to prevent the riot, had made preparations beforehand to enable their faction to take an effective part in it.

The Judge finds that the riot was unpremeditated. He does not find what, if any, were the lawful means to which Rakhal Doss Roy, the servant of the zemindar, could have resorted in order to suppress the riot or disperse the rioters. It is a fact that the police were stationed in the village, and it is found by the Judge that news of the riot was sent to the police by Rakhal Doss. It may be

that Baboo Rakhal Doss Roy might have used his influence with the ryots of the Paul party, and by that influence might have induced them to disperse and cease from rioting. But there is nothing to show that he had any such influence, and could have induced them to disperse, or that he wilfully kept out of the way, leaving the riot to take its own course. If we allowed the conviction to stand, it would be on some bare conjecture that he might have had some means of dispersing the riot, of which there is no evidence. Therefore, it seems to me that, on the Judge's finding, the conviction cannot stand.

There is a second objection taken by Mr. Bourke which I think of considerable importance, because it illustrates the inconvenience of a practice, which is very common upon charges of riot, namely, treating the attacking party and resisting party as constituting one unlawful assembly, and trying them together. Each party constitutes an assembly having an object totally distinct from that of the other party, and the responsibilities under which the several parties may come under Section 149 are totally distinct.

In the present case a fight took place between Mr. Anderson's men and the party of the Paul defendants. It is quite plain that the two assemblies did not constitute one unlawful assembly. They had not, within the meaning of Section 141, "one common object." It is suggested that the object of the Anderson's party was to beat, ill-use, and overawe the ryots of the Paul party, to compel them to cultivate the indigo, while the object of the party of the Paul zemindars was either to resist and drive off, or to wreak their revenge on, Anderson's party. The Paul party had no *common object* with the Anderson's party.

When the witnesses for the defence of Mr. Anderson's party were called, the vakeels for the Paul defendants' party wished to cross-examine the witnesses called for the defence of Mr. Anderson's men, and not unnaturally, as it was probably impossible for the witnesses for Anderson's party to avoid making statements, which would tend to fix charges on the Paul party. The Magistrate refused the application by the Paul defendants' vakeels to cross-examine Mr. Anderson's witnesses, and, as I think, properly refused it. This matter has been considered on the original side of the Court, and it has been held that the right of a defendant to cross-examine is limited to a right to cross-examine the witnesses of the plaintiff or of the Crown called against him. If he wishes to avail himself of evidence which has been given, or which can be given, by a witness called for another defendant, he must call him as his own witness.

On the second day the witnesses of the Paul party were called, and the vakeel of Mr. Anderson's party claimed a right to cross-examine those witnesses. The Magistrate, re-considering his former determination, permitted such cross-examination. Thereupon it was objected by the vakeels of the party of the Paul zemindars that they ought to have been allowed to cross-examine the witnesses called for the defence of Mr. Anderson's party. The Magistrate decided that he would allow the witnesses to be re-called and cross-examined, but it was ultimately arranged that the case of each prisoner should be tried and considered separately without advertence to the evidence for the defence of any other party. So far as prisoners can assent to anything, that arrangement was assented to by the vakeels of each party. I do not rely on any consent. I think that the course ultimately taken was the correct course.

The matter was brought to the notice of the Judge who has stated his view of it, as I think a very just and proper view, in the following words :—

"A preliminary objection is raised by "both Counsel that the case cannot proceed "in its present form, as the witnesses for the "defence summoned by the defendants con-"nected with Mr. Anderson and with the "Paul zemindars' party respectively were not "allowed by the Magistrate to be cross-ex-"amined by the pleaders retained for the "defence; and it is urged that, as the defence "set up on each side is that whatever was "done was in the right of private self-"defence, the Court cannot arrive at any "satisfactory conclusion without causing "such cross-examination to be allowed. But "it appears to the Court that the correct "principle upon which it should act under "the circumstances is to deal with the case "according to the evidence adduced for the "prosecution modified, so far as that may be, "in the opinion of the Court, by the evidence "adduced by each party in its defence. The "Court entirely admits, and will in consider-"ing its judgment thoroughly adopt, the "principle that *none of the evidence for the* "*defence can be used against any other per-*

"*son than the person on whose behalf it is* "*produced.*"

But, even if there was no error in dealing with the evidence as given on the examination and cross-examination of the witnesses in the case, it appears to me that, when two hostile parties concerned in a conflict are placed on their trial at the same time, they are still virtually arrayed against each other.

There is great danger that the mind of the Judge may be more or less influenced in the trial of one set of defendants by the evidence given for the defence of the other set of defendants. And although, no doubt, the Judge has a discretion in the matter, we think that discretion in cases like the present would be better exercised by trying each set of defendants separately.

The conviction of Surroop Chunder Paul and Heera Lall Paul must be quashed upon the ground that, on the finding of the Judge, there is nothing to show that their agent Rakhal Doss had any means of suppressing the riot which he did not use. The amount of the fines, if levied from them, must be returned.

As to the appeal of the ryots, the only objection being that they were not allowed to cross-examine the witnesses called by the other party, I see no reason to interfere, and their appeal is therefore rejected.

Kemp, J.—I concur in the remarks of my learned colleague with reference to the appeal of the ryots.

I also concur in quashing the order of the Sessions Judge under Section 154 on the appeal of the Paul appellants, but, for my part, I feel no regret whatever in setting aside the decision of the Judge in this case with reference to the Pauls.

I fully admit the duty which the law imposes on zemindars, and the obligation on the Court to administer that law with wholesome severity. I also admit that by the mere fact of the zemindar's not residing on his estate, he cannot avoid the liability which the law imposes.

In this case the zemindar has been fined for an act committed by his agent. Now, it is admitted that the police were on the spot before the riot. Whether they were deputed by the Magistrate himself, or whether they were sent on the application of the rival zemindars, does not appear, but they were there.

The Judge also finds that the riot was unpremeditated, and there is also evidence to show that the agent did direct the Chowkedar to suppress and disperse the riot or unlawful assembly, and also to take steps to inform the police of the same. I, therefore, wholly fail to see how he has neglected to use all lawful means in his power, within the meaning of Section 154, to disperse or suppress the riot. It cannot be expected that a Bengalee naib should personally attempt to suppress a riot between two parties, who suddenly and in great numbers and armed with deadly weapons choose to have a stand-up fight. The only means in the power of the naib is to invoke the aid of the police, and this the naib did in the present case; and, having done so, I think that his conviction under Section 154 was clearly wrong.

With these remarks I concur with my learned colleague in quashing the conviction, and in directing that the amount of the fine should be returned to the Paul defendants.

The 18th December 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Procedure—Preliminary investigation—Examination of accused—Witness for defence—Section 266, and Chapters XII., XIV., and XV. of the Code of Criminal Procedure.

Reference to the High Court from the Sessions Judge of the 24-Pergunnahs, in the matter of Mohima Chunder Chuckerbutty, sentenced by the Cantonment Magistrate of Dum-Dum to one month's rigorous imprisonment for criminal trespass.

Baboo Nursing Chunder Mitter for Petitioner.

A Magistrate holding a preliminary investigation under Chapter 12 of the Code of Criminal Procedure, and a Magistrate holding a trial of an offence within his jurisdiction under the 14th Chapter of the Code, has power, under Sections 202 and 250, to put questions to the accused, and to examine him as he may consider necessary, and the Court of Session has similar power in regard to persons on trial before that Court, but the Procedure Code makes no such provisions in respect of parties under trial under the 15th Chapter.

Where in a trial before him a Magistrate refused to examine or put upon his oath a witness tendered by the accused, it was held that the refusal was altogether irregular and illegal under Section 266 of the Code, and had prejudiced the prisoner, whose conviction was, therefore, quashed.

Jackson, J.—In this case one Mohima Chunder Chuckerbutty was charged before the Cantonment Magistrate of Dum-Dum with criminal trespass. There were several other persons also charged with the same offence. These parties were convicted, and the Magistrate, considering that Mohima Chunder Chuckerbutty was the principal offender, sentenced him to [illegible]ence. [illegible] imprisonment for one month, [illegible]n the Judge's [illegible] parties concerned to less periods [illegible] ment. Against these sentences, under [illegible] taken by [illegible] of the Code of Criminal Procedure [illegible]rable impeal could lie. Mohima Chunder [illegible] convenbutty, accordingly, presented a pe[illegible]ion [illegible]nmone Sessions Court of the 24-Pergs [illegible] the aipraying that his case might be sent up fo[illegible]vision to the High Court, and the Sessions Judge, accordingly, referred the case to this Court by his letter No. 103, dated the 11th of December last.

The substance of the Judge's letter was that he found no such irregularity in the proceedings as would necessitate a reference to the High Court; that, although he considered the punishment awarded excessive, that, in his opinion, would not justify him in recommending a revision of the proceedings. "But," he said, "the appellant has set forth "in his petition various facts, with reference "to which he alleges that the Cantonment "Magistrate, actuated by a personal feeling, "has treated him with great and unnecessary "severity and injustice. This allegation, so "far as the facts are concerned, is borne out "by the record, and I think that the excessive bail demanded by the Magistrate and "subsequent detention of the appellant on a "charge of this petty nature is deserving of "censure, and in the view of this treatment it appears to me that the High Court "may be of opinion that the imprisonment "which the appellant has already suffered "is sufficient for the offence of which he "has been convicted."

Now, it appeared to me and also to my learned brother Markby that this was a recommendation of the Judge on which we could not possibly act. The Judge was of opinion that no such irregularity has taken place in the proceedings as to warrant an interference by this Court by way of revision, but on a consideration of certain allegations of misconduct against the Joint Magistrate, he proposed to us to take such conduct into consideration, and upon that ground to mitigate the sentence passed upon the petitioner. This, as we intimated on a former occasion, it was impossible for us to do, because in the first place it would be impossible for us to make any order on such allegations of misconduct without hearing what the Joint Magistrate had to say by way of explanation or defence, and in the next place such acts of misconduct, if made out, might be ground for the Lieutenant-Governor, or other proper authority, making such order as might be required in regard to the Joint Magistrate, but would not be ground for our reversing a conviction legally arrived at.

But the vakeel who appeared for the petitioner in this Court informed us that he was prepared to make a substantial application to the Court, and to show ground upon which the Court ought to interfere by way of revision, and set aside the conviction.

Accordingly, we have heard him this morning. He has stated to us two grounds on which his application was to proceed. The first of them is that the Magistrate has irregularly and illegally examined the defendant or the accused person in this case, although, as the trial before the Magistrate was one under the 15th Chapter of the Code of Criminal Procedure, the law does not allow any such examination. He has pointed out, and I think correctly, that a Magistrate holding a preliminary investigation under the 12th Chapter of the Code, and a Magistrate holding a trial of an offence within his jurisdiction under the 14th Chapter of the Code, is distinctly empowered by Sections 202 and 250 to put questions to the accused, and to examine him as he may consider necessary, and the Court of Session has similar power in regard to persons on trial before that Court; but the Procedure Code makes no such provisions in respect of parties under trial under the 15th Chapter.

It is not easy to say, owing to the mode in which the examination of the accused has been recorded, to what extent this examination was carried, nor perhaps is it easy to say how far he has been prejudiced by such examination. But I think it unnecessary to give any positive opinion upon this point, inasmuch as the next ground on which the application proceeds is, in my opinion, sufficient to enable us to dispose of this case. That ground is that set forth in the petition to the Court of Sessions, namely,

that, when the petitioner was under trial, the Magistrate, upon a witness of his, named Tiluck Singh, being tendered for examination, refused to examine that witness, or put him upon his oath, but merely put certain questions in an informal way to the witness. It is quite manifest that such a refusal on the part of the Magistrate was altogether irregular, and was likely to prejudice the prisoner in a very serious degree. That the Magistrate did so we are assured not merely by the affidavit annexed to a previous petition presented to this Court which came before the Chief Justice and Mr. Justice Mitter upon an application to remove the case during trial to another Magistrate's Court, but is also further stated by the Magistrate himself, who is before us to-day, and who was present in Court during the proceedings before the Magistrate.

I attach the greatest importance to this statement made to us by the vakeel, because I consider that this is made under a sense of the responsibility which that gentleman must feel in making such a statement to us, knowing that we should feel bound to accept his statement on the guarantee of his character and of his responsibility to the Court; and therefore, although we might hesitate in fully accepting such a statement made merely on the affidavit of an interested party, when that affidavit is corroborated by the statement of a gentleman practising in the Court, I think we are bound to act upon it. His statement is most clear and unequivocal. What he says is nearly in these words: "I myself was a witness to the fact, *viz.*, the "Magistrate's refusal to examine that witness. On the 17th November the case "for the prosecution closed. Next morning the Magistrate asked what was the "defence, and the Magistrate proceeded to "examine the defendant, though I protested "against his doing so. He then called "upon the Court Inspector to produce the "list of witnesses filed by the defendant, "and then said he was not going to waste "his time by examining some 10 witnesses. "I said I must exercise my right of examining such witnesses as I think proper; but, of course, I would not call witnesses I did not consider material. Tiluck "Singh was the first witness produced. "The Magistrate said: 'Let us see what this "man knows.' He (the witness) said something I do not recollect. I asked the Magistrate to put the witness on his oath. "The Magistrate said that was not material. "I then said the Court has a question of fact "to consider, and a grain might turn the scale. "The Magistrate still refused to examine "the witness."

It appears to me that this is an irregularity which is quite fatal to the conviction had upon the trial. It would be most unsafe for a Magistrate or Judge to attempt to ascertain by such a mode as this what the nature of a witness's testimony was likely to be, and it would also be impossible for a Magistrate to determine in this rough way beforehand what the effect of such testimony a witness was giving might be, when he came to consider the evidence on both sides, and to determine whether the prisoner was or was not guilty. The Magistrate was clearly bound, as provided in Section 266 of the Code of Criminal Procedure, in such a case to proceed to hear the accused person and such witnesses as he might produce in his defence, and I think the refusal in the case was the less justifiable, inasmuch as the accused had the benefit of the advice of a pleader of this Court who must be supposed to have understood what was necessary and right to be done for his client's defence, and also to act under a sense of his responsibility as such pleader. I think, therefore, that, upon this ground, and without entering into the further questions which might be raised upon this application, we are bound to set aside the conviction, and to order the petitioner immediately to be discharged.

Markby, J.—I also think that this conviction must be quashed. It appears to me that the course taken by the Magistrate in refusing to examine a witness who was formally tendered on behalf of the accused was absolutely illegal, and that no conviction after such a course taken by the Magistrate can be supported. I observe that the Magistrate suggests as a ground for taking the course he did that the time of the Court would thereby be wasted. It is quite needless, I think, to point out that that would be no ground whatever for violating the law. It also seems to me that the ground does not exist, for, as has already been pointed out, the vakeel who was present pledged himself not to waste the time of the Court. Under any circumstances, the Court ought to have accepted that undertaking. I also think that any Judge who conducts business with tact and patience will find little difficulty in preventing time being wasted by the examination of useless witnesses without violating the established rules of procedure.

The 21st December 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Charge to Jury—Deceased Witness—Evidence—Procedure—Conditional pardon—Sections 209 to 211, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

The Queen *versus* Gogalao and others.

Committed by the Magistrate, and tried by the Judicial Commissioner of Assam, on a charge of murder.

Mr. H. Cowell for Appellants.

In reviewing the charge of a Judge to a Jury in the Mofussil, it is sufficient to see whether the tendency of the charge, taken as a whole, has given a correct or incorrect direction to the mind of the Jury, and it is not correct to apply to such charge the criticisms which would be applied to a charge of a Judge in a Court in England.

In order to make the evidence of a deceased witness legally admissible, provided the admission of the evidence is questioned, it is strictly necessary to prove the death of the witness. Proof of such fact may be dispensed with if the prisoner's Counsel admits it.

The procedure to be observed under Sections 209, 210, 211 of the Code of Criminal Procedure, when a tender of conditional pardon is made, pointed out.

Jackson, J.—THE appellants in this case have been convicted on trial by Jury in Assam of the offence of murder. The Judge, though entirely disapproving of the verdict, has passed sentence of transportation for life upon the prisoners, and the prisoners have now appealed on the ground that the direction of the Judge to the Jury contains both absolute errors in the way of misdirection, and also errors of omission such as to invalidate that direction, and to make it the duty of this Court to set aside the proceedings and order a new trial.

The learned Counsel, who appeared for the appellants, set forth what he considered to be the errors both of omission and commission on the part of the Judge, and proposed to read to us the evidence on the trial in order to show that the prisoners had been prejudiced by those errors, and that the case was one in which this Court ought to interfere. The case of Elahi Bux (5 Weekly Reporter) was very much referred to. The learned Counsel read portions of the judgment of the Chief Justice as indicating the principles on which this Court would proceed in dealing with such cases. But it seems to me impossible to lay down with precision in what cases this Court may and ought, and in what cases it may not and ought not, to interfere with the direction of a Judge so as to set aside a trial by Jury after verdict has been given. I do not think it necessary in this case to go *seriatim* into the grounds which the learned Counsel has laid before us, because I think we must deal with each case upon its own merits, and that, taking, as we are bound to take, the charge of the Judge to the Jury as a whole, we have to say whether its tendency has been upon the whole to give a correct or incorrect direction to the mind of the Jury; and, applying that test to the case before us, I think I am bound to say that there is no such error in the charge of the Judge as ought to induce us to interfere with the proceedings. I think the Judge has in no way led the Jury to attach undue weight to any portion of the evidence. On the contrary, I think that he has taken throughout a favorable and merciful view of the case towards the prisoners, and that it would be an altogether misplaced rule for us to apply to the direction of a Judge in a Mofussil Court the same criticisms which we would to a charge of a Judge in an English Court of Assize. I think, therefore, that the ground of appeal, as regards the whole of the prisoners in relation to the Judge's direction, must fail.

I have been reminded by my learned brother Markby of an objection which, I think, I ought to advert to separately, that is, an objection taken to the admission of the evidence of a witness named Oroona. It is objected, in regard to this witness, that he was not examined by a Court of Session, but that his deposition was received and read at the trial upon its appearing to the Court that the witness was dead, when, in fact, there was nothing before the Court in the shape of proof to show that he was dead. By Section 369 of the Code of Criminal Procedure it is provided that "the examination of a witness taken and attested by the Magistrate in the presence of the accused person may be given in evidence if the witness be dead, or the Court be satisfied that for any sufficient cause his attendance cannot be procured." I think that, in order to make the evidence of a deceased witness legally admissible, provided that the admission of that evidence is questioned, it is strictly necessary to prove the death of the witness. I think it would be quite competent to the Counsel for the prisoner at the time of the trial to admit the death of the witness, and to dispense the prosecution from proving that circumstance, and I think the

Court might, upon such admission, allow the evidence to be read, and I do not think it would be for the prisoner upon appeal to complain that his Counsel had made that admission improperly. Upon this point, therefore, I think no valid objection to the proceedings in appeal is made out.

There is another and separate objection which relates to the case of one of the prisoners named Magaloo. The point in question is that the Court of Session acting under the powers contained in Section 210, Act VIII. of 1869, being the Act to amend the Code of Criminal Procedure, during the trial tendered a pardon to this prisoner, that the prisoner made some statement to the Court, and that thereupon the Court, instead of ordering the commitment of the prisoner under Section 211, withdrew the tender of pardon, and ordered the trial to proceed as if no such tender had been made. It is contended that it was not open to the Court to take that course, but that the trial of Magaloo ought to have stopped, and, although it would proceed in regard to the remaining prisoners, that prisoner ought to have been re-committed, and proceedings taken in respect of him *de novo*.

I think that, under Sections 209, 210, and 211, the procedure, if properly and completely carried out, must be this. The Court or Magistrate must tender a pardon to the prisoner, explaining to him the conditions which accompany that tender. It is for the prisoner then either to accept or refuse the tender. If he refuse, the tender will have been abortive, and the trial would proceed as if no such tender had been made; if he accept, it is the duty of the Court, as pointed out in Section 209, to examine him as a witness in the case under the rules applicable to the examination of witnesses, and then, if, after having so examined him, the Court be of opinion that he has not complied with the conditions, the Court may then commit or order him to be committed for trial upon the charge in respect of which pardon was tendered. Now, what took place on the present occasion? I confess I have some doubt, though a slender doubt, as to whether the prisoner did accept or refuse the pardon offered to him. I am inclined to think that he did refuse. It is clear, however, that, if he did accept, the subsequent proceedings of the Court in respect to that prisoner were irregular, and the trial was probably void in regard to him.

I think, therefore, that, before we can make any further order in respect to this prisoner, it will be necessary to call upon the Judicial Commissioner (and I propose that he be called upon) to state whether, upon the tender of pardon being made to Magaloo, he accepted or refused the tender so made, that is, whether the words used by the prisoner, *viz.*, that he knew nothing of the case, amounted to an acceptance of the tender of pardon, and subsequent imperfect compliance with the conditions of it, or whether they were meant to be, and were looked upon by the Judicial Commissioner as, a refusal to make any communication and, therefore, a refusal of the tender of pardon. Upon the Judicial Commissioner making an answer to the question and so completing the record, we shall be in a position to deal further with the case of this prisoner.

Markby, J.—I am of the same opinion. I think there was no misdirection, and that there was no error in admitting the deposition. Upon the other point, our opinion must await the result of the inquiries which have to be made.

The 21st December 1869.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Confession—Evidence—Section 109, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

The Queen *versus* Domun Kahar and others.

Committed by the Magistrate, and tried by the Deputy Commissioner of Hazareebaugh, on a charge of lurking house-trespass by night, &c.

Section 109 of the Code of Criminal Procedure refers to cases where the confession of a prisoner has been made to the Magistrate conducting the investigation, and not to the police. It is only when properly made to the Magistrate that the confession can be used as evidence against the prisoner. The mere standing by of the Magistrate when the confession is being made to the police is not sufficient.

Glover, J.—THESE prisoners have been convicted by the Deputy Commissioner of Hazareebaugh under Section 457, Penal Code, of lurking house-trespass by night in order to commit theft, and have been sentenced each to 7 years' transportation.

In the first place, we remark that the offence charged, and which the Deputy Commissioner holds to be proved, is house-breaking by night, and not mere lurking house-trespass. Both offences are mentioned in the same Section of the Penal Code, and hence we suppose the Lower Court's mistake.

With reference to the case itself, we think that, as regards prisoner No. 1, Domun, the conviction of house-breaking by night, &c., should stand. This prisoner confessed very fully before the Deputy Commissioner on his defence being first taken, and there is no reason to suppose that his confession was other than voluntary.

But we can find no sufficient evidence in support of this charge against the other prisoners. In respect of the prisoner Jungla, indeed, we do not think that any offence is proved. There is nothing against him except his confession, and that only goes to the extent of admitting that he received 4 annas from the other prisoners. He does not say that this was part of the stolen property, or that he knew that a burglary had been committed.

The prisoners Otim, Mungla, and Bissoo, cannot, we think, be convicted of any higher offence than that of knowingly receiving stolen property under Section 411, Penal Code. Their confessions do not implicate them in the burglary: the utmost they go to is an admission of having afterwards received part of the property stolen, or of the proceeds of that property. The conviction of these prisoners must be amended, and we sentence them under Section 411, Penal Code, each to 3 years' rigorous imprisonment.

With reference to the Deputy Commissioner's reception of certain of the prisoners' statements made to the police as evidence, we desire to remark that the mere standing by of a Magisterial Officer when confessions are being made to, and recorded by, the police, for their own use, will not make these confessions evidence. Section 109 of the Criminal Procedure Code refers to cases where the Magistrate is himself conducting the investigation, and then, although the prisoner may be in the custody of the police at the time, such prisoner, making a confession, is liable to have that confession used against him. In the present case, the Deputy Magistrate appears to have had nothing to do with the investigation, and the prisoners' confessions were made solely to the police.

CRIMINAL LETTERS

All questions put to accused after his narrative, and all material questions and answers of accused during his narrative, should be recorded. The answers to be recorded in the vernacular language of the accused.

Letter No. 671, dated the 20th July 1869, from the Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Sessions Judge of Midnapore.

Present:

The Hon'ble G. Loch, *Judge.*

WITH advertence to your letter No. 85, dated the 23rd ultimo, I am directed to forward copy of the remarks of the Court in Hossein Ali's case for your information, and to inform you that the Court concurs with you in thinking that all questions put to the prisoner after he has concluded his narrative, and all material questions put to him during the narrative, with their answers, should be recorded.

Remarks of the High Court in the case of Hossein Ali (Present: Loch and L. S. Jackson, JJ.).

In the case of Hossein Ali, referred to in para. 3, the Court is of opinion that a conviction for robbery might have taken place, but that, the Magistrate having treated it as one of simple theft, the Judge need not have done more in the particular case than simply note for the Magistrate's guidance the heavier charge on which the prisoner might have been arraigned.

A charge ought in this case to have been framed, and the prisoner's examination ought to have been recorded fully in his own language.

The opinion which Mr. Wake has formed, that a confessing prisoner should have his examination recorded in English, because he is to be examined as if he were a witness, and because in Darjeeling the evidence of witnesses is to be recorded in English, appears to the Court an utter fallacy.

By the 203rd Section of the Code of Criminal Procedure, it is provided that, if an accused person proposes to confess the commission by him of the offence of which he is accused, the Magistrate shall require him to give an account of the facts in detail, and shall *examine him thereon* in the same manner as if he were a witness. This direction refers to the power given to the Magistrate in respect of such accused persons of sifting their statements by questioning and re-questioning them, and has nothing to do with the language in which the examination is to be recorded.

The Magistrate is not merely to be content with hearing a statement, perhaps tutored or suggested, from the prisoner, but is to examine him thereupon so as to test its truth, or to obtain light upon any point left obscure in the statement, but the language of record is the same as in the case of other persons accused.

Abetment—Common object of an assembly—Punishment—Murder—Strangulation — Sections 107, 109, and 111 of the Penal Code.

Extracts (paras. 2, 5, and 6) from Letter No. 736, dated the 6th August 1869, from the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Mymensingh.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

2. In the case of Fazoo Sheikh (Case No. 9, Statement No. 4), the Court observe that the proper questions have not been considered by you. The prisoner and one —— Singh engaged in the common purpose of attacking and seizing the deceased. The prisoner used his fists in the attack; ——Singh struck the deceased with a *lattee.* The deceased's ribs were broken, and his lungs ruptured, apparently by the blow inflicted by —— Singh. You say there is no evidence that the prisoner caused the death of the deceased or grievous hurt to him, remarking that he is a little weakly man who could not with his fist have struck such a blow as would have fractured the ribs of the deceased, and, accordingly, you convict and punish him for hurt simply, under Section 323 of the Indian Penal Code. But, if two or more persons engage in a conspiracy to attack, and make a joint-attack upon another, and if one of such conspirators, with the knowledge of the others, goes armed with a *lattee* or other weapon, and, in carrying out the common purpose of attacking and beating such other person, inflicts a serious injury upon him, those who are present are equally punishable with the chief actor—(*see* Sections 107, 109, and 111 of the Indian Penal Code). In such cases, the act is a probable consequence of the abetment, and is committed with the aid and in pursuance of the conspiracy which constitutes the abetment.

5. The Court think that the offence in the case of Somir Khan (Case No. 17, Statement No. 4) was of an aggravated description—a husband beating his sick and weak wife until he killed her. Such cases, which are too common, ought to be visited with severe punishment.

6. In the case of Sheikh Pubna (Case No. 18, Statement No. 4), the sentence of transportation for life passed on the prisoner appears a proper one; but the Court are of opinion that the conviction should have been for murder. There is nothing to show that the prisoner was deprived of the power of self-control. Killing by strangulation with a rope is in itself an act showing a deliberate intent to take life. In this case the adjusting of the rope, the fitting it round the prisoner's left foot, the straining it tight with the hand, are acts which must have taken time. They resulted from a fixed and settled purpose of killing the deceased, entertained by a person who must have had full control over himself, who knew quite well what he intended to do, and how to carry out his object most effectually. It is very different from a sudden blow with a stick, or axe, or a gun shot in the heat of passion.

Corroborative evidence to be adduced before one set of witnesses can be convicted of giving false evidence on the testimony of another set of witnesses.

Letter No. 808, dated the 23rd August 1869, from the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Bhaugulpore.

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

In acknowledging the receipt of the Jail Delivery Statements of your District for the month of July last, I am directed to observe that the prisoners in the cases marginally noted have been convicted of giving false evidence in stating before the Court of Session that Ali Kureem, Torib, and Chummun struck Mussamut Mujeedun with a sword. The abstracts in the cases do not show that these three persons were called as witnesses to contradict the prisoners. The prisoners appear to have been convicted upon the evidence of witnesses who swore, as they had done in the former trial, that Mussamut Mujeedun was wounded by her own husband. But if one set of witnesses—the witnesses for the defence—are to be convicted on the testimony of another set of witnesses, *viz*, those for the prosecution—if there is any independent evidence to corroborate the testimony of the witnesses for the prosecution, it should be produced; more especially in cases like the present, when the contradiction of the prisoners' story is not absolute and complete without the evidence of such other persons. The Court direct your attention to the point, though they do not think it necessary to send for the papers of the case.

1—Malick Khyroodeen,	Case 4	Stt. 4.
2—Joomun	,, 5	,, 4.
3—Joomun	,, 6	,, 4.
4—Malik Bhuttoo	,, 7	,, 4.

A Deputy Magistrate is bound to record evidence in his own vernacular language, unless the Government permit him to record it in English.

Letter No. 814A, dated the 23rd August 1869, from the Registrar of the High Court, &c., to the Officiating Sessions Judge of Hooghly.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V Bayley, J. P. Norman, and F. B. Kemp *Judges.*

I am directed to acknowledge the receipt of your letter No. 109, dated the 5th instant, referring, for the consideration and orders of the Court, one from Baboo * * * * a Deputy Magistrate of Hooghly, in which he remonstrates against a ruling of yours, to the effect that his habit of recording evidence in criminal cases is not warranted by law.

2. I am to state in reply that the Court consider you to be quite correct in the view you have taken of the law. Under the terms of Section 196 of the Code of Criminal Procedure, and the Government Notification of the 30th June 1864, a Deputy Magistrate, whose vernacular is Bengalee, holding his Court in any district to which the Code of Criminal Procedure extends, is bound to record evidence in Bengalee, and cannot lawfully do so in English. Baboo * * *, being a native of Bengal, is bound to record the evidence in his own vernacular, which is Bengalee, and cannot take advantage of the proviso of Section 196, which does not apply in his case.

3. I am to observe, accordingly, that the Deputy Magistrate must, however inconvenient it be to him, record the evidence in his vernacular, unless the Government permit him to continue to record evidence in English.

No sentence of qualified rigorous imprisonment can be passed, and the Sessions Judge cannot order the Officer in charge of a Jail to employ a prisoner in light or non-irksome labor.

Letter No. 1040, dated the 25th November 1869, from the Registrar of the High Court of Judicature at Fort William in Bengal to the Sessions Judge of Shahabad.

Present:

The Hon'ble J. P. Norman and F. A. Glover, *Judges.*

In acknowledging the receipt of the Jail Delivery Statements of your district for the month of August last, I am directed to observe, with advertence to the case of Sheonundun Muth (6, Statement 4), that the prisoner has been convicted under Section 436 of the Indian Penal Code of committing mischief by fire, knowing it to be likely that he would cause the destruction of a building ordinarily used as a human dwelling, and sentenced to nine months' rigorous imprisonment. To this sentence, apparently as a part of it, is added: "Officer in charge of the Jail requested to employ the prisoner in light and non-irksome labor." It appears to the Court that this addition to the sentence is illegal. By the Penal Code, Section 53, the punishment of imprisonment to which an offender is liable is either rigorous or simple imprisonment. There is no power to pass a sentence of qualified rigorous imprisonment. The prisoner appears to have suffered from epilepsy, and it may be reasonable and proper that this fact should be borne in mind in carrying out the sentence of rigorous imprisonment. But this is a matter with which the officer in charge of the Jail will be quite competent to deal. The Sessions Judge has no power to interfere with the discipline of the Jail by directing how the sentence is to be carried out by the officer entrusted with the duty.

RULES OF PRACTICE.

NOTIFICATION BY THE HIGH COURT.

DATED THE 9TH NOVEMBER 1869.

The Rules* prescribed by the High Court for the qualification, admission, and enrolment of Pleaders and Mookhtars are republished for general information. Particular attention is drawn to Rules 11, 22, and 30.

THE following modifications have been made in the *subjects for examination*, as set forth in the Rules passed by the High Court on the 2nd May 1866 for the qualification, admission, and enrolment of Pleaders and Mookhtars, and lately re-produced with notification, dated 9th November 1865, in the *Calcutta Gazette* of the 10th, 17th, and 24th instant. Act VIII. of 1869 (B. C.) has been added to the laws relating to Landlord and Tenant. The law relating to stamps has been omitted altogether from the list of subjects. And the Code of Criminal Procedure has been made to include the "Code of Criminal Procedure Amendment Act," *viz.*, Act VIII. of 1869.

The Rules which are affected by the modifications in question are rules 6, 18, and 34, which will now stand as they are given below and to which the attention of all intending candidates for enrolment as Pleaders and Mookhtars is directed.

RULE 6.

Every person may be admitted as a Pleader of the higher grade who shall be qualified as hereinafter prescribed, that is to say,

1st.—If he shall have obtained the degree of Bachelor in Law of one of the Universities of Calcutta, Madras, or Bombay, or shall be a Licentiate in Law of one of the said Universities: provided that his application for admission as a Pleader be made within three years from the time of his obtaining such degree or License, or within such further time as the High Court shall for any special reason allow: or,

2nd.—If he shall satisfy the Court that he possesses a competent knowledge of the subjects mentioned in this clause by producing a certificate from the Examiners hereinafter mentioned, that he has passed an examination in the Regulations, enactments, and text-books set opposite to the respective subjects. Where two or more books are mentioned in the alternative, it shall be sufficient if the applicant pass in one of such books to be selected by himself.

Subjects.	*Regulations, Enactments, and Text Books.*
1st.—The Law of Property current in Bengal.	Regulations (Bengal) I., VIII., X., XIV., XIX., and XLIV., of 1793, and the Regulations and Acts by which the same have been altered: Act XI. of 1859, and the preamble to Regulation (Bengal) II. of 1793.
A.—With reference to the Permanent Settlement—to the Government lien on land—to claims to hold land exempt from the payment of revenue—and to the mode in which estates can be brought to sale for arrears of revenue.	
B.—The law of under-tenures, and the mode in which the same can be brought to sale for arrears of rent.	Regulation (Bengal) VIII. of 1819, Act X. of 1859, and Act VIII. of 1865 (Bengal Council).
C.—The relation of landlord and tenant.	Act X. of 1859, Act VI. of 1862, and Act VIII. of 1869 (Bengal Council).

* The Rules alluded to are the "Rules drawn up in accordance with Section 4, Act XX. of 1865," dated 2nd May 1866, to be found at page 9 of the W. R., Volume V. (Rules of practice of the High Court). The only alteration now made is the substitution in Rules 11, 22, and 30 of the words "on or before the 1st of December in each year," for the words "or six weeks at least before the date fixed for the examination."

D.—Mortgages: Registration of Assurances.	Macpherson on Mortgages: Act XX. of 1866.
E.—The Hindoo Law of Inheritance, Succession, and Adoption.	Dyabhaga and Mitakshara. Dattaka Chandrika, or Macnaghten's Principles of Hindoo Law, first seven Chapters.
F.—Mahomedan Law.	Macnaghten's Principles of Mahomedan Law, except Chapter 9.
G.—The Indian Succession Act.	Act X. of 1865.
2nd.—Obligations arising from Contracts.	Macpherson on Contracts.
3rd.—Civil Procedure.	Act VIII. of 1859, Act XXIII. of 1861, Act XI. of 1865.
4th.—The Law of Evidence.	Act II. of 1855: and Best or Goodeve or Norton on Evidence.
5th.—The Law of Limitation.	Act XIV. of 1859.
6th.—Criminal Law and Procedure.	The Indian Penal Code (Act XLV. of 1860) and the Code of Criminal Procedure (Act XXV. of 1861 and Act VIII. of 1859.)

RULE 18.

Every person may be admitted as a Pleader of the lower grade who shall satisfy the Court that he possesses a competent knowledge of the subjects mentioned in this clause, by producing a certificate from the examiners hereinafter mentioned that he has passed an examination in the Regulations, enactments, and text-books, opposite to the respective subjects.

Subjects.	*Regulations, Enactments, and Text Books.*
1st.—Hindoo Law.	Macnaghten's Principles of Hindoo Law, first seven Chapters.
2nd.—Mahomedan Law.	Macnaghten's Principles of Mahomedan Law except Chapter 9.
3rd.—Law of Contracts.	Macpherson on Contracts.
4th.—The Law of Property current in Bengal, with reference to the Permanent Settlement: to the Government lien on land: to claim to hold lands exempt from the payment of Government revenue: and to the mode in which estates can be brought to sale for arrears of revenue.	Regulation (Bengal) I., VIII., X., XIV., XIX., and XLIV. of 1793, and the Regulations and Acts by which the same have been altered: Act XI. of 1859, and the preamble to Regulation (Bengal) II. of 1793.
5th.—The relation of Landlord and Tenant.	Act I. of 1859 and Act VI. of 1862 and Act VIII. of 1869 (Bengal Council).
6th.—The Law relating to Putnee Talooks.	Regulation (Bengal) VIII. of 1819: Act VIII. of 1865 (Bengal Council).
7th.—The Law of Limitation.	Act XIV. of 1859.
8th.—Civil Procedure, including the Small Cause Court Act.	Act VIII. of 1859, Act XXIII. of 1861, Act XI. of 1865.
9th.—The Law of Evidence.	Act II. of 1855, and Norton on Evidence.
10th.—Criminal Law and Procedure.	Penal Code (Act XLV. of 1860), Code of Criminal Procedure (Act XXV. of 1861, and Act VIII. of 1869).

RULE 34.

The examination shall be held before such persons as the Government of Bengal shall appoint to be examiners in pursuance of Section 6, Act XX. of 1865, and according to such regulations as shall be made by the said Government for conducting such examinations. The examination shall be in the following subjects:—

Code of Civil Procedure,
Law of Limitation,
Small Cause Court Act,
Penal Code and Code of
Criminal Procedure.

(Sd.) F. B. PEACOCK,
Registrar, High Court.

JURY RULES.

Passed by the High Court, to take effect from 1st December 1869.

Existing rules repealed.

I. All existing rules now in force in the High Court, relating to the summoning, empanelling, qualification, challenging, and service of Jurors, are hereby repealed, and the following rules in lieu thereof, are made and passed as the rules of the High Court, to take effect from the 1st day of December 1869, provided that they are not to be applicable to the Session to be held in that month.

Qualification of Jurors.

II. Subject to the right of challenge mentioned in Section 19 of Act XIII. of 1865, every male person resident in the Presidency Town of Calcutta, not being the subject of any Foreign State, shall be qualified and liable to serve as a Juror in the said Presidency Town, provided his name be included in the Jurors' List for the time being.

Qualification of Jurors.

III. No person shall be put on the list of Jurors unless he be a resident holder of a house or tenement within the Town of Calcutta, of the monthly value of not less than thirty rupees; or a resident in Calcutta whose property or interest in lands, tenements or goods is worth the sum of not less than rupees three thousand; or a resident in Calcutta in receipt of an income or salary of not less than rupees one hundred a month.

Disqualification of Jurors.

IV. No person shall be put upon the list of Jurors who holds any office in or under the High Court; or who receives any pay or emolument for any employment in any office or under any officer thereof, or for executing any duties of Police; or who is the subject of any Foreign State; or who is under the age of twenty-one years or above the age of sixty years; or who has been convicted of felony or any fraudulent offences, or any offence punishable with rigorous imprisonment for a term of three years or upwards, or of an attempt to commit such offence, unless he shall have obtained a free pardon; or who is a lunatic or idiot; or who does not understand the English language.

Persons exempted from serving on Juries.

V. The following persons are exempted from liability to serve on Juries, and shall not be put upon the list of Jurors, *viz.*:—

1. The Viceroy and Governor-General of India.

2. The Lieutenant-Governor of Bengal.

3. The Members of the Council of the Governor-General of India.

4. The Members of the Council of the Governor-General of India and of the Lieutenant-Governor of Bengal, respectively, for the purpose of making laws and regulations.

5. Judges.

6. The Members of the Personal Staff of the Viceroy.

7. The Members of the Personal Staff of the Lieutenant-Governor of Bengal.

8. The Secretaries, Under-Secretaries, and Assistant Secretaries of the Governments of India and Bengal, respectively.

9. The Members and Secretaries of the Board of Revenue.

10. Officers of the Army, Navy, or Marine.

11. Advocates, Vakeels, and Attorneys of the High Court in actual practice, and Managing Clerks to Attorneys.

12. Clergymen of the Church of England, and persons actually employed as ministers of any religious worship whatsoever, and not engaged in any secular employment, except that of teaching.

13. The Comptroller-General of Accounts of the Government of India.

14. The Chairman, Vice-Chairman, and Secretary to the Justices of the Peace, and the Health Officer.

15. The Commissioner and Deputy Commissioner of Police.

16. The Secretary and Treasurer, and the Deputy Secretary of the Bank of Bengal.

17. The Mint-Master.

18. The Collector of Customs, and all persons employed in the Customs Department.

19. The Director-General of the Post Office, and all persons employed in the Post Office.

20. The Director-General of Electric Telegraphs, and all persons employed in the Telegraph Department.

21. The Controller-General of Military Expenditure.

22. The Inspector-General of Jails, L. P.

23. The Surveyor-General and Deputy Surveyor-General.

24. The Administrator-General.

25. The Principal Inspector-General, Medical Department.

26. The Accountant-General of Bengal.

27. The Inspector-General of Ordnance and Magazines.

28. The Remembrancer of Legal Affairs.

29. The Director of Public Instruction.

30. All Magistrates and Deputy Magistrates receiving any pay or stipend from Government as such.

31. The Coroner.

32. Physicians, Surgeons, and Apothecaries duly admitted and actually practising as such.

33. Surgeons, Assistant Surgeons, Sub-Assistant Surgeons, Apothecaries, and Compounders in the Medical service of the Government, or attached to any Hospital or Dispensary.

34. The Master Attendant, the Deputy Master Attendant, Harbour Masters, and all persons employed in the Pilot Service.

35. The Assay Master.

36. The Superintendent of Government Printing.

37. The Examiner of Claims.

38. All persons exempted from personal appearance in the High Court, under Section 22 of Act VIII. of 1859, or any other similar enactment.

39. All domestic servants.

40. All persons who from mental or bodily infirmity shall be unfitted to serve on a Jury.

Nothing in rules III., IV., and V. to disqualify a Juror whose name is in the Jury List.

VI. Nothing contained in Rules III., IV., or V. shall disqualify a person from serving on a Jury, if his name be included in the Jury List.

Jurors not to be summoned again within twelve months, unless by special order.

VII. No Common Juror, who shall have served or been summoned to serve as a Juror at any Session, and shall not have made default, shall be summoned to attend at any other Session within the period of twelve months from the time of such service or summons, unless by special order of a Judge.

Lists of Special and Common Jurors to be summoned for each Session when and by whom to be prepared, and number of names to be contained therein.

VIII. On some day not less than six weeks before the commencement of each Session, one of the Judges of the High Court shall cause to be made out lists of the persons to be summoned as Special and Common Jurors, respectively, for such Session. The list of Special Jurors shall contain the names of 39, and the list of Common Jurors the names of 87, persons of those respectively included in the lists of Special and Common Jurors. The lists shall be respectively called "The Special Jurors' List" and "The Common Jurors' List" for the particular Session, designating it by the date on which it is to commence, and shall be prepared as follows:—

List of Special Jurors how prepared.

(1) The names of all persons, if any, ordered to be entered in the list of Special Jurors for such Session, under Rule IX., XII., or XV., shall be first entered in the said list, unless the Judge shall be satisfied as regards any one or more of such persons that he or they will be unable, from illness or other sufficient cause, to attend at such Session, in which case the name of such person may be set aside in the same manner as it might have been set aside under Rule IX., if the name had been drawn by lot for such Session. The Judge shall then cause to be drawn by lot the names of such a number of persons qualified and liable to serve on Special Juries as, with those already on

the list, will, subject to the provisions of these rules, make up the number of 39 persons qualified and liable to serve on Special Juries, of whom one-third shall be Natives; and the names of such 39 persons shall be entered upon and form the list of Special Jurors liable to serve and to be summoned as Special Jurors for such Session.

List of Common Jurors how prepared.

(2) In like manner, the names of all persons, if any, ordered to be entered in the Common Jurors' List for such Session under Rule IX., XII. or XV., shall be first entered in the said list, unless the Judge shall be satisfied as regards any of them that such person will be unable, from illness or other sufficient cause, to attend at such Session, in which case the name of such person may be set aside in the same manner, as it might have been set aside under Rule IX., if his name had been drawn by lot for that Session. The Judge shall then cause to be drawn by lot the names of such a number of persons qualified and liable to serve on Common Juries as, with the names already on the list, will, subject to the provisions of these rules, make up the number of 87 persons qualified and liable to serve on Common Juries, of whom one-third shall be Natives; and the names of such 87 persons shall be entered upon, and form the list of Common Jurors liable to serve, and to be summoned as Common Jurors for such Session.

Mode of proceeding to draw the names of the Special and Common Jurors to be summoned.

IX. The mode of proceeding to draw the names of such Special and Common Jurors, respectively, shall be as follows:—

The names of all the Jurors in the lists of Special and Common Jurors, respectively, prepared by the Clerk of the Crown, shall be numbered consecutively. The number attached in the list of Special Jurors to the name of each Juror liable to be summoned as a Special Juror for the Session for which the list of the Special Jurors is to be prepared, shall be written on a distinct piece of card or parchment, the several pieces of card or parchment being all, as nearly as may be, of equal size and shape, and such cards or parchments shall be put together by the Clerk of the Crown into a box, and, on the day to be fixed for drawing the names of the Jurors, the Clerk of the Crown shall in open Court draw or cause to be drawn the said cards or parchments, one after the other, until the requisite number of Special Jurors shall be obtained. The Juror on the Special Jurors' List, whose number on such list shall correspond with the number drawn, shall, subject to the provisions in these Rules, be entered in the Special Jurors' List for the Session, and a number denoting the order in which the name of each Juror is so drawn, shall be set against the name of such Juror in the Special Jury List for the Session.

A similar course *mutatis mutandis* shall be adopted in drawing the names of the Common Jurors.

Names of deceased persons, or persons not liable to serve, or excused from service, to be set aside.

The Judge may order the name of any person who has actually served as a Juror in the preceding year, and of any person known or believed to be dead, absent from Calcutta, or likely to be unable from illness or otherwise to attend, to be set aside; and, in every such case, an additional name shall be drawn in lieu of that so set aside, and the Judge, if he think fit, may order the name of any person so set aside, except on account of death, to be entered on the list of Special or Common Jurors, as the case may be, for any subsequent Session to be then fixed.

Names of persons excused from service, to be entered in list for future service.

Names to be arranged in the lists in the order in which they are drawn, with additions and places of abode.

X. The names, additions, and places of abode of the several persons included in such Special and Common Jurors' Lists for the Session, shall be written therein, and numbered in the order in which they shall have been drawn, and such lists shall be signed by the Judge.

Copy of lists to be annexed to precept to the Sheriff to summon 36 Special Jurors and 72 Common Jurors in numerical order.

XI. A copy of such lists shall be annexed to a precept to the Sheriff, commanding him to summon the first 36 on the list of Special Jurors, and the first 72 on the list of Common Jurors, and, in case, he shall not be able to summon the whole of the first 36 or 72, as the case may be, then to summon as many as shall be necessary to make up the full number of 36 or 72, of those in numerical order in such lists respectively next after the first 36 or 72.

The name of any Juror excused attending at one Session, on condition of his serving at a subsequent Session, to be inserted by the Clerk of the Crown in the list for such subsequent Session.

XII. Any person whose name is included in the Special or Common Jurors' List for any Session may apply to the Clerk of the Crown to cause him to be excused from attendance as a Juror, either generally or at the particular Session. Such application shall be made at least one week before the day fixed for the commencement of the Session, and shall specify the grounds upon which the application is made. The Clerk of the Crown shall, as soon as possible after the last day allowed for making such applications, bring them before one of the Judges of the Court, and such Judge shall pass orders thereupon, which shall be communicated by the Clerk of the Crown to the respective applicants. If the Judge shall think fit to excuse any of the applicants from attendance at the particular Session, he may do so unconditionally, or on condition of his serving at the next or some subsequent Session to be fixed, and any such conditional order shall operate as an authority to the Clerk of the Crown to include the name of such person in the list for such subsequent Session under the provisions of Rule VIII.

Jurors to be summoned 10 days before the first day of the Session.

XIII. Every person named in the lists mentioned in Rule X., and in any such supplementary lists as hereinafter mentioned, shall forthwith, or as soon as possible, after the receipt of the precept by the Sheriff, be summoned by him to attend at the Session for which he shall have been appointed to serve as a Juror, and such summons shall be served at least 10 days before the first day of the Session.

Sheriff to return precept with two panels, one of Special Jurors and one of Common Jurors, showing in tabular form names and particulars of service, and accounting for non-service.

XIV. The Sheriff, shall as soon as possible after such service, and not later than one week before the commencement of the Session, return the precept to the Clerk of the Crown, with two panels annexed thereto, one of the Special Jurors, and one of the Common Jurors, which panels shall show in a tabular form the names of the persons summoned, and the particulars of service upon each; and if any person or persons named in the lists annexed to the precept shall not have been served, the panel shall state that fact, and the reason why such person or persons has or have not been summoned; and in every case, the reason why such service has not been effected, shall be verified by the affidavit of the officer whose duty it was to effect such service, and such affidavit shall be filed with the Clerk of the Crown, with the return to the precept.

Sheriff's return to be immediately laid before a Judge for orders.

XV. On the receipt of such return, the Clerk of the Crown shall without delay bring the same before one of the Judges of the Court. The said Judge may, if necessary, examine the Sheriff's officer or officers as to the truth of such return, and as to the circumstances of the service or of the absence of service on any person, and may direct service to be made upon the person or persons not already served in such manner as to him shall seem fit. The Judge, if he think fit, may cause the name of any person returned by the Sheriff as not summoned to be entered on the list of Jurors, either Special or Common, as the case may be, for any subsequent Session to be fixed by the Judge.

If sufficient number of Jurors not served, further names of Jurors to be drawn by lot, as provided by Rule IX.

XVI. If the Judge shall be of opinion that the number of Jurors named in either of the said lists who shall have been served, is not likely to be sufficient, he may cause to be drawn by lot, in the mode provided by Rule IX., such further number of names as may be required to make up the full number of Special and Common Jurors summoned to attend at the Session to 39 and 87 respectively.

Copy of Supplementary Lists of Jurors to be annexed to additional precept to the Sheriff to summon the persons named therein.

XVII. Such lists shall be called the supplemental Lists of Special or Common Jurors, as the case may be, and shall be prepared and signed in the manner hereinbefore provided, with respect to the original lists, and copies thereof shall be sent to the Sheriff with an additional precept, and the Sheriff shall, as soon as possible, after the receipt of such additional precept, cause the persons named therein to be summoned to attend at the Session, and shall return the precept to the Court not later than one clear day before the first day of the Session, with a panel similar to that provided by Rule XIV. in respect of the original lists and precept.

Sheriff to return the precept with a panel as provided by Rule XIV., one clear day before the first day of Session.

Jury how to be drawn and empanelled.

XVIII. In order to nominate a Jury for the trial of any prisoner or other person to be tried by Jury, the Clerk of the Crown shall cause to be put together into one box pieces of card or parchment containing the names of all the persons summoned to serve on the Common Jury for the Session, if the trial is to take place before a Common Jury, or on the Special Jury, if the trial is to take place before a Special Jury, except such of the said persons as shall have been excused by the Judge from serving on that day in consequence of his having served as a Juror on the previous day or for any other cause. Such pieces of card shall be, as nearly as may be, of equal size, and each shall bear the name of one person summoned to serve on the Jury for that Session. The Clerk of the Crown shall then in open Court draw or cause to be drawn out of the said box twelve of the said cards or pieces of parchment, one after another, and if any of the Jurors whose names shall be so drawn shall not appear, then such further number shall be drawn until twelve Jurors shall appear. The prisoner or person to be tried shall be informed, that if he desires to object to any Juror, he must make his objection before the Juror is sworn. The names of the Jurors shall then be called aloud, and if, upon any challenge or objection either by the Government or the party to be tried, or for any other lawful cause, any Juror is not allowed to serve or is exempted from serving, the Clerk of the Crown shall draw out another piece of card or parchment from the said box, and so on, until twelve Jurors shall have been drawn who shall be allowed to serve.

Proceedings in case of deficient Jurors.

XIX. If, by reason of absence, or disallowance on challenge, or any other cause, there be a deficiency of Jurors, the Court may command the Sheriff, or other Officer, to name or summon a sufficient number of persons to make up a full Jury; and the Sheriff or other Officer shall, at such command of the Court, return such men duly qualified to serve as shall be then present, or can be found to serve on such Jury, and the course of proceeding shall be the same as if their names had been returned in the panel, and drawn by ballot under Rule XVIII; provided that, in case of a Special Jury, the additional Jurors may be taken from the list of Common Jurors summoned to serve at the same Session, if a sufficient number of Jurors qualified to serve as Special Jurors shall not be present in Court.

The same Jury, if not objected to, may try several accused persons in succession without being re-drawn.

XX. The same Jury, if not objected to, may try as many accused persons successively as to the Court may seem expedient without their names being re-drawn.

Mode of proceeding when a view by the Jury is necessary.

XXI. Whenever, in the opinion of the Court, it may be proper or convenient that a Jury shall have a view of the place in which the offence charged is said to have been committed or to which the trial relates, or of any other place in which any transaction material to the enquiry took place, an order shall be made to that effect, and the Jury empanelled to try the case shall be conducted in a body, under the care of an Officer or Officers of the Court to the place, which shall be shown to them by a person appointed by the Court; and it shall be the duty of the Officer or Officers not to converse, or to suffer any other person to speak to, or hold any communication with, any of the Jury; and when the view is finished, the Jurors shall be immediately conducted back into Court.

After each Session entry to be made by the Clerk of the Crown against the name of each Juror who has not made default.

XXII After each Session, the Clerk of the Crown shall make an entry in the list of Jurors opposite the names of those who shall have served or shall have been summoned to serve at such Session and shall not have made default, together with the date of service, or of the Session for which he shall have been summoned to serve.

No person not on the Common Jury list to be summoned to serve on a Coroner's inquest, and no Juror, except in case of necessity, to be summoned again within twelve months.

XXIII. No person shall be summoned to serve upon any inquest before a Coroner unless he is on the Common Jury list, nor, unless in the case of necessity, after he shall have served or shall have been summoned to serve on a Coroner's inquest within the period of twelve months immediately preceding such summons and shall not have made default. The Coroner shall keep a copy of the Common Jury List, and shall enter therein the names of the persons who shall have served or been summoned to serve and not made default, and the date of the inquest at which such Juror shall have served, or for which he shall have been summoned to serve.

Coroner to keep a copy of the Common Jury List, and make an entry as required by Rule XXII.

CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

Circulates Memo. from Accountant-General, Bengal, regarding Bills for the travelling allowances of officers of Small Cause Courts.

No. $\frac{T}{1848}$.

OFFICIAL MEMORANDUM.

To the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 12th July 1869.

WITH reference to your letter No. 1146, dated 18th March 1869, to the address of the Judge of the Small Cause Court of Patna, I request the favor of your bringing to the notice of the High Court that, as the travelling allowances of the Nazir's establishment of a Small Cause Court are chargeable to a Local Fund and not to the Imperial Budget, it would be contrary to the orders of Government to include such sums in one consolidated bill with the travelling allowances of the rest of the establishment, which are provided for in the Imperial Budget.

These two classes of bills are dealt with in this office by different departments, and it would be very inconvenient for the amounts to be shown in one general form for your counter-signature, showing the travelling allowances of all officers as directed in your letter under reference. I would suggest, therefore, that, with the permission of the High Court, Small Cause Court Judges be instructed to submit two consolidated bills for your counter-signature monthly, showing the travelling allowances of officers of the Court who are paid from Imperial Revenues and from the Peons' Fee Fund respectively.

CIRCULAR MEMO. No. 6.

Copy forwarded to the Judges of Small Cause Courts for their information and guidance.

By Order,

(Signed) F. B. PEACOCK,

CIVIL SIDE, *The 21st July* 1869. } *Registrar.*

Draws attention to a previous Circular, and states that an application from a Judicial Officer for transfer must be sent through the Judge of his District.

CIRCULAR No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Regulation and Extra—Regulation Provinces, dated Calcutta, the 26th July 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges*.

THE Civil Authorities of the Regulation and Extra-Regulation Provinces are informed that following the rule laid down in Circular Order No. 73 of the 6th March 1840, no application from any Judicial Officer subordinate to a District Judge, for transfer to another district, will be attended to unless sent through the Judge of his district; and it is requested that this resolution may be communicated to all officers in the subordinate judicial service by the Judges of their respective districts.

Prescribes the Rules to be observed in the Offices of Zillah Judges with regard to the furnishing applicants with information from the records or with unauthenticated copies of papers.

CIRCULAR ORDER No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal; to all Civil Judges and Judicial Commissioners, dated Calcutta, the 16th July 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

It is ordered by the High Court that the following rules will be observed in the Offices and Record-rooms of Zillah Judges, in regard to furnishing applicants with any information from the records or with unauthenticated copies of papers or documents:—

1. All applications for information or for unauthenticated copies of papers or documents, shall be made at a place, and to the officer, designated by the Zillah Judge for that purpose, between the hours of 12 and 2.

2. The officer to be so designated shall be either the Record-keeper, or such other paid ministerial officer of the Judge's Court, as can be spared; the officer taking the duty on each day shall be noted by the Sherishtadar in the office-diary.

3. The applications shall be on a printed form (A), to be obtained from the Nazir at the price of one pice or ¼ anna. The officer receiving such application is to note, on the space reserved for that purpose at the foot of the printed form, the number of the application and name of applicant with date of receipt, and shall tear off such note and return it to the applicant. If the information required can be immediately obtained, the Record-keeper, or other officer receiving the application, shall at once pass on the application to the amlah with whose department it is connected, who will endorse on it the necessary information; the application will then be returned through the receiving officer to the party presenting it.

4. If the application be for a copy of any paper or document, or for any information which cannot be immediately obtained, the application shall be passed on to the proper officer with a memo., stating the hour and date by which the copy or information is to be ready, and a corresponding note shall be made on that portion of the form which is to be returned to the applicant. Such applications shall be in Form B, which will be obtainable in the same manner and at the same cost as Form A.

5. All applications of the latter kind shall be entered in a book to be kept by the Record-keeper, or other officer receiving applications, in the form annexed. Sheets of such books may be indented for on the Superintendent of Government Stationery.

6. The Judge is to license as many copyists, to be selected as far as practicable from the apprentices in his office—regard of course being had to their efficiency—as may be required for the purpose of supplying

all applicants with copies without inconvenient delay; and no one but a licensed copyist is to be employed in the preparation of copies. Copies are to be paid for at the rate of one anna for every hundred words in the Vernacular, and of two annas for every hundred words in English, four figures counting as one word. On each copy the amount of the fee received is to be noted as follows :—

Number of words (English or Vernacular) in the copy

at anna per 100 words is ... Rs. 0 0 0

Received payment,

(Signed) A. B.,

Licensed Copyist.

7. Copies of maps and plans cannot be supplied from the Judge's office; but application should be made to the offices where the original maps are deposited. No copy of a copy shall be supplied without express sanction of the Judge.

The number of copyists licensed should not be greater than will admit, under ordinary circumstances, of each Vernacular copyist earning at least 12 rupees, and of each English copyist earning at least 20 rupees per month.

8. Each copyist is to keep a register showing his receipts, which he is to submit once a month to the Judge, who will thus be enabled to regulate the establishment of copyists, and to reduce the number, if required, with reference to the provisions of the preceding rule. The Judge may, under pressure of work, depute to his Sherishtadar the duty of examining these registers; but he is, under no circumstance, to omit doing so himself at least once a quarter, and a certificate of his inspection of these books, is always to be inserted in the annual report.

9. A fee of 8-annas shall be charged for searching. No fees are to be required or paid for seaching or copying papers wanted by public officers for public purposes.

10. A book is to be kept by the Record-keeper, in which all sums received on account of searching are to be entered. These sums are to be handed over daily to the Nazir, and by him paid into the Treasury to the credit of Law and Justice, under such heading as the Government may direct, once a month or oftener, if, with regard to the amount received, this should be necessary.

11. The Record-rooms are not open to the public generally, but public officers of the district (including Sherishtadars) and pleaders may enter the Record-room and examine the record of any case in the presence of the Record-keeper or one of his assistants. Pleaders before making such examination should pay the fee prescribed by Rule 9.

12. Translations of Forms A and B, in Bengali and Urdoo, will be sent by the Court to the Superintendent of Stationery. Judges should therefore indent upon him for a supply of forms both in English and the Vernacular of their respective districts, quoting this Circular Order as their authority.

Form B will be supplied in books, and will have attached to them counterfoils, on which will be entered the name of the applicant, the date of receipt of the application, and the time by which the copy required is to be ready; and the receiving officer after properly filling up the counterfoil in the manner just indicated will affix to it his signature.

13. These rules are only experimental, and the Court will be glad, therefore, to have a report at the end of the year as to how they have worked, and whether or not the fees and charges fixed require alteration.

NOTE.—These forms may be procured from the Nazir of the Court at 1 pice per single form, or 100 for a rupee.

The person applying for information is to fill up Columns 1 (except the Number), 2, and 3, and present it to the officer appointed to receive such applications, who, if the information required cannot be immediately supplied, will fill up, tear off, and return the bottom part of the form to the applicant.

A.

Form of Application for information.

No. and date.	Name and residence of applicant.	Nature of the information required.	Date on which the information is to be ready.	Signature of officer receiving the application.	REMARKS.
			such a kind that it can be column wont be filled up, only will be passed into the nished immediately, the dup- original returned to the ap- ing made in this column.		
No. and date.	Name and residence of applicant.	Nature of the information required.	Date on which the information is to be ready.	Signature of officer receiving the application.	REMARKS.
			If the information is of immediately furnished, this and the original application office. If it cannot be fur licate will be sent in, and the plicant, the proper entry be		

B. (COUNTERFOIL.)

Name of applicant.

Date of receipt of application.

The time by which the copy required is to be ready.

NOTE.—These forms may be procured from the Nazir of the Court at 1 pice per single form, or 100 for a rupee.

The person applying for a copy is to fill up Columns 1 (except the Number), 2, and 3, and present it to the officer appointed to receive such applications, who will pass it on to the proper officer.

B.

Form of Application for copies.

No. and date of application.	Name, residence, and description of applicant.	Specification of paper of which the copy is required.	Case or proceeding in which such paper is to be found or filed.	Name of Office or Department where the paper in question is to be found.	Time when copy will be ready.	Name of Copyist.	Name of officer receiving application who fills up the three preceding columns.	REMARKS.

Copy required will be furnished by on the at

Signature.

Enquires whether Judges are restricted to any particular monthly sum for the purchase of stationery, &c., and if such sum is sufficient.

CIRCULAR ORDER No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges and Judicial Commissioners, except Judges of Small Cause Courts, dated Calcutta, the 1st September 1869.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

THE Court request to be informed whether you are restricted to any particular monthly sum for the purchase of stationery and charge for book-binding, &c., for your Court, and, if so, whether the sum fixed is sufficient for that purpose. You will also state whether the sums allowed by Circular Order No. 1407A of the 17th December 1862 for the Courts of Principal Sudder Ameens (now Subordinate Judges) and Moonsiffs, *viz.*, Rupees 15 and Rupees 8 a month respectively, is sufficient to meet the requirements of those Courts, and, if not, what sum you would recommend in each case.

Directs Judges to furnish information as to Moonsiffees to the Registrar General of Assurances for his Registration Manual.

CIRCULAR ORDER No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges and Judicial Commissioners, dated Calcutta, the 22nd September 1869.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

THE Registrar General of Assurances being desirous of the assistance and co-operation of Zillah Judges with a view to the more accurate definition of those Moonsiffees which are imperfectly described in the list of the districts and sub-districts appended to his new edition of the Registration Manual, the Court request, at the instance of His Honor the Lieutenant-Governor, that all District Judges and Judicial Commissioners will render the Registrar General all the assistance in their power in obtaining the requisite information.

Forwards resolution prescribing rules for the payment of tullubana on account of service of notice to respondents in appeals to the High Court.

CIRCULAR ORDER No. 11.*

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Authorities in the Lower Provinces, dated Calcutta, the 7th October 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

A COPY of a resolution, passed by the High Court on the 25th of May last, embodying rules for the payment of tullubana

* This Circular No. has been altered from 13 to 11.

on account of the service of notice to respondents in appeals in civil cases preferred to the High Court, is forwarded herewith for the information and guidance of all Civil Courts; and the attention of those officers is at the same time drawn to C. O. No. 10 of the 26th of April 1864, and they are required, in every instance in which the instructions of that Circular are not complied with, to specify the reasons of such non-compliance.

2. The sanction and approval of His Honor the Lieutenant-Governor having been obtained to the system of payments introduced by the rules, that system will be brought into effect in respect of all appeals to the High Court from and after the 1st of December next.

3. The attention of all Civil Courts is specially drawn to Rule 4, which requires them, on receipt of the High Court's precept calling for the record and transmitting the notices of appeal, at once to cause service of notice without requiring further payment of tullubana or action on the part of the appellant, except that "the appellant, or any one employed by him," is to "be at liberty to accompany the serving officer for the purpose of pointing out the residence of the respondent."

4. Their attention is also drawn to the provisions of Rules 5 and 6, and the latter clause of Rule 10.

High Court of Judicature at Fort William in Bengal.

Civil Appellate Jurisdiction, the 25th May 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

READ a report from the Deputy Registrar containing suggestions for the alteration of the table fixing the time allowed for service of the notices on the respondents in appeals preferred to the High Court, and the Minute of the Hon'ble the Chief Justice thereon.

Read also the draft Rule for the deposit of process-fee in the treasury of the Collector of the 24-Pergunnahs, and the letter of the Under-Secretary to the Government of Bengal, No. 6721, dated the 21st of December 1867.

IT IS ORDERED

(1). That the Time Table A hereto annexed be adopted, and a copy sent for guidance to the several Zillah Courts.

(2). That, upon obtaining the sanction and approval of His Honor the Lieutenant-Governor of Bengal, it be ordered that, from and after the first day of May next, the cost of service of notice on the respondent in every appeal in a civil case preferred to the High Court shall be paid at the High Court, at the time of presenting the appeal, by an adhesive stamp, of such description as shall be issued for that purpose, to be affixed to the petition of appeal. The amount to be so paid shall be 3 rupees if there be only one respondent, or one rupee and eight annas for each respondent to be served, to which shall be added on account of boat-hire, &c., in respect of respondents to be served in any district mentioned in the annexed Table B, in the months specified, the sums respectively set down, one such payment for each appeal.

(3). That separate account be kept of such stamp-duty.

(4). It is further ordered that the precept of this Court calling for the record and transmitting the notices of the appeal, shall direct that the notices be served; and it shall be the duty of the Lower Court thereupon to cause service of the notices without further payment of tullubana or action by the appellant; provided that the appellant, or any one employed by him, shall be at

liberty to accompany the serving-officer for the purpose of pointing out the residence of the respondent.

(5.) That the Lower Court shall issue all notices received for service immediately on receipt thereof, and that, in their return of service, in every instance, the Lower Courts shall be required to insert the date of receipt by them of the notice, the date on which it was made over to the serving-officer, and the date on which it was received back from him.

(6.) That every return of service, or of failure to serve the notice, be accompanied by the affidavit or solemn declaration of the serving-officer, specifying the fact and the mode of service or the reason why service could not be effected in any of the modes allowed by law. It shall be the duty of the Lower Court to cause the notice to be served in sufficient time before the date fixed, and, if such service be impracticable, to state the reasons for which service cannot be effected; and thereupon a fresh date shall be fixed by the High Court. In every case, the Court making the return is to satisfy itself that a valid service has been made, or that there has been a failure of service, and shall certify such opinion to this Court, with the reasons, in case of a failure of service.

(7.) That the time allowed for service of the notice shall be specified therein by the Deputy Registrar in accordance with the table of time now adopted, and shall commence from the date on which it is despatched, which shall, in general, be within three days at the latest from the date on which the appeal is filed.

(8.) That the date to be fixed by the Deputy Registrar for the hearing of the appeal shall be the 7th day after that on which the time allowed for service of the notice expires, provided it be not a Sunday or holiday, and in that case, the first business-day afterwards.

(9.) That if there be several respondents to be served, and they do not all reside in the same district, the time for service of the notices and for hearing shall be fixed with reference to that district for which the longest time is allowed in Table A.

(10.) That in every instance in which it shall appear that the respondent, or any one of the respondents to be served, resides in any district other than that from which the appeal comes, the Deputy Registrar, in fixing the time for service, and for the hearing of the appeal, shall add a sufficient time for sending the notice from the district from which the appeal comes to the district in which any notice is to be served; and the Court which serves any notice sent through the Lower Court shall make its return of service, or of the failure of service, as the case may be, direct to the High Court, and shall be guided by Rules 5 and 6.

(11.) That the endorsement on every paper-book prepared hereafter for the use of the Court at the hearing of the appeal, shall, in addition to the other matters at present specified in such endorsement, contain—

The date on which the appeal is filed;

The date on which the notice is sent out;

The date of service of notice;

The date on which the record is received from the Lower Court; and

The date on which the appeal is ready for hearing and the paper-book prepared.

(12.) That in appeals in which the respondent shall not have appointed a vakeel up to the date of the preparation of the paper-book, an appendix containing the deposition of the serving-officer, and the return, and the remarks of the Lower Court as to the service, shall be added to the paper-book either in transcript or translation according as they may be in English or the Vernacular.

That a copy, and, where necessary, a translation, of these Rules be transmitted to each of the Zillah and other subordinate Courts for information and guidance; and that their attention be drawn to the Circular Order of this Court, No. 10, dated the 26th of April 1864; and that they be required in every instance in which the instructions contained in the Circular Order are not complied with, to specify the reasons of such non-compliance.

That a copy of these Rules be hung up in each of the two libraries, and at the main entrance of the Court House for general information.

By order of the High Court,
(Sd.) F. B. PEACOCK,
Registrar.

A.

Time Table.

Districts.	Number of Days allowed for service of Notice of Appeal on the Respondent.	Districts.	Number of Days allowed for service of Notice of Appeal on the Respondent.
Akyab	50	Hooghly	25
Arracan	50	Jessore	29
Assam (including Eastern Dooars)	50	Midnapore	27
Backergunge	35	Moorshedabad	23
Beerbhoom	23	Moulmein	50
Bhaugulpore...	31	Mymensingh	35
Burdwan, East	23	Nuddea	29
Burdwan, West	25	Patna	31
Cachar	50	Purneah	33
Cherrapoonjee	50	Rajshahye	31
Chittagong	35	Rungpore	33
Chota Nagpore	40	Sarun	31
Cooch Behar (including Western Dooars)	50	Shahabad	31
Cossiah and Jynteeah Hills ...	50	Sylhet	35
Cuttack	35	Tipperah	37
Dacca	29	Tirhoot	33
Dinagepore	31	24-Pergunnahs	25
Gyah	33		

B.

Table of Charges for Boat-hire and Ferry-toll.

Districts.	Amount to be charged.			The period during which the charge is to be made.
	Rs.	As.	P.	
Backergunge (whole district)	1	0	0	All the year.
Bhaugulpore	1	0	0	June to October inclusive.
Chittagong	0	8	0	All the year.
Cuttack	0	4	0	June to November inclusive.
Dacca	3	0	0	All the year.
Dinagepore	1	8	0	June to October inclusive.
Jessore	3	0	0	All the year.
Moorshedabad	1	0	0	June to October inclusive.
Mymensingh	3	0	0	Ditto.
Purneah	2	0	0	Ditto.
Rajshahye	1	8	0	Ditto.
Rungpore	3	0	0	All the year.
Sylhet	3	0	0	Ditto.
Tipperah	2	0	0	June to October inclusive.
Kamroop	1	8	0	All the year.
Nowgong	1	8	0	June to October inclusive.
Luckimpore	1	0	0	All the year.

The practice reported from several districts of exempting from Toll peons wearing their badges, and engaged in executing processses, should be made general.

Draws attention to previous Circular, and issues further instructions regarding the reception of documents and exhibits during the trial of a cause.

CIRCULAR ORDER No. 12.*

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges and Judicial Commissioners, dated Calcutta, the 3rd December 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, F. B. Kemp, J. B. Phear, A. G. Macpherson, F. A. Glover, and Sir Charles Hobhouse, *Bart., Judges.*

NOTWITHSTANDING the instructions contained in Circular Order No. 9 of the 26th February 1867,† the Court often find it extremely difficult, and in some cases impossible to ascertain what documents or exhibits have been actually admitted or relied on by the parties as evidence in the Lower Courts; and hence, there is no security that documents and exhibits may not be used or offered in this Court which have never been admitted in evidence or inspected by the Courts below.

2. Whilst, therefore, the Court take this opportunity of calling the particular attention of all Subordinate Judicial Officers to the instructions contained in the Circular Order above alluded to, and especially to paragraphs 2 and 6 and 7 to 12 of it, they direct that in future, immediately after the conclusion of the trial, the presiding officer shall cause to be prepared two lists, one containing all the exhibits admitted as evidence in the case numbered with the same numbers as those by which they are respectively distinguished in the Judge's notes—which should be in numerical order according to their reception; the other containing those that have been rejected as inadmissible, lettered alphabetically in consecutive order, and having a column for remarks in which should be entered the shortest possible explanation of the reason of their rejection.

Rejected exhibits, after being endorsed, are returned to the party producing them (Section 134, C. P. C.), so that the Judge must prepare the list of rejected exhibits from his own notes.

3. The lists shall distinguish the exhibits put in or offered on the part of the plaintiff from those put in or offered on the part of the defendant, and shall be signed by the presiding officer, and shall form part of the record.

* The number of the Circular printed at page 7, *ante*, has been altered from 13 to 11.

† 7 W. R., Civil Circulars, p. 4.

Circulates letter from the Judicial Commissioner of Oudh, requesting that Civil processes for service on persons in Lucknow be addressed to the Civil Judge.

No. 1283 of 1869.

FROM

CHARLES CURRIE, ESQ., C. S.,
Offg. Judicial Commissioner of Oudh.

TO

THE REGISTRAR OF THE HIGH COURT, CALCUTTA.

Dated Lucknow, the 4th October 1869.

SIR,

I have the honor to request that, all processes in Civil Suits forwarded for service on persons residing in the city or station of Lucknow, may be addressed to the Civil Judge, and not to the Deputy Commissioner of Lucknow, as the latter has no Civil jurisdiction within the city or station.

I have, &c.,

(Sd.) CHARLES CURRIE,
Offg. Judicial Commissioner.

CIRCULAR MEMO. No. 7.

Copy forwarded to all Civil Judges and Judicial Commissioners for information and guidance.

By order of the High Court,

(Sd.) F. B. PEACOCK,
Registrar.

HIGH COURT.
CIVIL SIDE;
The 10th December 1869.

Directs the preparation of an Alphabetical List of the villages in each district, showing the Thannah and Moonsiffee jurisdiction in which each village is situated.

CIRCULAR No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal to all District Judges and Judicial Commissioners, dated Calcutta, the 16th December 1869.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

THE Court directs that an Alphabetical List may be made by every District Judge and Judicial Commissioner, after reference to the records of the Revenue survey, of the villages in his district, showing the Thannah and Moonsiffee jurisdiction in which each village is situated. The list should be prepared in the form adopted by the Judge of the 24-Pergunnahs, as indicated on the margin, and should be prefaced with an abstract statement on a distinct sheet exhibiting in three columns, *the names of Moonsiffees, the sub-divisions with which they are conterminous, and the thannahs comprised in each Chowkey.*

Alphabetical List of Mouzahs in the district of

No. of Mouzah in the list prepared by Boundary Commissioner.	Name of Mouzah.	Thannah in which the Mouzah is situated.	REMARKS.

2.—The Court desire, at the same time, that it be understood that the statements contained in such lists are not to be taken as conclusive and irrebuttable evidence as regards the jurisdictions within which the villages therein enumerated are situated.

Notifies the list of holidays for the year 1870 for the Subordinate Civil Courts other than those in the Behar Districts.

CIRCULAR ORDER No. 15.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Civil Judges, Lower and Extra Regulation Provinces, dated the 18th December 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges*.

The High Court of Judicature hereby authorizes the closing of the Subordinate Civil Courts in the districts under its jurisdiction, except in the districts comprised in the province of Behar and named in the margin, on the dates specified in the annexed list, being the Christian and Native Holidays permitted to be observed in the ensuing year.

Bhaugulpore.
Gyah.
Patna.
Sarun.
Shahabad.
Tirhoot.

2. The Courts are not to be closed except on the days specified; and this order is not to be taken as justifying the refusal to do any act or make any order for which emergent application may be made, and which may be lawfully made or done out of Court.

List of authorized holidays for the year 1870.

[*Omitted as unnecessary.*]

Notifies the list of Holidays for 1870 for the Civil Courts in the Behar Districts.

CIRCULAR ORDER No. 16.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Judges of the Behar Districts, dated Calcutta, the 21st December 1869.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges*.

THE High Court of Judicature hereby authorizes the closing of the Subordinate Civil Courts in the Districts as per margin comprised in the Province of Behar on the dates specified in the annexed list, being Christian and Native holidays permitted to be observed in the ensuing year.

Bhaugulpore.
Gya.
Patna.
Sarun.
Shahabad.
Tirhoot.

2. The Courts are not to be closed except on the days specified, and this order is not to be taken as justifying the refusal to do any act or make any order for which emergent application may be made, and which may be lawfully made or done out of Court.

List of authorized holidays for the year 1870 (Behar Districts).

[*Omitted as unnecessary.*]

CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Cancels three Circular Orders requiring a return of criminals sentenced to long terms of imprisonment and transportation.

CIRCULAR No. 5.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Sessions Judges and Judicial Commissioners, dated the 15th June 1869.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

A SPECIAL return of criminals annually sentenced to long terms of imprisonment and transportation being no longer required by the Government of India, the following Circulars of the High Court are hereby cancelled:—

Circular Order No. 10, dated 14th Novr. 1862.
" " " 12, " 5th June 1863.
" " " 12, " 11th Sepr. 1867.

Enjoins the course to be pursued in forwarding the appeals of prisoners and in transmitting the orders of Appellate Courts thereon.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities and Officers in charge of Jails, dated the 2nd July 1869.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and L. S. Jackson, *Judges.*

THE Court directs that communications from the officer in charge of the Jail to the Sessions Judge relative to the appeals of prisoners to him be made to the Judge direct, and not through the Magistrate of District, who has no concern with the decisions of the Court of Session made on appeal, unless when the appeal happens to be from his own decision.

2. The Appellate Court shall in every case certify its decision to the Court or Magistrate from whose decision the appeal has been preferred; and it will be the duty of the Court or Magistrate either to issue such warrant as may be necessary in consequence of the decision of the Appellate Court, or to inform the appellant *in writing,* through the officer in charge of the Jail, of the result of his appeal.

Enjoins the course to be pursued in forwarding the appeals of prisoners and in transmitting the orders of Appellate Courts thereon.

(Substituted copy.)

MEMO.

The accompanying copy of Circular Order No. 6, dated 2nd July 1869, should be substituted for the copy previously sent,* which should be returned to this office.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities and Officers in charge of Jails, dated Calcutta, the 2nd July 1869.

(Criminal Side.)

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

THE Court directs that communications from the officer in charge of the Jail to the Sessions Judge, relative to the appeals of prisoners to him, be made to the Judge direct, and not through the Magistrate of the District who has no concern with the decisions of the Court of Session made on appeal, unless when the appeal happens to be from his own decision.

2. The Appellate Court shall in every case, except as otherwise herein provided, certify its decisions to the Court or Magistrate from whose decision the appeal has been preferred, and it will be the duty of the Court or Magistrate either to issue such warrant as may be necessary in consequence of the decision of the Appellate Court, or to inform the appellant *in writing*, through the officer in charge of the Jail, of the result of his appeal.

3. In cases where an order passed by an officer in charge of a sub-division other than the Sudder sub-division is reversed or modified on appeal, the Appellate Court shall certify its decision to the Magistrate of the District, who will issue a warrant to the officer in charge of the Jail to give effect to the orders of the Appellate Court and will inform the Court, from whose orders the appeal was preferred, of its result.

* *Ante*, p. 1.

Directs Sessions Judges not to send to the High Court the records of cases in which no appeal lies, unless called for by the High Court.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, Lower Provinces, dated the 12th August 1869.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

INSTANCES having repeatedly occurred of Sessions Judges applying the "General Rule" laid down in Circular Order No. 5, dated 28th May 1868, to cases in which sentences or orders have already been passed by an Appellate Court upon appeal, and which, therefore, are final under Section 428 of the Code of Criminal Procedure, except as provided in Section 405, the Court directs that records be not sent up in cases in which no appeal lies unless called for by the High Court.

2. In such cases parties should be left to apply to the High Court by motion.

* W. R., Criminal Circular, 13.

Directs Jailors not to send to the High Court petitions of appeals from prisoners in cases in which no appeals lie to the High Court.

CIRCULAR MEMO. No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Officers in charge of Jails, dated the 25th August 1869.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

OFFICERS in charge of Jails are hereby informed that petitions of appeal from prisoners should not be forwarded to the High Court in cases in which sentences or orders have already been passed by an Appellate Court on appeal (as, for example, by a Court of Session on an appeal from a conviction before the Magistrate of the District or other officer exercising the powers of a Magistrate), such sentences or orders being final under Section 428 of the Code of Criminal Procedure, except as provided in Section 405, under which the High Court may *call for* and examine the records of any case tried by any Court of Session.

2. In such cases parties should be left to apply to the High Court by motion made by a Pleader in open Court.

Directs Magistrates to deal carefully with cases under Section 325 or 323, Penal Code, when death has resulted from injuries inflicted.

CIRCULAR ORDER No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 9th September 1869.

(Criminal Side.)

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

It having been brought to the notice of the High Court that several cases have recently occurred in which Magistrates have disposed of cases as coming under Section 325 or 323 of the Penal Code when death has resulted from the injuries inflicted, in some of which, in the opinion of the Court, the parties ought to have been punished for culpable homicide or murder, the Court desire to observe that, in cases where death appears to have resulted from injuries voluntarily inflicted by the party accused, Magistrates ought to be very careful not to take it upon themselves to absolve the accused from the graver charge, and convict them of hurt or grievous hurt only, unless they are quite clear that there is no sufficient evidence to warrant a commitment to the Sessions for murder or culpable homicide not amounting to murder.

Forwards Circular from Inspector-General of Police, and directs Judges to allow Government Pleaders to have access to their decisions in Criminal cases in which Medical evidence is taken.

CIRCULAR ORDER No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Judicial Commissioners, Lower Provinces, dated Calcutta, the 22nd September 1869.

(Criminal Side.)

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, J. P. Norman, and F. B. Kemp, *Judges.*

With reference to the accompanying copy of a Circular which the Inspector-General of Police has been authorized to issue to District Superintendents, the Court, at the instance of His Honor the Lieutenant-Governor, direct all Zillah Judges and Judicial Commissioners to allow the Government Pleaders, in their several districts, to have access to their decisions in all Criminal cases in which Medical evidence is taken, for the purpose indicated in the Circular.

2. The intervention of the Government Pleader will, however, only be necessary in cases where, for any reason, it may be thought undesirable that this duty should be performed by the Court Inspector, to whom it should ordinarily be entrusted.

BENGAL POLICE.

CIRCULAR No. .

FROM

LIEUT.-COLONEL A. H. PATERSON,

Offg. Inspr.-Genl. of Police, L. P.,

To

All Deputy Inspectors-General and District Superintendents of Police, dated Fort William, the August 1869.

SIR,—WITH a view to facilitate the compilation and circulation, for general information, of complete Medico-legal Reports of the most important Criminal cases, the following instructions are issued :—

On receipt of the Memorandum (Form No. 26) from the Court Officer showing the result of a case in which a report has been asked for, from the Civil Surgeon, the District Superintendent will communicate the final order in the case to the Civil Surgeon in as few words as possible, with a reference to the report above-mentioned. Ordinarily it will be sufficient to note whether the accused has been convicted or acquitted; but in all cases where the final order appears to be opposed to the medical evidence, the Civil Surgeon should be furnished with any remarks made in the decision regarding that evidence. These remarks will be communicated to the District Superintendent by the Court Officer when reporting the result of the case.

In Sessions cases the Court Inspector will obtain the necessary information through the Government Pleader (who will have access to the records), and will furnish it to the District Superintendent in the same manner as in other cases.

I have, &c ,

(Sd.) A. H. PATERSON, *Lt.-Col.,*
Offg. Inspr.-Genl. of Police, L. P.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 12th March 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, and Sir Joseph Napier.

Hindoo Law—Adoption—Succession—Decree.

On Appeal from the late Sudder Court at Agra.

Chowdhry Pudum Singh

versus

Koer Oddey Singh.

When a widow adopts a son under the authority of her husband, such authority must be strictly pursued. The son adopted is adopted to the husband, and not to the widow; and an adoption by the widow alone would not, for any purpose required by the Hindoo Law, give to the adopted child, even after the widow's death, any right to the property inherited by her from her husband.

Where a plaintiff was declared by a judgment to be entitled to a share of the property sued for, and the decree on that judgment awarded the whole of the property to the plaintiff, but there was nothing to enable the Appellate Court to limit the decree to the share to which his right was established, the decree was entirely set aside, and the case was remanded to ascertain that share.

THIS is an appeal from a decree of the late Sudder Dewanny Adawlut at Agra, reversing a decree of the Principal Sudder Ameen of Zillah Meerut, made in favor of the appellant.

The suit was instituted by Chowdry Mohur Singh, the father of the respondent (who died while the suit was pending), to recover possession from the appellant of the whole of the moveable and immoveable property formerly belonging to Chowdry Hem Singh, deceased, a cousin of the plaintiff, consisting of ancestral property and of property acquired and amassed by Chowdry Hem Singh and by his widow Khoosal Kooer, out of the proceeds of his ancestral estate.

The suit was instituted after the death of the widow Khoosal Kooer, the plaintiff's claim being founded on his right of heirship to Hem Singh. It appears by the plaint and a genealogical table annexed to it that there were other persons descended from the same common ancestor as the plaintiff, who would have an equal right with him to a share in the succession of Hem Singh. The plaintiff in his plaint assigns as a reason for not including them among the defendants, that "they had not "possession of the property in suit, and that, "if they thought they had any right or in-"terest in the matter, they could proceed "against the plaintiff at their option."

The plaint states that after the death of Khoosal Kooer the managers of the estate presented a spurious will to the Collector, setting forth the defendant as her adopted son, and by that means he contrived to get possession of the estate. And it alleges that the defendant is not the adopted son of the deceased widow Khoosal Kooer, and that she had no power to adopt a son as long as the plaintiff was alive. That the defendant does not belong to the family of which Khoosal Kooer and plaintiff are members, and that he is merely the foster son of Suhej Kooer. That it is not true that Khoosal Kooer ever executed a will, and had she done so, a will made on the point of death would not be legal.

The defendant by his answer to the plaint states that the villages and properties claimed belonged to Hem Singh, the sole and absolute proprietor, though some of the properties were purchased after his death by his widow Khoosal Kooer. That Hem Singh had no issue, and therefore he selected the defendant, who was of the same family and sect as himself, and was then but twelve months old, and the youngest child of his parents, with their consent, to be his

adopted son. That he received defendant into his arms, and brought him up as his own son, and authorized his wife, in case the rites of adoption were not performed during his own lifetime, to perform them after his death, declaring that he had constituted defendant proprietor of his entire estate, as though defendant were his own son. That, accordingly, when Hem Singh died, Khoosal Kooer carried out his injunctions, and performed the ceremony of adoption of the defendant.

The defendant further states in his answer that the property left by Suhej Kooer, aunt of Hem Singh, also came into his possession in consequence of his being Hem Singh's adopted son; and that, although being the rightful heir and successor to the estate, he did not need the support of a will, yet that, as a matter of precaution, Khoosal Kooer executed a will in his favor. That he does not rest his title upon that will, but bases his claim as lawful and absolute proprietor of the estate on his hereditary rights.

Issues were framed by the Zillah Court which were calculated to raise various questions, but the Sudder Court, in their judgment upon appeal from the Zillah Court, after observing that the issues were very badly drawn, said: "The pleadings show "that the only point for determination was "whether the widow, Khoosal Kooer, adopt-"ed the defendant, Pudum Singh, by desire "of her husband, Hem Singh."

This single question appears to have been the one to which the greater part of the evidence in the suit was directed, and upon which alone the judgment in the Zillah Court, and also in the Sudder Court, proceeded.

The Principal Sudder Ameen dismissed the plaintiff's claim with costs, being of opinion that it was clearly proved by the testimony of the defendant's witnesses—most of whom, he said, were respectable and trustworthy persons—that Hem Singh adopted the defendant Pudum Singh when he was twelve months old. and gave authority to his wife, Khoosal Kooer, to complete the formal ceremony of adoption, and that it was further proved by the same witnesses, that after Hem Singh's death, Khoosal Kooer went through the ceremonies of adoption in respect to the defendant.

Upon appeal from this decree to the Sudder Court, that Court, upon the documentary evidence in the cause, arrived at a conclusion directly opposed to that of the Lower Court, considering that it entirely excluded the presumption of the truth of the defendant's story, that the widow adopted him at the end of 1836 by desire of her husband.

They, therefore, held that the plaintiff was entitled to succeed to a share in the property in suit as one of the next of kin of Hem Singh, and decreed in favor of the appeal and of the plaintiff's claim, and reversed the decision of the Lower Court with costs.

The decree which was drawn up in conformity with this judgment, embraced the whole of the property included in the plaint, although the Court held that the plaintiff was entitled only to a share in the succession as one of the next of kin of Hem Singh. The decree, therefore, cannot be maintained, and the evidence furnishes no materials to enable their Lordships to vary it so as to limit it to the share of the property to which the plaintiff has established a right. It is possible, also, that some portion of the property claimed may have belonged to Khoosal Kooer in her own right, and may have passed to the defendant by her will, the validity of which as to such property the plaintiff can have no right to question.

But although the decree in favor of the respondent for the whole of the property claimed by him cannot stand, yet as he would not be entitled even to a share in the succession to Hem Singh if there were a valid adoption of the appellant, their Lordships have felt it their duty to determine that question (the most important if not the sole question dealt with by the Courts below), in order to prevent further litigation respecting it.

The question as to the adoption of the appellant is one entirely of fact. There is no doubt, and indeed it was fully admitted, that adoption might be made by a widow under an authority conferred upon her for that purpose by her husband. Of course, such authority must be strictly pursued, and as the adoption is for the husband's benefit, so the child must be adopted to him, and not to the widow alone. Nor would an adoption by the widow alone, for any purpose required by the Hindoo Law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. In order, therefore, to establish the validity of the adoption in this case, it was necessary

for the appellant to prove—

1st.—The authority given by Hem Singh to his wife to make the adoption; and

2nd.—The actual adoption by Khoosal Kooer of the appellant as the son of Hem Singh.

The appellant proved, by several witnesses to whom the Principal Sudder Ameen gave credit, but upon whom the Sudder Court placed no reliance, that the appellant was the younger son of Zalim Singh; that Hem Singh asked and obtained permission of Zalim Singh and his wife, to adopt the appellant. That Hem Singh took away the appellant, then a child of twelve months old, and carried him to his house, and placing him on the lap of Khoosal Kooer, said: "I have brought you this child to adopt as our son." That a year after, Hem Singh said to Khoosal Kooer: "If I live long enough, I "shall go through the ceremony of adopting "the child myself; if not, I authorize you "to perform the ceremonies of adoption as "soon as he is five years old;" and that Hem Singh died a year after giving this authority. The witnesses also proved that when the appellant had attained the age of five years, Khoosal Kooer went through all the ceremonies of adoption which they minutely described. It does not appear by the evidence of any of the witnesses that Khoosal Kooer declared at the time that the ceremonies were performed for the purpose of the adoption of the appellant as the son of Hem Singh, in pursuance of the authority which he had given her. One of them, on the contrary, says that, "Khoosal Kooer adopted Pudum "Singh as her own son, at the request of "Hem Singh."

If the adoption of the appellant as the son of Hem Singh had really been completed by Khoosal Kooer, his name ought to have been substituted for hers in the books of the Revenue Collector, as the property of Hem Singh would, by the act of adoption, have been devested from Khoosal Kooer, and would have vested in the appellant as his son and heir. Some of the witnesses say that after performing the ceremonies, Khoosal Kooer ordered her dewan to give notice of the adoption to the Collector. Either this order was never given, or it was not obeyed, for it does not appear that any change was made in the entry in the Collector's books; and Hem Singh's property continued to be registered in Khoosal Kooer's name down to the time of her death, which took place at least ten years after the appellant had attained his majority. But Khoosal Kooer caused herself to be entered in the books of the Kanoongoe or Record-keeper of the village of Koorja, as the guardian and protector of Pudum Singh (the appellant).

Now, if this were intended as the record of the fact of an adoption which had devested the property of Hem Singh from his widow, and made her merely guardian of the minor adopted son, it seems extraordinary, after such a complete lawful adoption as the witnesses represent, that Khoosal Kooer did not take the most effectual mode of recording it, by pursuing the regular course of substituting the appellant's name for her own in the Revenue Collector's books. In the absence of any such record, the instances of the occasional description of the appellant as the son of Hem Singh are of no value. The Principal Sudder Ameen laid great stress upon a supposed entry of the defendant's name as under the guardianship of Khoosal Kooer in the khewut for Proprietary Register of 1256 Fuslee, which he said would not have been made if the appellant were not the adopted son of Hem Singh. Upon turning, however, to the only khewut printed in the proceedings of the date named, it will be seen that there is no entry at all as to guardianship, but under a column headed "Name of Putteedar" the appellant is entered as "Pudum Singh, son of Hem Singh." In a statement of mutation of names of lumberdars and putteedars, however, in which Pudum Singh's name is entered in the column of putteedars, but not as the son of Hem Singh, there is the signature of Khoosal Kooer, with the addition of the words "guardian of Pudum Sing;" and it is probable that the Principal Sudder Ameen mixed up the khewut and this document together in his mind. It is the only one of similar documents in evidence which is signed by Khoosal Kooer, and there is nothing upon the face of it to show that it relates to Hem Singh's property.

The description of Pudum Singh as the son of Hem Singh, in the first power-of-attorney executed by him and Khoosal Kooer, is of little importance, as the parties were at liberty to describe themselves as they pleased in this private instrument; and the same observation applies to the entry of Hem Singh's name as the father of the appellant in the income-tax receipts, as most of the particulars inserted in the different columns could only be

known to and filled in by the party by whom the tax was to be paid. The appellant, in support of the evidence of an adoption, relied upon a proceeding by Khoosal Kooer on the 25th March 1836, when she presented a petition at the office of the Deputy Collector of Revenue, describing herself as the widow of Hem Singh, and praying that the name of Pudum Singh might be added to her own in the zemindary registers of certain villages. The Sudder Court observed upon this proceeding "that the joint entry of the widow's and Pudum Singh's names was in some respects inconsistent with the averment of his adoption, which would have placed the two in the position of parent and child, or guardian and heir." And they added: "We find that the application referred to property acquired by the widow after her husband's (Hem Singh's) death, and which is not in suit in the present case."

There is some doubt as to the accuracy of the statement that the villages named in the petition of Khoosal Kooer are not in suit in this case, as it was pointed out in the course of the argument that most of them are included in the plaint. But there still remains an objection to the use of this proceeding in proof of the adoption of the appellant, which was slightly adverted to by the Court. It must have preceded the alleged ceremony of adoption. The appellant was twelve months old at the time of the commencement of the intended adoption. Hem Singh lived a year afterwards, and died on the 22nd October 1834. The ceremonies of adoption are stated to have been performed by Khoosal Kooer when the appellant was of the age of five years, which, according to the dates, he could not have been on the 25th March 1836, when the petition of Khoosal Kooer was presented.

All the acts of Khoosal Kooer with respect to Hem Singh's property appear to have been dictated by a desire to continue to be zemindar during her life, and to secure the succession to it after her death to the appellant. She may have attempted, at the same time, to reconcile her continued possession with the alleged wishes of her husband in favor of the appellant.

The documentary evidence produced on the part of the respondent tends much more strongly to throw suspicion upon the veracity or the accuracy of the witnesses who speak to the fact of the adoption by Khoosal Kooer, as it is wholly inconsistent with the idea of any such adoption having taken place.

It must always be borne in mind that Khoosal Kooer remained the registered owner of Hem Singh's property for the whole of her life. In addition to this circumstance, there are acts and declarations of Khoosal Kooer which cannot be reconciled with the fact of an adoption of the appellant. Stress was laid by the Counsel for the respondent on a statement made by Khoosal Kooer in a suit instituted by her against Tara Singh, claiming the succession as heir to the whole of her husband's property, that "Hem Singh died without leaving any issue, male or female." It was observed that this action, which was brought on the 23rd of March 1836, was contemporaneous with the above-mentioned petition of Khoosal Kooer to have the appellant's name added to her own as the proprietor of certain villages, which was presented on the 25th of March 1836. According to what has been already remarked, this must have been prior to the time at which the alleged adoption took place, and therefore it was then strictly true that Hem Singh had died without leaving issue. But yet it is extraordinary, if Khoosal Kooer had any intention of carrying out her husband's wishes with regard to the appellant, that no mention whatever should have been made of the authority to adopt, and of her purpose to adopt the appellant when the proper period arrived, in a suit which seemed peculiarly to require a true and full account of the destination of Hem Singh's property. Again, in 1841, long after the alleged adoption, Hem Singh, and Tara Singh his brother, having been joint proprietors of a village, and upon the death of Hem Singh, Khoosal Kooer's name having been entered in the register instead of his, and upon the death of Tara Singh, the name of his widow Meha Kooer having been substituted, upon the death of Meha Kooer, Khoosal Kooer caused her name to be recorded as proprietor of the village, which, if there had been an adoption of the appellant as heir of Hem Singh, he would have been.

Although the appellant does not rest his title to Hem Singh's property upon the will of Khoosal Kooer, yet it is impossible to pass over the fact of her having made this will or to omit all notice of the contents of it. Although, according to the case of the appellant, Khoosal Kooer had failed in her duty by not devesting herself of Hem Singh's

property upon the completion of her adoption, yet as that act made him heir to his adopting father, no strength could be added to his title by the will of the widow. In consequence, however, of her remaining in possession of Hem Singh's property, doubt would probably be cast upon the fact of the appellant's adoption, and therefore her declaration of her having performed the ceremonies in pursuance of her husband's authority would have been useful as evidence; but instead of describing the appellant as the adopted son of Hem Singh, the will of Khoosal Kooer is in these terms: "As "Pudum Singh, the adopted son of your "petitioner, has been in possession of "your petitioner's estates for a long period, "and as petitioner has no other heir or suc-"cessor but him, and as petitioner has retained "him in possession during her lifetime, and "he carries on all the business of managing "the villages and zemindaries, &c., therefore "petitioner prays that the name of Pudum "Singh be substituted for her own name as "proprietor of all the zemindary and mâl-"goozary villages and maafee lands of her "estate, and Pudum Singh may be recognized "as the owner of all her real and personal "property."

Upon the death of Khoosal Kooer reports were made of the facts connected with her death by the Kanoongoes of the different mouzahs, in which Khoosal Kooer was styled either zemindar, or zemindar and lumberdar, and all of them stated the conditions of settlement of mouzahs in these terms: "Whomsoever Khoosal Kooer may constitute "her heir in her lifetime, the same shall be "entitled to the office of mâlgoozar after her "death."

The putwary's memorandum on the death of Khoosal Kooer is as follows: "The said "Mussumat departed this life by the will of "God on the 17th December 1861, &c., and "left Kooer Pudum Singh, her adopted son, "aged 31 years, as the heir and successor to "all her property."

Pudum Singh, being of the age abovementioned at the time of Khoosal Kooer's death, it is not likely that he had never heard of his having been adopted as the son of Hem Singh, if such a ceremony had taken place. And if he had been informed of the fact, it was to be expected that, although he had patiently submitted to Khoosal Kooer's usurpation of his property during her life, he would have seized the earliest opportunity of asserting his rights as the heir of Hem Singh. But it appears that this was not the course which he pursued, nor the title by which he claimed the succession. The report of the tehseeldar of Koorja on the succession to Khoosal Kooer, states "that the putwary and Kanoongoe, in their respective reports of the death in question, have mentioned Kooer Pudum Singh, her adopted son, as the heir to the property of the deceased Mussamut. And that Pudum Singh had put in a petition praying that his name might be recorded as lumberdar and putteedar in place of that of Khoosal Kooer, deceased, as there was no other heir but himself.

The counsel for the appellant endeavoured to explain away the effect of this claim as heir of Khoosal Kooer, by the suggestion that in thus claiming, the appellant had been misled by the reports of the Kanoongoes as to the right of succession to the property held by Khoosal Kooer. But (as already observed) if the appellant really had a title to the property as the heir of Hem Singh, it is impossible to believe that he could have been ignorant of it; and his claim to the succession in a different character is almost conclusive against the attempted proof of lawful adoption of the appellant as the son of Hem Singh by Khoosal Kooer, and consequently against the truth of the story told by the witnesses upon the subject.

Their Lordships, therefore, agree with the Sudder Court that the appellant has failed to prove that he was lawfully adopted as the son of Hem Singh by Khoosal Kooer, in pursuance of authority conferred upon her for that purpose by her husband; and that he has, therefore, no answer to the claim of the respondent to a share of the succession to Hem Singh's property. But as the Court has made a decree which gives the respondent the whole of Hem Singh's property, when he is entitled only to a part, that decree must be set aside.

Their Lordships, however, think it right, for the purpose of restricting future litigation within as narrow bounds as possible, to declare that it has been established between the parties to the suit that the appellant is not the duly adopted son of Hem Singh, and that, on the death of Khoosal Kooer, Mohur Singh, the father of the respondent, and the other heirs in equal degree then living, became entitled to inherit the estate of Hem Singh, of which his widow died possessed. And they will recommend to Her Majesty

that with this declaration the cause be remitted to the High Court of Agra to make such inquiries as shall be necessary to ascertain what share of the estate of Hem Singh the said Mohur Singh was entitled to, and what part of the property claimed by the plaint was the estate of Hem Singh. And as the appellant has succeeded in proving the invalidity of the decree, although he has failed in his opposition to the plaintiff's title, their Lordships will further recommend that each party bear his own costs of the appeal.

The 12th March 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier, and Sir Lawrence Peel.

Sales—Mortgage—Suit—Champerty—Specific performance——Onus probandi—Contract—Mokurruree tenure—Limitation—Pendency of appeal—Section 32, Act VIII. of 1859—Regulation VII. of 1822.

On Appeal from the late Sudder Court at Calcutta.

Rajah Saheb Perhlad Sein
versus
Baboo Budhoo Singh.*

Kalee Pershad Tewaree
versus
Rajah Saheb Perhlad Sein.†

Rajah Saheb Perhlad Sein
versus
Doorga Pershad Tewaree.‡

Rajah Saheb Perhlad Sein
versus
Run Bahadoor Singh and others.§

Rajah Saheb Perhlad Sein
versus
Maharajah Rajender Kishore Singh.‖

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* From the judgment of Raikes and Bayley, JJ., in Special Appeal No. 1032 of 1859, decided 27th September 1860.—*See* Sudder Decisions for 1860, p. 239.

† From the judgment of Steer and Seton-Karr, JJ., in Regular Appeal No. 275 of 1860, decided 21st May 1863—not published.

‡ From the judgment of Raikes and Seton-Karr, JJ., in Regular Appeal No. 125 of 1863, decided 6th January 1864—not published.

§ From the judgment of Sir Charles Jackson and Kemp, JJ., in Regular Appeal No. 164 of 1862, decided 17th December 1862—*See* I. Hay's Reports, p. 465.

‖ From the judgment of Morgan and Pundit, JJ., in Regular Appeal No. 135 of 1863, decided 21st May 1863—not reported.

A sued *B* on a deed of sale for possession of 4 annas of certain lands, which *A* alleged *B* had sold him in consideration of an advance of a sum of money which *A* said he paid to *B* when the deed was executed. *B* answered that, being in want of funds to carry on a suit for the recovery of the very lands, 4 annas of which *A* now sues for, he gave *A* the deed in question on condition that *A* was to advance him the amount mentioned in the deed, but that *A* only advanced portions of the sum from time to time. The allegation of *A* that he paid the money to *B* when the deed was executed was found to be false.

HELD that the execution and transfer of the deed of sale from *B* to *A*, and the partial payment of the purchase-money by *A* to *B*, did not pass to *A* a complete title to the lands, and that *B* in retaining possession could not be regarded as having only a lien for the unpaid portion of the purchase-money or liable to account to *A* as a mortgagee in possession of the rents and profits.

HELD that even if part of the purchase-money had been paid by *A* to *B* at the time of the execution of the deed, and *A* tendered to *B* the remainder of the purchase-money, *A* would not have been entitled to a decree for specific performance, the contract sued on being eminently a speculative, not to say a gambling, one.

Where a plaintiff sues to set aside a deed of mortgage executed by him, under which possession passed to the mortgagees, on the allegation that the consideration had not been received by him, the law of India (the English Law being the same) casts upon him the burden of establishing a good *primâ-facie* title to the relief which he seeks, and he must make out a clear and consistent case for setting aside his own deed.

In cases of contract in India it has never been held that a contract made under seal of itself imported that there was a sufficient consideration for the agreement.

Where a plaintiff, a zemindar, sues to set aside a mokurruree deed set up by the defendant and to recover possession of the lands covered by the deed, it lies upon the defendant to defeat that right by proving the grant of an intermediate tenure, and the case must be decided not upon the defects of the plaintiff's claim, but upon the right of the defendant to hold under a perpetual and hereditary tenure at a fixed rent.

By Section 32, Act VIII. of 1859, a plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

Where a survey proceeding, conducted in the presence of both parties, declares lands to be included in the zemindary of a person, a plaintiff who sues such person to recover possession of the lands as included in his own zemindary, must prove by counter-evidence at what precise time, if ever, he or any one from whom he claims was in possession of the lands.

In deducting any period under Regulation VII. of 1822, it must be shown that plaintiff was "from good and sufficient cause precluded from obtaining redress."

The pendency of an appeal to the Privy Council does not put the party, who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

THEIR Lordships have now to dispose of five appeals in which the same person, Rajah Perhlad Sein is an actor, being in four of them the appellant, and in the fifth the respondent. Though the cases are not otherwise connected with or dependent on each other, it will be convenient to state certain facts relating to the Rajah and his title which are common to all. He is now in undisputed possession of the Raj and zemindary of Ram-

nuggur, the title to which was in litigation from 1835 until 1858. He originally sued for them as the guardian on behalf of his infant son under a deed of gift; they were at the same time claimed by Run Murdun Sein as a son of the former Rajah, Umur Purtab Sein, and by other parties under different titles. Ultimately the right of succession of the present Rajah as the nearest collateral heir of Umur Purtab Sein was declared by a decree of the Zillah Court, dated the 27th of February 1845, and that decree was affirmed on appeal by the Sudder Court on the 9th of September 1846. From that date the litigation was confined to the Rajah and Run Murdun Sein, who alone preferred an appeal to Her Majesty in Council, which was finally determined in the Rajah's favor in January 1858. The estate was in the possession of one of the widows of Umur Purtab Sein from the time of his death in 1834 until February 1840, when she died. The Collector of the District was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the Sudder Court's decree in 1846, an order was made that the Rajah should be put into possession on giving security to abide the event of the appeal to England; but owing to delays in perfecting that security, he did not obtain actual possession until June 1848. The security afterwards failed, the Rajah was unable to give fresh security to the satisfaction of the Courts; an order was made on the 18th of May 1854 that the property should again be attached by the Collector; and it remained under attachment from that time until possession was restored to the Rajah in 1858, upon the determination of the appeal in his favor. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which Budhoo Singh is respondent.

Rajah Saheb Perhlad Sein
versus
Baboo Budhoo Singh.

The suit out of which this appeal has arisen was brought to recover from the appellant (the Rajah), possession of four-annas share of certain specified property, comprising the whole, or a very considerable part, of the zemindary of Ramnuggur. The original plaintiff was a Mussulman lady, claiming to be, at least for the purposes of the suit, the sole representative of her late husband Sultan Jan, who was the sole representative of one Kajah Hossein Ally Khan. After the institution of the suit, she sold all her interest therein to the respondent, who has been substituted as plaintiff on the record, and may be taken to have all the rights in the subject-matter of the suit which could have been successfully asserted either by Kajah Hossein Ally Khan or by Sultan Jan.

His title is founded on a kowala or bill of sale of the property in dispute, which is admitted to have been executed to the Kajah by the appellant on the 23rd of September 1844, and therefore at a time when the latter neither was in the possession of the zemindary, nor had established in any Court his title thereto. The case of the respondent is that this bill of sale expresses the real contract between the appellant and the Kajah, which was one for the absolute sale by the former, and purchase by the latter, of a four-annas share of the specified property for the price of 75,000 rupees, and that that sum was actually paid down in cash when the instrument was executed.

The case of the appellant is, that being in want of funds to carry on his suit for the Raj and the zemindary, and for his suit for his own support, he applied to the Kajah, who agreed to make advances for those purposes on condition of having the bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of 75,000 rupees was paid on the execution of the instrument; and that, though the Kajah from time to time advanced small sums of money, the whole amount of his advances fell far short of 75,000 rupees; that afterwards the Kajah absconded from Patna on a charge of disaffection to the Government; whereupon it was agreed between his son, Sultan Jan, and the appellant, that a bond for 76,000 rupees hypothecating the whole of the property in question, and not merely a twelve-annas share of it, should be substituted for the instrument importing the absolute assignment of four-annas share; and that, accordingly, such a bond was executed by the appellant to Sultan Jan on the 7th of March 1846; but that the 76,000 rupees was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which Sultan Jan undertook, but failed to make.

The questions thus raised between the appellant and respondent are not now litigated for the first time. In August 1848, Sultan Jan instituted two suits against the appellant, of which one, being almost identical with the present, was brought to recover possession of four-annas share of the property, under the title founded on the bill of sale; and the other was for the recovery of the 76,000

rupees purported to be secured by the bond which he alleged to have been advanced in addition to the 75,000 rupees said to have been paid on the execution of the instrument of September 1844.

Both these suits were dismissed by the Zillah Judge (Mr. Hathorn). He held that the plaintiff's story in one suit as to the payment of the 75,000 rupees, and in the other as to the payment of the 76,000 rupees, was false; and in his judgment in the bond-suit he expressed an opinion that the appellant's account of the transactions was substantially the true one. There was an appeal to the Sudder Dewanny Adawlut against both decrees. The appeal in the bond-suit was absolutely dismissed. On the other appeal, the pleaders for the respondent (the present appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which had been put in evidence; and the Sudder Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the plaintiff, Sultan Jan, all the advantages which a judgment of non-suit has over a judgment for the defendant.

The result, however, of that litigation was a conclusive decision against Sultan Jan in the bond-suit; whilst in the other suit a decision on the merits was passed against him in the Zillah Court, which was only so far qualified by the decree of the Sudder Court that he was left at liberty to bring a new suit. The date of that decree was the 4th of January 1853.

In this state of things the present suit was instituted on the 22nd of August 1856. It was brought in the Court of the Principal Sudder Ameen, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the Zillah Judge (Mr. Atherton). Both decisions proceeded upon the assumption that the respondent's case as to the payment of the consideration of 75,000 rupees was false, and the appellant's true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the bond for 76,000 rupees of 1846 had been given in substitution for the absolute bill of sale of 1844. According to the practice of the Courts of India, these two decisions were final in India on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court. Such an appeal was, in fact, preferred. It is unnecessary to state any of the grunods of it, except the 4th, which is to the following effect: "If for argument's sake it be admitted that the defendant did not receive the full price, yet by reason of his acknowledging to have executed a bynamah (bill of sale), a decree in this suit would be just and indispensable, because the defendant has the power to sue for the recovery of the balance of the purchase-money.

On that appeal the Sudder Court, on the 27th of September 1860, made the decree which is the subject of the present appeal. Though bound by the finding of the Courts below that the 75,000 rupees had not been paid as alleged by the plaintiffs, the Judges who sat on the appeal, nevertheless, proceeding upon a statement in Mr. Atherton's judgment to the effect that the advances made to the appellant probably amounted to about 18,000 or 20,000 rupees in all, arrived at the conclusion that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held that in these circumstances a complete title to the lands passed to the Rajah by virtue of the bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money, and was to be held accountable as a mortgagee in possession for the rents and profits. They accordingly remitted the cause to the Judge with directions "to decide it *de novo* in his Court on the points now mooted, or upon others which fairly arise on the pleadings."

Before they consider whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindoos or between Hindoo and a Mussulman, their Lordships must observe that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part-payment of the consideration for a subsisting contract of sale, and not, as the Rajah insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the bond for the original contract, left this very point open.

Their Lordships, however, are of opinion that even if this question of substitution had been determined in favor of the respondent, the decree of the Sudder Court would nevertheless have been erroneous.

It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sudder Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindoo vendor is, to use the phraseology of English Law, to pass an estate irrespectively of actual delivery of possession; giving to the instrument the effect of a conveyance operating by the statute of uses. Whether such a conclusion would be warranted in any case is, in their Lordships' opinion, very questionable. It is certainly not supported by the two cases* cited in the judgment under review; in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in futuro*, and upon the happening of a contingency, of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the instrument, but that allegation had been found to be false. Nor, if the fact had been, as assumed by the Sudder Court, that part of the purchase-money was paid upon the execution of the contract, and the purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the vendor agrees, in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the purchaser, at a sum far below the real value of the thing sold. But if the purchaser under such a contract has retained part of the price for several years, and until the risk has been determined by the happening of the contingency, he has *pro tanto* diminished the risk which he contracted to bear; and the vendor has *pro tanto* lost that for which he stipulated—the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed according to the true meaning and intent of the contracting parties. Their Lordships are therefore of opinion that the decree made by the Sudder Court upon their assumption of the facts was in every point of view erroneous, and cannot be supported.

They have now to consider not only what decree the Sudder Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since, in order to complete justice between the parties, they have allowed the learned Counsel for the respondent to impeach the decrees of the two Lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. Bell. The first and most material question is, whether it has been correctly found that the 75,000 rupees were not paid, as alleged by the respondent, upon the execution of the bill of sale. That has been so found by three Courts in India; and, therefore, in attempting to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. Hathorn; and that that gentleman's judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the appellant in executing the bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede that though, according to the law and practice of the Courts in India, those acts were not conclusive evidence against the appellant, the presumptions arising from them ought to have been allowed due weight upon the trial of the issue whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after

* Gopee Mohun Kur *vs.* Koroona Dossea, Sudder Decisions for 1857, p. 225.

Surbonarain Singh *vs.* Mahraj Singh, Sudder Decisions for 1858, p. 601.

giving full weight to the presumptions in question and to the other circumstances in the case, that the finding was wrong. They are disposed to believe that the real arrangement between the appellant and the Kajah was for advances to be made from time to time; and that the form of the contract was adopted in order to evade the effect of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding that the 75,000 rupees were not paid as alleged; and it follows, from the reasons which they have already stated when dealing with the judgment of the Sudder Court, that if that finding was correct, the suit was properly decided in the appellant's favor upon it. Their Lordships, however, think it right to add that upon the evidence, corroborated as it is by the fact that the bond hypothecated the whole, and not only three-fourths of the property in question, they think that the issue as to the substitution of that security for the bill of sale would also have been properly found in the appellant's favor.

Mr. Bell pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the appellant the terms of re-paying the advances actually made to him by the Kajah and Sultan Jan. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. Sultan Jan's proper course was to sue for the re-payment of them in the bond-suit, if they were included in that security; or if they were not so included, under his general title as representative of his father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the appellant, who is not in this suit seeking the aid of the Court, but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance that the respondent is not the representative of the Kajah or of Sultan Jan for all purposes, but is merely the assignee of the rights which Furkhoonda Khanum has specially claimed in this suit.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the Sudder Court be reversed; and that, in lieu thereof, an order be made dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. Atherton. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the Lower Courts.

In the second appeal under consideration,

Kaleepershad Tewarree *versus* Rajah Saheb Perhlad Sein.

Kaleepershad Tewarree is the appellant and the Rajah the respondent.

The suit out of which it arises was brought by the respondent to set aside a zur-i-peshgee deed dated the 23rd of December 1851, which purports to have been executed by him to the appellant and his brother, Muddun Mohun Tewarree, since deceased, for securing to them the re-payment of 49,453 rupees, with interest, by the pledge or mortgage of 15 mouzahs, part of the zemindary of Rammuggur. He also claimed wassilat or the mesne-profits of the property for six years. The respondent admits the execution of the deed, but says that it was executed as a security for the amount appearing to be due on a bond, previously executed by him in favor of the same parties in February 1849; that he never received any consideration for the bond; and that he was induced to execute both documents by his servant, Binda Lall, who was acting in collusion with the Tewarrees.

His story as to the consideration for the bond is, that in the course of the negotiations for procuring the security to abide the event of Run Murdun's appeal to England, which he had to give when he got into possession of the property in 1848, it was arranged that Ranee Unopoorna, who became his surety and pledged her property by way of security, should receive a bonus of 20,000 rupees; that the appellant and his brother should pay that bonus, and for so doing should themselves receive another bonus of 20,000 rupees; that the bond was given to secure these two sums of 20,000 rupees; but that the Tewarrees failed to pay the 20,000 rupees to the Ranee, who consequently contrived to escape from her obligations as security by means of a revenue sale and *benamee* re-purchase of the property which she had pledged as security, and so brought about the re-attachment of the zemindary in 1854. His case, therefore, is that the deed impeached was obtained from him fraudulently and without consideration.

The case of the appellant is that the transactions were what they purported on the face of them to be; that the bond was given to secure advances which had been made in Calcutta to Binda Lall as the agent of the

respondent, with his sanction and on his account; and that the zur-i-peshgee deed was executed to secure a balance found on a settlement of accounts to be due in respect of the bond-debt, and some other transactions.

It is an admitted fact that the appellant and his brother have been in possession of the property under the deed for several years. The appellant's case is that he is still in such possession; but this seems to be disputed by the respondent.

The cause was tried by the Principal Sudder Ameen, who dismissed the suit with costs. His decree was reversed by the High Court, chiefly on the ground that the defendants, the Tewarrees, had failed to prove that they had been given consideration for the bond; but the decree of that Court, though it directed that the zur-i-peshgee deed should be set aside, refused to award any of the wassilat or mesne-profits sued for, and gave no costs.

The appellant, as the survivor of the two defendants, appeals against the decree; and there is also a cross-appeal against so much of it as rejects the claim to wassilat, and refuses to give the costs of the suit to the respondent.

From the foregoing statement, it sufficiently appears that the question between the parties is one of fact, *viz.*, which of these conflicting stories is true.

It is obvious, however, that, in the first instance, it lies upon the respondent, who comes into Court to set aside a security solemnly executed by himself and perfected by possession, to make out his case. And the first question to be considered is whether he has done so, at least so far as to cast upon the defendants the burthen of proving theirs. There has been some argument as to the rule and practice of the Courts in India on this point, and, in particular, upon the ruling of the Sudder Court in its judgment in the suit of Sultan Jan upon the bond for 76,000 rupees, which has been made one of the exhibits in this cause. Upon that, their Lordships observe that, if what was stated by the Sudder Court be read in connection with the context, it does not seem to go beyond what both sides would admit to be the law in India. The appellant in that case had argued that, unless the "party sued in the bond could establish affirmatively that his signature had been obtained under the influence of force or fraud," he was conclusively bound by that signature, and that a decree must pass against him. The Court said, in answer to this, that it had become the established practice of Courts in India, in cases of contract, to require satisfactory proof that consideration had been actually received according to the terms of the contract; and that it had never been held there that a contract made under seal of itself imported that there was a sufficient consideration for the agreement. The latter proposition seems to be indisputable. The former may be too loosely expressed; and the later cases cited by Mr. Pontifex show that, if it is to be taken as affirming that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burthen of proving payment of that consideration, it is too wide. It is further to be observed that a party who, like the plaintiff in the case referred to, comes into Court to enforce a bond, is in a very different position from him, who in suing to set aside a contract under which there has been possession and enjoyment, and of which so far as it has yet been capable of being performed, there has been performance.

Their Lordships have no doubt that, in the latter case, the law of India, as of this and probably every other country, casts upon the plaintiff the burthen of establishing at least a good *primâ-facie* title of the relief which he seeks; and they will first proceed to consider how far the respondent has affirmatively made out the case upon which he relies.

Now, what are the facts which are either common to the cases of both parties, or are proved beyond dispute?

In 1845, Binda Lall was in Calcutta, as the agent of the respondent, looking after the appeal in the great suit for the raj which was then pending in the Sudder Court, and possibly other law-business. He remained there after the Sudder Court's decree of the 9th September 1846 had been made in the respondent's favor. The principal business which he had then to perform was to procure the security which the respondent had to give in order to get into possession. Whilst he was so resident in Calcutta, he certainly had some transactions with the Tewarrees, one of whom, Muddun Mohun, was or had been the vakeel, or *quasi*-diplomatic agent of the Maharajah of Nepaul, but who also carried on there some of mahajunny or money-lending business. On the 27th December 1847, Ranee Unopoorna executed the security-bond, pledging her property; and on the same day entered into an agreement with Binda Lall as the respondent's agent, by which it was stipulated that for her protection

her manager should be allowed to make the zemindary collections from Ramnuggur, paying thereout an allowance to the respondent, but keeping the surplus moneys in deposit. There is not a word in this subsidiary agreement about the bonus of 20,000 rupees. The respondent seems to have objected to the arrangement so proposed, and for that, or some other reason, it was not carried out. The security itself was, in the first instance, rejected by the Zillah Judge, Mr. Hathorn, but on appeal to the Sudder Court was admitted as sufficient. The delay caused by these proceedings accounts for the interval of time between the date of the security-bond and June 1848, when the respondent was actually let into possession. The proceedings put in by the respondent show that, in September 1848, Ramchund, and very shortly afterwards, Unopoorna herself, made an application to have the security-bond set aside, and Unopoorna and her property released therefrom. The final order of the Sudder Court refusing to release her was, however, not made until the 19th of February 1851. Thereupon she took the steps which have been already mentioned to release herself. The property which she had pledged by way of security was sold for arrears of revenue on the 11th of October 1851. Notwithstanding this sale, the respondent remained in possession of the zemindary until May 1854. Run Murdun's first application for fresh security was not made until August 1853; fresh security, the nature of which does not appear, was then tendered, and was finally rejected in May 1854. The respondent, whilst still in possession, received from the Tewarrees for at least two years the rent payable to him under the zur-i-peshgee deed. After the attachment, the following circumstances occurred. The Collector in the first instance attempted to make the gross collections from the zemindary irrespectively of all interests intermediate between the zemindar and the ryots which had been created by the respondent. A remonstrance was made by many of those claiming such interests, though not, so far as the evidence goes, by the Tewarees. The Commissioner directed that such interests should be respected pending the attachment. In consequence of this, the Collector issued an order to the respondent, calling upon him to specify what mouzahs he had given in mokurruree and under simple leases and zur-i-peshgee deeds; and in answer to that order he filed a report, stating, amongst other things, that the fifteen mouzahs in question were under zur-i-peshgee to Muddun Mohun Tewarree. Thereupon the tenure and possession of the Tewarrees was confirmed by an umuldustuck of the Collector, dated the 7th of June 1855; and, on the 8th June 1855, two mookhtears filed, in the name of the respondent, a petition in answer to some remonstrance of Run Murdun Sing's affirming, among other things, the *bona fides* of the transaction with the Tewarrees, and repudiating the imputation that they were servants of the respondent holding for his benefit. In August 1856, under orders of the Collector confirmed by the Commissioner, the Tewarrees obtained a refund of 1,88[illegible] rupees 9 annas 2 pice, the amount of the collections deposited in the Collectorate in respect of the rents and profits of the fifteen mouzahs received between date of attachment. and that of the Commissioner's order above referred to.. This proceeding seems to have elicited from the respondent, the first suggestion of the case now made by him. On the 18th of October 1856, a petition was presented by a mookhtear, professing to act in his name, complaining of the order for the refund, and setting up against the Tewarrees a case substantially, but not altogether. the same as that now made. The petition was referred to the respondent in order to ascertain whether it was really his act; and by another petition signed, not by himself, but by a Moonshee, he adopted it generally. though he disputed the accuracy of some of its statements, and insisted that the fifteen mouzahs ought to be re-attached. It does not appear by any evidence what, if anything, was done on the petitions; but the mouzahs were certainly not re-attached. The Tewarrees remained in possession of them up to the time when the respondent recovered possession of the zemindary in 1858, if not up to the day of the commencement of this suit.

What, then, is the case proved by the respondent, and how far is it consistent with these established facts?

It is not very easy to make out from the plaint and the depositions of the respondent in support of it, a clear or consistent story touching the alleged undertaking of the Tewarrees to pay the bonus to the sureties. His case must be tried by the testimony of his witnesses, of whom Binda Lall, though treated as having colluded with the Tewarrees, and made a defendant to the suit, is the most important, and certainly not the least friendly. He is, moreover, admitted to have been restored, whatever his former delinquencies may have been, to the respondent's service.

According to that testimony, the history of the transactions in question is this :—

Before the security-bond was drawn up, *i. e.*, before the 27th December 1847, Binda Lall had agreed with Unopoorna, or with Ram Chund on her behalf, to pay the bonus of 20,000 rupees as soon as the respondent, upon the acceptance of the security, should be put into possession. After the execution of the security-bond, but before it was tendered to Mr. Hathorn, Muddun Mohun Tewarree, on Binda Lall's application, agreed to become responsible for the payment of the bonus on the condition that he and his brother should receive the further bonus of 20,000 rupees to be paid out of the estate.

The undertaking, therefore, was given some time before the 18th June 1848, and ought to have been performed at that date. The bond was executed in February 1849. The witnesses who speak to that transaction all admit that the respondent then knew that the *bonus* had not then been paid to the surety. They do not explain why, in these circumstances, the bond was taken for 40,100 rupees, or bore interest from its date.

According to Beharry Lall and some of the witnesses, it was in consequence of the failure of Muddun Mohun to perform the promise of payment, which he renewed at the time of the execution of the bond, that the surety first made her attempt to be released from her security. But the documentary evidence already adverted to, shows that she had applied to be released before the bond was executed. Again, the witnesses who speak to the execution of the zur i-peshgee deed, equally prove that the respondent then knew that Muddun Mohun had not paid the bonus which they say he had undertaken to pay. They allege that he then renewed his promise to pay it, and that, on the faith of that promise, the zur-i-peshgee deed was executed. They represent that, in consequence of the non-performance of this last promise, the surety caused her pledged property to be sold at the auction-sale. Yet the documentary evidence proves that it had been so sold more than two months before the date of the zur-i-peshgee deed. The respondent himself admits that he executed that deed to secure the amount of principal and interest due on the bond. But neither he nor any of his witnesses give any explanation why interest was thus allowed upon a sum which, to his knowledge, had not been paid. Again, Binda Lall says that, when he finally discovered that the surety had not been paid the bonus and had escaped from the liability, he wrote to the respondent not to give the Tewarrees possession under the deed. Yet the documentary evidence proves that they were put into possession, and that the respondent repeatedly recognized them as *bonâ-fide* zur-i-peshgeedars in possession, until, in the autumn of 1856, he was induced to put forward some such case as that now made.

The learned Counsel for the respondent sought to account for the discrepancies above-mentioned by various suggestions ; but these were all more or less speculative and inconsistent with the depositions of their witnesses. They also contended that their case was established by the admissions made by the appellant in his deposition.

Their Lordships, however, are of opinion that these admissions cannot fairly be taken to amount to more than that the appellant and his brother, or one of them, took some part in the negotiations with Ram Chund and Unopoorna for procuring the security ; that they knew the surety was to receive a bonus, and believed that she did, in fact, receive 18,000 rupees from Binda Lall, partly directly and partly through them, that is, out of the advances which they made to Binda Lall on the respondent's account. If there is any doubt as to what really took place between Binda Lall and the Tewarrees, on the one side, and Ram Chund or Unopoorna on the other, and in particular whether, as suggested at the Bar, there were negotiations after the sale of her property for the renewal of that particular security, it lay upon the respondent to clear all that up by examining, as he might have done, the two last named persons, or one of them.

Upon this evidence, the Principal Sudder Ameen came to the conclusion that the plaintiff had failed to prove his case, and dismissed the suit. The judgment of the High Court proceeds on the ground that the respondent had at all events established such a *primâ-facie* case as threw upon the appellant the burthen of proving his own, and that he had failed to do so. Their Lordships cannot assent to the reasoning by which the Judges of that Court have arrived at the first of these conclusions. They seem to their Lordships in some passages to substitute speculation for proof; in others, as for instance, in all that relates to Unopoorna's security, which they treat as subsisting down to 1854, to proceed upon a misconception of the facts proved; and in others to draw inferences from facts proved or admitted, which are not the necessary, or even the legitimate, consequences of those facts.

Their Lordships do not deny that, if it lay upon the appellant to prove the truth of his case, he has very imperfectly done so, and that exceptions might fairly be taken to the non-production of his books of account, and to the non-appearance of Muddun Mohun as a witness. But considering that it lay upon the respondent to establish a clear and consistent case for setting aside his own deed, and that the evidence in the cause wholly fails to do so, their Lordships are of opinion that the conclusion to which the Principal Sudder Ameen came, was just and proper, though the reasons which he gives for it may not be altogether satisfactory. The order, therefore, which in this case they will recommend to Her Majesty, is that this appeal be allowed; that the judgment of the High Court be reversed; and that, in lieu thereof, an order be made dismissing the appeal to that Court with costs; and further that the cross-appeal be dismissed. The respondent must pay the costs both of the appeal and of the cross-appeal.

Rajah Saheb Perhlad Sein *versus* Doorgapershad Tewarree.

In the next case to be disposed of, the Rajah is appellant, and Doorgapershad and others, the representatives of Muddun Mohun Tewarree, deceased, are the respondents.

This suit was brought by the appellant on the 31st of December 1861, to recover possession of two mouzahs forming part of his zemindary of Ramnuggur, from the respondents, "in reversal of an allegation of mokurruree, and the proceedings of the Deputy Collector and Collector, dated the 9th and 16th June 1856." He also claimed a refund of a small sum of money, being collections in deposit paid to Muddun Mohun under those proceedings, and the mesne-profits of the mouzahs between 1264 and 1269.

His case was that, in 1849-50, he made over these villages, or their produce, to Muddun Mohun Tewarree, who "lived with him," in consequence of the execution of the security-bond by Ranee Unopoorna, "in lieu of allowance," for his rendering service; that no mokurruree grant of them was ever made by him; that some time in 1851, he discharged Muddun Mohun from his service for bad faith, whereupon his tenure determined; and that the moneys in deposit in the Collectorate had been paid out to Muddun Mohun upon a false allegation of the existence of a mokurruree grant, which the Revenue officers had never seen.

The case of the respondents was that Muddun Mohun Tewarree held the villages under a mokurruree (*i. e.*, an hereditary tenure at a fixed rent) granted by the appellant on 5th Falgoon 1256 (February 1849), as a reward for services already rendered; that Muddun Mohun never lived with the appellant as a servant, in the proper sense of the term, but was the vakeel of the Maharajah of Nepaul, and resident in Calcutta. The substantial issues settled in the suit were—*first*, whether the suit was barred by the Law of Limitation; *secondly*, whether the property in dispute was possessed by Muddun Mohun by virtue of a mokurruree grant, or as payment for service from 1257 Fuslee; and, if by the mokurruree grant, whether that grant was valid or not; *thirdly*, whether Muddun Mohun Tewarree was a servant of the appellant, or a vakeel of the Maharajah of Nepaul, residing in Calcutta.

The Zillah Judge found that the suit was barred by the Law of Limitation, having been instituted more than twelve years of the date of pottah set up by the respondents, and the commencement of Muddun Mohun's possession. And dealing also with the other two issues of fact, he found that the defendants had had possession since 1256 Fuslee by virtue of the mokurruree grant, and that that grant was genuine and valid. He, therefore, on both grounds, dismissed the suit.

Their Lordships will here observe that it is upon the latter finding alone that this decision can be upheld. For, if it be not established that Muddun Mohun, in fact, held possession under a mokurruree tenure, there is no evidence at all that the appellant knew that he claimed so to hold it at any time before 1856, and his suit would be in time. On the other hand, if that fact be established in favor of the respondents, they are entitled to a decree upon the merits. The nature of Muddun Mohun's tenure is, therefore, the only real question in the cause.

The High Court, on appeal, affirmed the decree of the Zillah Judge. The grounds assigned by the Judges were that the appellant had failed, in their opinion, to establish the precise case set up by him; that there was no proof of any lease other than the mokurruree pottah; and, therefore, that Muddun Mohun must be taken to have been in occupation of the lands, either under no engagement at all, which was highly improbable, or under the pottah propounded by his heirs; and the judgment ends with this sentence: "We incline to think that the pro-

babilities are in favor of the latter view of the case; and as we are not satisfied that the decision of the Court below is wrong upon the merits, we see no reason to interfere with the judgment, and dismiss the appeal."

The result of these decrees, if they stand, will be to establish against the appellant, and all who claim under him, the right of the respondents and their successors to hold the villages in question under a perpetual hereditary tenure at a fixed rent. Their Lordships proceed to consider how far this conclusion is justified by the evidence taken in the cause.

The witnesses of the appellant do not greatly differ from those of the respondent as to the origin of the transaction. They differ somewhat as to the date of it, but all speak to a visit of Muddun Mohun to the appellant, and to a demand by the former of something for his support. Again, those for the appellant, whilst they treat what was given as being a retainer for future services, admit that it was also a reward for past services, including that of procuring the security on which the appellant had obtained possession of his estate. It is, moreover, clear that Muddun Mohun was not, in the ordinary sense of the term, a servant of the appellant; that he was or had been the vakeel of the Maharajah of Nepaul; that his residence was in Calcutta; and that whatever services he had rendered or was to render to the appellant were rendered or to be rendered there. On the whole, the weight of the evidence on this part of the case is in favor of the conclusion that, whatever was given was given as a reward for a past and special service; and that the gift was not a mere assignment in the nature of wages to a servant for continuing services determinable with those services at the will of the master. The chief and irreconcilable discrepancy between the witnesses is as to subject of the grant. Those for the appellant say that the mouzahs in question were then under lease to two ticcadars, and that in answer to Muddun Mohun's demand, the appellant caused letters to be written to those persons directing them to pay their rents to Muddun Mohun and his brother Munnoo Tewarree, who was to remain at Ramnuggur. From one of the proceedings which will be afterwards mentioned, though not from the testimony of the witnesses, it appears that for the assignment of those rents, which amounted together to nearly 1,000 rupees per annum, Muddun Mohun and his brother were to pay the appellant a reserved rent of 81 rupees per annum. And it has not unnaturally been asked why, if this case be true, is it not corroborated by the production of the letters to the ticcadars or by some evidence on their part, or by proof of a kubooleut from the Tewarrees undertaking to pay the reserved rent of 81 rupees.

On the other hand, the witnesses for the respondents depose that, in answer to Muddun Mohun's demand of a reward, the appellant caused a mokurruree deed of the two villages to be then and there drawn in the name of Muddun Mohun, and signed and sealed it himself. And the respondents produce a deed which purports to grant to Muddun Mohun a *bekh-birt* mokurruree of the two villages on an annual jumma of 136 rupees to be enjoyed by the lessee from generation to generation. It appears to have been originally on plain paper (for the memorandum at the foot of it shows that the respondents before filing it in this suit had to pay a penalty for getting it stamped). It was never registered; and as set out at page 39 of the record, it does not appear to bear the appellant's signature. It was contended at the Bar that the impression of his seal is also wanting. Their Lordships cannot think that, if this were really the case, both the Courts below would have omitted to comment on these material defects in the document, of which the original was before them. On the other hand, their Lordships are bound to say that the evidence before them, so far as they have hitherto considered it, is far from being satisfactory proof of the grant of a mokurruree tenure.

The respondents have also produced the *farkhuttee* or receipt (No. 24, p. 39). The importance of it is that the appellant thereby purports to admit the receipt of the rent of the villages from 1256 to 1261 (1849 to 1854) from Baboo Munnoo Lall Tewarree, mokurrureedar. The date is the 10th of Bysack 1261. But, in their Lordships' opinion, this document and the evidence in support of it are extremely suspicious. On the face of it, it does not bear the appellant's signature, but that of some other person. It was written on plain paper. It does not specify the amount paid, and it treats Munnoo Lall, who is not named in the mokurruree deed, as the mokurrureedar. Again, it is a general receipt for rents which would in ordinary course have been paid on separate receipts, at different times, during four or five years. The witnesses who speak to it say that it was signed by the Rajah on a settlement of accounts between him and Munnoo

Tewarree, and that the Rajah then requested Munnoo to give him the receipts or letters which he had received. If these receipts were returned, they are not produced; if they were retained, no sufficient reason is assigned for their retention. And this piece of evidence appears to be so far from advancing the respondent's case that it throws additional suspicion upon it.

The degree in which the proceedings which took place after the re-attachment of the zemindary tend to corroborate the case of either party remains to be considered.

On the 26th October 1854, the Collector called upon the appellant to make a return of the mouzahs of which he had given mokurruree, simple ticca, and zur-i-peshgee ticca leases. On the 13th November 1854, the appellant made a return of the mokurruree tenures created by him, in which there is no mention of that which is now in dispute. He did not then send a list of the ticca leases, but promised to do so thereafter. On this, the Collector passed an order that the collections should be made from the attached estate, without regard to the tenures created by the appellant. The persons affected by this appealed to the Commissioner, who, on the 27th of December 1854, passed an order reversing that of the Collector, and directing that such rents only as the appellant would have been entitled to, had he remained in possession, should be collected by the manager. Amongst the appellants, whose names and claims are stated in the Commissioner's proceedings, Muddun Mohun Tewarree is not found; and on the other hand, certain persons claiming to be simple ticcadars of the villages in question are so found. On the 14th of March 1855, the appellant, in obedience either of the original perwannah of the 26th October 1854, or some subsequent perwannah, sent to the Collector the *urzee* (No. 6, p. 16), in which he says he has, on inquiry into his records, had prepared a detailed statement (which he forwards) of all the mouzahs in Raj Ramnuggur, containing the names of the ticcadars and zur-i-peshgeedars, and the names of servants to whom particular mouzahs have been assigned in lieu of wages, and other particulars. And the exhibits Nos. 4 and 5 (pp. 15 and 16) were treated by the appellant's Counsel as extracts from that statement. These relate to the two mouzahs in question; state that Muddun Mohun is the ticcadar of both at jummas which make up the sum of 81 rupees; and, further, that each village is held "on conditions of service." There is in these exhibits also a statement of sums under the head of expenses, which their Lordships feel some difficulty in explaining or in reconciling with the hypothesis of either party. On the other hand, Mr. Pontifex, for the respondents, relies strongly on the exhibit No. 29, which is signed by one Binda Lall as the Roojoonovees on the part of the Rajah, and was filed in the Collectorate on the 17th of October 1854. In that document, Muddun Mohun Tewarree is stated to be mokurrureedar of the two villages, and the rents payable by him amount to 81 rupees.

There are some receipts which show that the Surbarakur afterwards received rent from Muddun Mohun as mokurrureedar on various occasions; but these receipts being for small sums do not show whether the total annual rent received was 81 rupees or 136 rupees. It is further shown, and this is one of the proceedings impeached by the suit, that, on the 9th of April 1855, Muddun Mohun, describing himself as mokurrureedar of the two villages, petitioned for a refund of the rents held in the Collectorate in deposit, and named a sum of 189 rupees as the amount of such rents under an order of the Commissioner dated the 28th of August 1856, in which the villages are described as covered by the mokurruree deed executed by the appellant. There is, however, no other evidence that the deed now relied upon was produced before the Revenue authorities; and their Lordships doubt whether an unstamped paper would have been received by any such officer. It is further to be observed—and this fact has been strongly pressed against the respondents—that in his petition Muddun Mohun described himself as holding the two villages at jummas aggregating 81 rupees, under a mokurruree deed, whereas the rent reserved by the deed now produced is 136 rupees.

Their Lordships must observe that it is difficult, if not impossible, to extract from the proceedings last adverted to any recognition, binding on the appellant, of Muddun Mohun as mokurrureedar of the villages in question, under the deed now propounded, or even under any deed.

The jummabundee filed by the Roojoonovees has been attacked, and the character of the party signing it was impugned by Muddun Mohun himself in his petition at p. 29. It is not shown under what circumstances it was filed; and, in any case, it was

filed before the Collector's order of the 18th of October 1854, and cannot be treated as binding on the appellant in equal degree with the returns made by him in pursuance of that order. And, lastly, it states that the rent of the villages is 81 rupees, and is so far inconsistent with the deed now produced. The appellant cannot be held bound by the form of the Surbarakur's receipts, or by the proceedings for the refund, to which he was no party.

Their Lordships are not insensible to the defects in the appellant's proof. They have already intimated that, in their opinion, the evidence preponderates in favor of the hypothesis that whatever was given was given as a reward for past services, and was not recoverable upon the dismissal of Muddun Mohun, of which dismissal there is, in fact, no proof. They have also pointed out that the appellant's case as to the nature of the reward might, if true, have been better proved. But even if it be admitted that the appellant had failed to establish the particular case alleged by him, it does not follow that the Courts below were right in leaping to the conclusion that the respondents had established their right to hold the lands under their mokurruree tenure. It is possible that the reward to Muddun Mohun may have been an assignment of the rent of the villages to him for his life, or other life-interest.

The appellant is the zemindar; as such, he has a *primâ-facie* title to the gross collections from all the mouzahs within his zemindary. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the lifetime of Muddun Mohun Tewarree.

On the other hand, they have felt that the respondents have the concurrent judgments of the two Indian Courts in their favor; that some of the doubts thrown upon the instrument, produced might have been removed if the original instrument, to which exceptions, which do not seem to have been taken in the Court below, have been taken here, had been before them; and that, if that document does purport to bear the Rajah's seal or signature, no evidence to show that it is a forgery has been given.

They have, therefore, somewhat reluctantly come to the conclusion that the safer course is to remit the cause for further trial on additional evidence. If it shall come to such a trial the duty of the Court which tries it will be to require satisfactory proofs of the genuineness of the mokurruree deed produced; for it is upon that, and not upon the defects in the appellant's case, that the right of the respondents to hold these villages under a perpetual and hereditary tenure at a fixed rent must depend. The order which their Lordships will humbly recommend Her Majesty to make on this appeal is that the appeal be allowed, and the decrees of both the Zillah and the High Court reversed, and that the cause be remitted to the High Court with directions to re-try the same or cause the same to be re-tried upon further evidence on the first issue of facts, and to decide the same or cause the same to be decided accordingly. With respect to the costs of this appeal, their Lordships propose to take the course which has been followed here in similar cases, *viz.*, to cause the costs of both sides to be taxed, and to make it part of the order to be recommended to Her Majesty that these costs be costs in the cause to be dealt with by the High Court.

Rajah Saheb Perhlad Sein
versus
Run Bahadoor Singh and others.

In the fourth of these cases the Rajah of Ramnuggur is the appellant, and Run Bahadoor Singh and others are respondents. In this case, as in the last, the appellant has brought his suit to recover two villages which the respondents claim to hold on a mokurruree tenure created by him. Their title is founded on three deeds, of which two are Bekbarut deeds which purport to have been executed by the appellant, as father and guardian of the infant son for whom he originally claimed the zemindary, on the 13th of Jeyt 1250 (being some time in 1843-44); and the third is a *Sudruth Puttur* or deed of confirmation purporting to have been executed by the appellant in his own right on the 17th of Bhadoor 1255 (1847-48). The appellant impeached these documents as forgeries; and there may have been other questions to be tried concerning them The Principal Sudder Ameen, however, saw fit to settle one issue in bar in these words, *viz.*: "Does limitation apply or not; and when must the cause of action be said to have arisen in this suit?" and, on the assumption that the determination of the suit depended on that issue, proceeded at once to try it.

The question raised by the issue was not whether the deeds impeached were genuine, but whether the appellant was precluded by

the Law of Limitation from showing that they were not genuine, and the twelve years period of limitation was to be calculated, not necessarily from the date of the deeds impeached, but from the time when the appellant, having notice of them, might first have brought his suit to impeach them. That time the appellant alleged to be the 27th of December 1854, in which case his suit, which was commenced on the 31st of December 1861, was in time.

The Principal Sudder Ameen, however, found the issue against him, and dismissed the suit. His decision proceeds on the ground that, on the 7th of December 1858, the appellant, by his mooktear, had filed a petition before the Collector, admitting that the respondent Run Bahadoor Singh was mokurrureedar of the villages in question, and assenting to the payment of some rents in deposit to him out of the Collectorate. The Principal Sudder Ameen held that this was an admission of the deeds impeached, and that the period of limitation was to be calculated from the date of the deeds. His decision was affirmed in effect by the High Court, and the question is whether those decisions can stand. It was almost admitted at the Bar that they cannot. It is obvious that the petition, if taken as mere proof that the appellant knew of the title asserted by the respondents in 1858, does not help the case, for he admits that he knew of it in 1854. On the other hand, to treat it as a conclusive admission of the genuineness of the deeds, and thence to infer that the appellant, having executed them, must have known of their existence at their date, is to determine against him upon one piece of evidence, which may be capable of explanation, the material question in the cause, before the issue raising that question has been settled, and without giving the party the means of bringing forward all the evidence which he may have to adduce upon it.

Their Lordships, therefore, must in this case advise Her Majesty to allow the appeal, to reverse the decrees of both the Courts below, and to remand the cause for trial upon its merits. The miscarriage being that of the Judge, they think that the costs of this appeal should likewise be costs in the cause, and should be dealt with in the same manner as those of the last case.

Rajah Saheb Perhlad Sein *versus* Maharaja Rajender Kishore Sing.

In the fifth and last of these appeals the Rajah of Ramnuggur is appellant, and the Rajah of Bettiah is the respondent.

The suit was brought by the appellant to recover 5,000 beegahs of land or thereabouts, being the whole or larger part of the lands included between the yellow and red lines on the Map No. 2, which is one of the exhibits in the cause; and with them the right of realizing certain profits derivable from a bazaar attached to the fair which is periodically held within them at a place called Tribenee. The question between the parties is therefore simply one of boundary, *viz.*, whether the property in dispute lies within the limits of the zemindary of Ramnuggur or within those of the contiguous zemindary of Bettiah. The northern boundary of that property is the River Bechund, which in that locality is the frontier line between the territories of British India and the Kingdom of Nepaul.

The suit has been decided both by the Court of first instance and also by the High Court of Calcutta upon the question of limitation. The plaint was filed on the 31st of December 1861.

On this point of limitation, the respondent raised two distinct questions. He alleged that the boundaries between the two Rajs had been fixed and adjudicated by a decision of the Thakbust (or Survey) authority, dated the 11th February 1848; and that, under Act XIII. of 1848, the appellant's suit was barred, because brought more than three years after the date of that decision. He also alleged that it was barred by the general Law of Limitation.

The Principal Sudder Ameen, who first tried this case, held that the suit was barred by both the special and the general Law of Limitation. The High Court, entertaining some doubt as to the application of Act XIII. of 1848 to the particular case, rested its decision upon the general Law of Limitation alone.

In the course of the argument their Lordships intimated their opinion that this case was not within Act XIII. of 1848, because the operation of that Act is in terms limited to awards made by the Revenue authorities under Regulation VII. of 1822, Regulation IX. of 1825, and Regulation IX. of 1833; and the learned Counsel for the respondent had failed to show that the Thakbust proceeding in question was an award made under either of those Regulations. They now deem it right to observe that, having, since the close of the argument, examined the Regulations more closely, they are not prepared to say that the Thakbust proceeding of the 11th of February 1848

may not be an award under Regulation IX. of 1825 within the meaning of the Act; for although Regulation VII. of 1822 was originally limited in its operation to what are now known as the North-Western Provinces, many of its provisions were by Regulation IX. of 1825 extended to the Lower Provinces of Bengal; and looking at the 2nd and 3rd Sections of the latter Regulation, and at Sections 36 to 44 (both inclusive) of the Survey Manual issued by the Board of Revenue, their Lordships think it probable that Mr. Chapman, as Superintendent of Survey, was duly invested with power to determine boundary disputes by an award under the 34th Section of Regulation VII. of 1822, and may have made such an award by the proceeding in question. The proceeding seems to have been assumed in the Courts below to be an award within the scope of Act XIII. of 1848; and if the determination of this appeal necessarily turned upon the applicability of that Act to the present case, their Lordships would have had that point re-argued with reference to the Regulations to which they have drawn attention.

Their Lordships, however, have come to the conclusion that the Courts below have properly held that this suit is barred by the general Law of Limitation.

The appellant comes into Court admitting upon the face of his plaint, that he is out of possession, and has been so for more than ten years; and the date which he assigns to his dispossession is the 20th of March 1851. Upon the issue as settled by the Court, it lay upon him to establish that he was in possession up to that date; or, failing in that, that the date at which he or some former proprietor of Ramnuggur was last in possession is consistent with a right to institute this suit. Act VIII. of 1859, Section 32, shows that the plaintiff is bound to satisfy the Court that his right of action is not barred by lapse of time.

In the present case the Magistrate's order of the 26th of March 1851, certainly did not cause the dispossession. As far as its effect can be gathered from the document at page 13, if it proves anything, it proves that the appellant was then out of possession, and had been so at all events since the date of the Thakbust proceeding of the 11th of February 1848. It does not in any degree prove that he or any former Rajah of Ramnuggur had been in possession at any former period. The appellant has, however, produced evidence to show that in point of fact he was in possession after the date of the Thakbust proceeding, and up to 1851. But both the Courts below have treated that evidence as unworthy of credit; and their Lordships cannot see any grounds for holding that they were wrong in that conclusion. That there was any possession adverse to the Rajah of Bettiah after the date of the Thakbust proceeding seems highly improbable.

Great stress is then laid upon the report and proceedings of the Commissioners who in 1847 settled the frontiers of Nepaul and British India; and on the evidence given in this cause by two of the Nepaulese Commissioners. The effect of the official documents is merely to show that as between the two Governments it was settled in January 1847, that whatever was north of the Bechund, within certain limits beginning from the Tribenee Ghât, and extending to Gurh Somessur, was to be treated as Nepaulese, and all south of that river as British, territory. It is true that one document recommends that the Amlah of Ramnuggur should be directed not to make any collections north of the Bechund, and that another speaks of settling the boundary of Ramnuggur. But it is to be observed that if Map No. 2 be compared with any good general Map of India, and the frontier line of Nepaul, and the course of the River Bechund be carefully examined, it will be found that a considerable portion of the tract south of the Bechund, which was the subject of discussion, lies beyond the red line on Map No. 2, and within the admitted limits of Ramnuggur. And it was far from improbable that the Commissioners and the Resident should speak of all the lands south of the Bechund as Ramnuggur without adverting to the precise boundary line between that and the contiguous zemindary of Bettiah, with which they had no concern. Again, the testimony of the two Nepaulese Commissioners proves at most that, according to their information at the time, the collections of the Tribence Fair, and the lands immediately south of the Bechund River at that point, were, in 1847, in the possession of the Rajah of Ramnuggur, who has since been dispossessed by the Rajah of Bettiah. The evidence might be worth something if it stood alone; but when opposed by that which is to be gathered from the contemporaneous Thakbust proceeding, it is really worth little or nothing.

From that proceeding it appears clearly that before January 1846, the boundary between the two zemindaries was in dispute, and that on the 1st of February of that year, Mr. Yule, the ticcadar of Ramnuggur, under

the Collector, invoked the aid of the Superintendent of Survey, complaining that in the Fuslée year 1253 the Bettiah Rajah had forcibly collected the proceeds of the fair. The inference is that if he had ever had possession of the lands on which the fair is held, he had then been dispossessed. The Bettiah Rajah, on the 2nd of May 1846, brought his case before Mr. Chapman, and asserted that the lands in question had been always part and parcel of the zemindary. The Map No. 2 was then made. The Amlah on both sides pointed out what each side considered the boundary line; and these are designated by the red and yellow lines upon the Map. Mr. Chapman, however, delayed to make any final order in the matter before the decree of the Sudder Court affirming the title of the appellant had been made. It is proved that the appellant then executed a mookternamah in the name of Lalla Sohur Dutt, and appeared by that person in the subsequent proceedings; and he must be taken to have then adopted the proceedings of Mr. Yule, who seems, on the appellant's appearance, to have retired from the contest. The final judgment of Mr. Chapman was on the 11th of February 1848, as has been already stated. It held on the proofs of possession before him, that the greater part, if not the whole, of the lands between the yellow and the red lines, with the right to the profits of the fair, belonged to Bettiah, and settled a line of demarcation which, if not identical with the red line, at least includes the lands which are the subject of this suit within the limi s of Bettiah.

Now, whatever be the effect of that proceeding, and whether it were or were not an award under Regulation VII. of 1822, it cannot be treated as being other than a material piece of evidence upon the question of possession now under consideration. To discredit it, their Lordships have been referred to the proceedings before the Magistrate on the 21st of March 1851 (No. 19), and to the decree in the civil suit which was brought thereon (No. 20). But these seem to their Lordships not to relate to the lands now in question or to the effect of Mr. Chapman's proceeding: but to other lands and to a question of boundary settled by some other proceeding. Their Lordships think that this proceeding before Mr. Chapman establishes that the property in dispute was then in the possession of the Bettiah Rajah, and that there is no satisfactory evidence that it has ever since ceased to be so.

They further think that this careful local investigation conducted in the presence of both parties, and implying that the property in dispute had always formed part of the Bettiah zemindary, casts upon the appellant the burthen of showing by satisfactory counter-evidence at what precise time, if ever, the Rajah of Ramnuggur was in possession of it. And their Lordships agree with the Judges of the High Court that this he has failed to do. There may have been assertions of right, such as were likely to occur in respect of a tract of wild and jungly land on the confines of two large estates; but of an actual legal possession, and of the determination of it at any given time, there is no proof. And their Lordships must observe that it is a fallacy to treat the appellant, as one of the reasons in the petition of appeal seems to treat him, as having necessarily twelve years from the date of the establishment of his title in which to enforce this claim. For he did not come in under a new title: he merely established his right to succeed to the former Rajah of Ramnuggur; and if the right of that Rajah to sue for the property in question was barred by the Law of Limitation, the right of the appellant was also barred.

Their Lordships, therefore, think that the decrees under appeal may be supported on the ground stated by Mr. Justice Morgan, *viz.*, that even if the appellant was allowed to deduct the full period during which this suit concerning the Raj was pending, he had failed to show that he had a right of suit which accrued to him during the legal period of limitation.

If, however, it were granted that a right of action accrued to the appellant at the date of the Thakbust proceeding—and their Lordships think it impossible on the evidence to fix the dispossession at a later date—the suit would nevertheless fall within the twelve years' limitation, unless the appellant could show that he is entitled to deduct the whole or some part of the period between February 1848 and the beginning of 1858. And to support this claim to deduction, he must show that during the period to be deducted, he was, in the words of the Regulation, "from good and sufficient cause precluded from obtaining redress."

Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The appellant's title to Ramnuggur was established in the Courts of India in September 1846; he was put in

possession of the property in June 1848, though between May 1854 and some day in the beginning of 1858 it was again under attachment. How can it be said that, in these circumstances, he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary, and recovering lands taken from it by encroachment? It would be very dangerous, in their Lordships' opinion, to lay down as a rule, that the pendency of an appeal to England puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties.

The cases in the 7th Moore's Indian Appeals which have been cited are very distinguishable from the present. In Troup *vs.* the East India Company,* the good and sufficient cause was insanity; a personal disability *ejusdem generis*, with infancy, which is specified in the Regulations. In Rajah Enayet Hossein *vs.* Sayud Ahmed Reza, the facts are complicated; but it will be found that the decision proceeded on the ground that the title upon which the plaintiff sued had only accrued to him on the 15th of January 1842, when Her Majesty's Order in Council had determined the right of succession to be in the general heirs according to the Sheah law of succession, and that the suit to which the bar was pleaded had been commenced in February 1852. Here the appellant's title to Ramnuggur, subject to the appeal to England, was complete in 1846.

Their Lordships, therefore, must humbly advise Her Majesty to dismiss this appeal, and to affirm the decrees of the Courts below, with costs.

The 15th March 1869.

Present:

Lord Chelmsford, Sir James W. Colvile, Sir Robert Phillimore, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Succession—Inheritance—Rajdom—Custom—Seniority.

On Appeal from the High Court at Calcutta.†

Neel Kisto Deb Burmono

versus

Beer Chunder Thakoor and others.

In a suit for succession to a Raj, the right to which was founded on family custom governing the succession, the plaintiff stated that he was the oldest living member of the class out of which the successor could alone be appointed, and that the predecessor of the last Rajah had promised to appoint him the plaintiff. The defendant contended that the choice of the Rajah within a certain class, within which he was included, was absolutely free and could not be controlled by the wishes of a former Rajah.

Held that where there was evidence of a power of selection, the actual observance of seniority even in a considerable series of successions could not of itself defeat a custom which established the right of free choice, and that even if the instances had been uniform and without exception, that alone would not be sufficient to support the plaintiff's case.

Where the custom required the union of two things to constitute the legal heir, *viz.*, seniority in age and nearness of kin, a claimant who has but one of these qualifications (seniority) cannot be entitled to succeed by the family custom.

Held that the general rule of Hindoo Law, which gives a preference as heir to the whole blood over the half blood, extends also to a raj, in the absence of evidence showing that the family custom by which the succession to the rajdom is governed supersedes the general law. Where a custom is proved to exist, it supersedes the general law; but the general law still regulates all beyond the custom.

This is an appeal from a decision of the High Court at Calcutta which reversed a decision of the Principal Sudder Ameen of the Zillah of Tipperah. The suit was one in the nature of an ejectment brought by the appellant, the half-brother of the late Rajah of Tipperah, Essan Chunder, against the respondent, Beer Chunder Thakoor, the uterine brother of Essan Chunder, and against the other respondents, to recover a very valuable zemindary, being that part of the Royal possessions of the Rajah of Tipperah which lies within the Indian territories of the British Crown. The Rajah of Tipperah, though in respect to these lands subject to the laws and Courts of British India, is, in fact, an independent Prince with a considerable territory known as the Tipperah Hills; and as the title to the zemindary and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the musnud or throne of the independent Principality. The respondent, Beer Chunder, has been acknowledged by the British Government as *de facto* Sovereign of Tipperah; but this acknowledgment has been regarded in the Court below as determining nothing more than his present and actual possession of the throne; and their Lordships will deal with the question between the parties as if the litigation were between two ordinary subjects of the Crown upon a disputed title to the lands within the jurisdiction of the Indian Courts.

The appellant included originally as defendants to the suit four persons besides the respondent Beer Chunder, *viz.*, the third,

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* 4 W. R. 111.

† From the judgment of Norman, Officiating *C.J.*, and Kemp, *J.*, in Regular Appeal No. 245 of 1864, decided 26th September 1864—*See* 1 W. R., 177.

fourth, fifth, and sixth named defendants in the appeal, being the spiritual guide and the servants of the deceased Rajah. He charged that these four defendants colluded with Beer Chunder to obtain by fraud the Raj and the zemindary in question. Another defendant, the second on the record, was made a defendant on his own petition. He was an illegitimate son of Kristokishore, the father of the claimant and Beer Chunder; and the ladies whose names appear on the record, being the mothers of infants whose legitimacy was disputed, were made parties by the act of the High Court on a petition addressed to it in the progress of the litigation. In disposing of this appeal, however, it is unnecessary in their Lordships' view, to consider the cases made for or against any of these parties. It will be sufficient, for the purpose of their decision, to treat the suit as being in the nature of an ejectment brought by the appellant against the respondent Beer Chunder alone.

The Rajah, Essan Chunder, had one legitimate son, Brogendro Chunder, who survived him. He was not made a defendant in this suit. He died after its commencement at some early stage of its progress; but this event affects in no way the questions either of law or fact at issue in this suit.

After Essan Chunder's death, Beer Chunder claimed and obtained the throne. His claim was founded on an appointment of him as Jobraj by Essan Chunder, the deceased Rajah, who, it was alleged, had the day before his death, being the 16th Srabun 1269, or the 31st July 1862, duly appointed Beer Chunder Jobraj, his legitimate son Brogendro Chunder, Burra Thakoor, and an illegitimate son Kurta. The fact of this appointment was denied by the plaintiff, who charged it to be false and fraudulently concocted between Beharry Gossain, the family priest, Brojomohun Thakoor, Goorodoss Burdhun, and Bissonauth Goopto, all officers in considerable trust and employment under the deceased Rajah, and who are respectively the third, fourth, fifth, and sixth defendants on the record.

Before the institution of the plaintiff's suit, the second defendant, Chuckerdhuj, filed a suit of a similar character with the present, against Beer Chunder and others; and the present plaintiff intervened in it as a defendant. That suit and the present were treated as substantially involving the same questions, and were heard together; much of the evidence in this suit was taken in the other. The suit of the second defendant, Chuckerdhuj, was dismissed by the Principal Sudder Ameen on the ground of his illegitimacy; he did not appeal from that decision, and his claim may, therefore, be treated as no longer in question.

It is not necessary to consider minutely the pleadings in the cause, or the issues settled between the parties. Their Lordships will only observe, in answer to an argument of Mr. Field upon these issues, that, in their judgment, they do not in any degree relieve the appellant from the obligation which lay upon him as plaintiff in a suit in the nature of an ejectment, of recovering by the strength of his own title, and of showing not merely that the defendant's title was bad, but that failing that title, he, the plaintiff, was entitled to the possession of the lands in question.

The questions to be determined upon this appeal are simply these—

1. Had Essan Chunder the power of appointing Beer Chunder Jobraj in preference to the appellant?

2. Did he in fact so appoint Beer Chunder?

3. Supposing there was no valid appointment of Jobraj, who was entitled to succeed to the Raj and the zemindary in question, or is now entitled thereto?

The two latter questions were decided in favor of the appellant by the Principal Sudder Ameen; all three questions have been determined by the High Court in favor of the respondent.

It is admitted that the right of succession to both Raj and zemindary is governed, not by the general law, but by koolachar, or family custom. This custom had been the subject of investigation, trial, and decision in the Courts of the East India Company in the early part of this century. The cases are reported in the 1 Sudder Dewanny Adawlut Reports, and in the second and third volumes of the same work. These cases establish that, according to the custom, a reigning Rajah should name a Jobraj and Burra Thakoor, of whom the first succeeds to the Throne, and the latter to the office of Jobraj. Both parties to this appeal admit the custom so far. It is, however, contended by the appellant, that if Essan Chunder appointed a Jobraj, he was bound to appoint him partly on account of an alleged promise or intention on the part of the former Rajah, Kristokishore, and partly on the ground that he was the oldest living member of the class out of which, according to the family custom, a Jobraj could alone be selected. On the other hand, the respondent insists that the choice of the reigning Rajah, at least

within a certain class, is absolutely free, and cannot be controlled by the wishes of a former Rajah, had any such, in fact, been expressed in favor of the appellant.

On the argument of this appeal before their Lordships, the appellant's preferential title by seniority to the Jobrajship was sought to be established by evidence of a family custom to be collected from the instances given in the genealogy of actual successions. But where there is evidence of a power of selection, the actual observance of seniority even in a considerable series of successions cannot of itself defeat a custom which establishes the right of free choice; and had the instances been uniform and without exception, that alone would not have been sufficient to support the appellant's case. Such uniformity of practice was, however, not proved, for several instances appear of infants appointed to the office of Jobraj, whilst relatives within the custom, and older in years, were living. This evidence, therefore, failed. Still it was open to the appellant to contend, as he did, that, in default of any appointment to either office, seniority of age constituted a title by descent to this Raj; and to this latter branch of the argument insisted on by the learned Counsel for the appellant, their Lordships will now direct their attention.

The question now to be considered is whether, assuming no valid title to the office of Jobraj to have been conferred on the respondent Beer Chunder, the appellant establishes a title by seniority. It is not denied that his title to succeed must be made out as legal heir to the last Rajah. Essan Chunder. The plaintiff is senior in years to Beer Chunder; he was the half-brother of Essan Chunder, and Beer Chunder is Essan Chunder's brother by the whole blood. By the general Hindoo Law, Beer Chunder would be the heir to Essan Chunder in preference to his half-brother, were it a disputed succession to divided property. The learned Counsel for the appellant have, however, contended that this preference of whole blood to half blood does not extend to a Raj; and to support this contention they relied on the rule which obtains in certain cases of undivided ancestral estate, when brothers of the whole and half blood are on the same footing.

The rule on which they insisted is this, that in the case of a raj or kingdom, or other impartible estate descending by inheritance to a sole heir, the Court must view the property as though it were joint estate—part of an undivided joint ancestral estate—and apply the law applicable to such an estate with a view to the selection of the eldest from those who would be equal in degree as co-parceners. This position was advanced in the High Court without success. The Court observed that no authority had been cited in its support, and treated the doctrine as novel and unknown to them. The argument has been strongly urged by Mr. Bell, and their Lordships will give their reasons for concurring in the opinion which was expressed by the High Court, somewhat more fully than was done in that Court.

The normal state of every Hindoo family is joint. Presumably every such family is joint in food, worship, and estate.

In the absence of proof of division, such is the legal presumption; but the members of the family may sever in all or any of these three things. The family in which a title to a kingdom exists in one member follows this general law, but it follows it in part only: for the succession to a kingdom is an exception to it from the very nature of the thing (*see* I Strange's Hindoo Law, p. 198): the family may have property distinct from that to which a sole heirship belongs, and may continue joint. Still, when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the Royal lands is, as in this case, one and the same title. Survivorship cannot obtain in such a possession from its very nature; and there can be no community of interest: for claims to an estate in lands, and to rights in others over it, as to maintenance, for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir. In the Shivagunga case (9 Moore's Indian Appeals), it is stated in a judgment which underwent the most careful consideration by their Lordships, that there are in the Hindoo Law two leading rules of inheritance—that founded on the religious duty and superior efficacy of oblation and sacrifice; and that of survivorship. Where the latter rule cannot apply, the former must be resorted to. Now, this rule of religious obligation and priority marks the

brother of the whole blood as preferable heir in succession to the estate of his brother, over the brother of the half blood only. The reason given is that he offers more sacrifices, and benefits more the manes of the dead of his family:—in their eyes a real substantial ground of preference. In nature also, he is nearer, and therefore satisfies the description nearer of kin. Since, then, the custom in this family, where no appointment of Jobraj or Burra Thakoor has been made, requires the union of two things to constitute the legal heir, *viz.*, seniority in age and nearness of kin (which in truth is in conformity with the general law of Royal descent), and the claimant has but one of these qualifications in himself, *viz.*, seniority, he does not entitle himself by the family custom. There is no trustworthy evidence that the custom supersedes the general rule as to the precedence of the whole over the half blood. The custom is silent on that point. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. On general principles, therefore, the Hindoo Law must be resorted to in this case, and that does not favor the appellant's claim: for, unless where survivorship furnishes an exception, the whole blood is preferred.

The decision of this question alone would justify the dismissal of this appeal; but their Lordships think it right to review also the decision of the High Court on the facts as to the appointment.

The facts stated by the *de facto* Rajah and deposed to by his witnesses on this part of the case are few and simple. The fact that the Rajah had appointed a day and hour for the celebration of the ceremony of opening a new hall, cannot be doubted. The disputed nomination of the Jobraj is said to have been made on that occasion, and during that ceremony the Rajah is stated to have directed the intended Jobraj, Burra Thakoor, and Kurta to bathe and come to his presence. Dresses had been prepared, it is said, by orders overnight to the bearer. The dresses were brought on silver dishes to the Rajah's presence; the Jobraj, Burra Thakoor, and Kurta were invested with their dresses, appeared, made their salaams, were verbally appointed, gave presents of goldmohurs, and, so appointed, received the customary nuzzurs.

This contest is, in truth, a contest as to the title to reign—a matter, rather, of state policy than one proper for judicial decision. Into such disputes, passions stronger than those which affect the minds of ordinary litigants may well be supposed to enter, and fear and favor may sway in an unusual degree the minds of those who depose on either side. The power of an absolute prince over the fate of those who surround him may enable him to array a body of witnesses deposing to facts to which it may be difficult to offer any positive contradiction. The addition by false testimony of an incident or two, or of a few words, to an actual scene or ceremony, may, if credited, determine the title to a throne; and it is scarcely possible to conceive a case more requiring than this does, the nicest scrutiny and examination of the evidence. The defendant, Beer Chunder, is, *de facto*, Sovereign, and as such has been recognized by the Indian Government, the paramount arbiters in a case of disputed succession. The High Court has founded its judgment on the positive testimony which was given in support of the appointment. The objections stated by the Court below to the testimony of the witnesses, twenty-one in number, are not that they are of a bad character or that their manner and demeanour induced the Court to disbelieve them; but they are of such a nature as a Court of appeal may be well able to judge of without being under any inferiority to the Judge who tried the case. The exact agreement in the story, even to its details, by all the witnesses; the supposed difficulties as the ready production of dresses and goldmohurs; the dependence of the witnesses more or less on the Rajah's power and favor; the absence of all mention of the appointment in the early letters of the Gooroo to the Superintendent; the want of notification to the British authorities and of the invitations to the members of the family absent from the ceremony, though resident in the palace, with the ignorance as to any such appointment stated by ladies of the palace of high rank; the want of the accustomed religious ceremony and non-observance of regal state in the usual throne-room—these, with some minor objections, led the Judge below to discredit a story fully and consistently deposed to by witnesses of a class not ordinarily untrustworthy nor to be lightly disbelieved. In addition to this, the *de facto* Rajah was considered to be throwing difficulties in the way of the appellant, who desired to examine the Gooroo and some other witnesses; and the singular character of the answers of the latter, which avoided any recognition of the titles of Jobraj, or Thakoor, or Kurta, augmented the matter of suspicion. Their Lordships are far from saying that the objections urged with so much force by the Counsel for the appellant

are undeserving of a very serious and attentive consideration; they appear to have received such consideration in the High Court, and their Lordships, during the argument, and since, have carefully considered and weighed them. The probabilities, however, are, in their Lordships' opinion, strong in support of the fact of a nomination of the *de facto* Rajah by his deceased brother to the office of Jobraj. An experience of Indian cases shows that few of them, however true, are free from admixture of exaggeration; and it is not necessary to the affirmance of this judgment that their Lordships should believe entirely all the attendant circumstances detailed by the witnesses who support the nomination.

The Rajah was infirm in health; his state was evidently one calculated to inspire doubt and alarm; he had two years before declined to appoint to the offices of Jobraj and Burra Thakoor; he was supposed at that time to desire to be succeeded by his own son; but from his reluctance to name him when he was of tender age, he may reasonably be supposed to have considered the appointment of an adult sovereign the best for his kingdom. When his own health was seriously impaired, it would become, not only to him, but to those around him, a subject of anxious thought how the Raj should be preserved. The appellant had an enemy in the Gooroo, who exercised great influence over the mind of the Rajah; and sickness and the near prospect of death would not diminish that influence. His son was still young; the Rajah might naturally suppose him unable to compete with one who laid claim by right to the succession upon an alleged superior title. He might dread also the appellant's influence over the hill tribes, whether that influence were real or supposed, the offspring of a jealous fear. The Gooroo might think it best to arrange matters with one Thakoor; and the appointment of the two sons of the Rajah, one, though illegitimate, to the office of Kurta, gives an air of probability to the supposition that some arrangement may have preceded the actual celebration of the opening of the hall, especially as some rumours of an intended appointment appear to have reached the ears of a witness who deposes on the side of the appellant. Notwithstanding, therefore, the former reluctance of the Rajah to appoint either the appellant or Beer Chunder, Thakoor, the changed circumstances prevent the conclusion that his mind was still opposed to the appointment of one of them, his own brother of the whole blood, whom he might desire to associate with his son, for the advantage of his son, of himself, and of the kingdom. Nor is the concurrence of his spiritual adviser in this view, under the changed circumstances of the case, an improbable supposition.

The Rajah was not then in a state in which he was likely to resist any strong pressure upon him to make some appointment to secure the succession. Many feelings might exist in a weak and suspicious mind to explain the absence of the usual ceremonies, invitations, and notification. Fear of the appellant and of his influence; jealousy of the English officials, and apprehensions, however groundless, of annexation to the British rule; doubts whether some delay or obstruction might be interposed, might induce his advisers to snatch at an opportunity offered by the approaching ceremonial to add the more important to the less important ceremony. Rival parties appear to have existed in the palace. It seems little credible that a story of an act having been performed before a large audience which never took place, should have been adopted by the conspirators in a fraudulent usurpation, as so much larger scope for contradiction would thereby be given by such a mode of fabricating the story; and the falsehood of the alleged nomination would be needlessly exposed to many persons. It is still more improbable that the conspirators, without the slightest necessity, should be found so dangerously communicative of their conspiracy.

The utter worthlessness of this part of the appellant's case lends considerable support to the defendant's story; the Gooroo made no sign till he himself was dismissed or disgraced. And the reliance which the High Court justly placed on the early resistance by the new Rajah to this man, in whose power he would have been, had they been common actors in this scheme of fraud, cannot be discarded in considering the weight of the whole body of evidence.

Though, according to the appellant's story, the Rajah had placed his character, and perhaps his power and throne, at the mercy of the Gooroo, he, before the litigation had ended, appointed another agent, and deposed the Gooroo from power. Can it be supposed that if the plot was really planned, no thought of it had occurred to the respondent Beer Chunder until many hours after the Rajah's death. A moment of time would have sufficed to give rise to the thought that the throne might be reached by contrivance, and yet the

evidence discloses this man as at once weak, timid, and needlessly communicative, crying and exclaiming that the Raj was ruined, and then entering into an inner chamber to concoct a fraud, which some of the conspirators seem immediately eager to reveal. The evidence for the appellant on this part of the case is inconsistent. One witness stated that the Gooroo told him of the nomination in the afternoon between the hours of 3 and 4 of the 17th Shrabun; whilst the others, speaking of a much later hour of the same day, tell their story of the distress manifested by the Gooroo and Beer Chunder because no nomination had been made.

One letter which is treated as a forgery by the High Court, and in defence of which no argument has been advanced before their Lordships, is ascribed to Beer Chunder, who is represented by it as informing the Government that he has no hopes of the Raj but from their mercy: whilst at this very time he must reasonably be presumed, if guilty, to have formed the design to usurp the throne. The family took sides in this dispute, part siding with the appellant, and part with the *de-facto* Rajah. The ladies in the recesses of the palace might well know nothing of their own knowledge of what actually took place at the ceremony in the hall. The story they repeat may have been so represented to them; but this kind of evidence is negative against positive testimony. It is so regarded, and rightly, in the judgment of the High Court. The mother of the legitimate son of the deceased Rajah supports the appointment, and so do the mothers of the two illegitimate sons. To the argument that they are swayed on the side of the Rajah may be opposed the argument that in these contests of factions in a native palace little of unbiassed testimony can be looked for. The appellant seems not to have wanted friends and supporters there, and even Chuckerdhuj found support in similar quarters in favor of his groundless claim.

On the subject of the obstruction offered to the appellant's procurement of evidence, the respondent may have feigned a fear of the appellant's measures at his capital, in order to oppose being present at the examination of the named witnesses; but, on the other hand, it is idle to suppose that no one but the appellant himself could have been found to ascertain the identity of the ladies whom he wished to examine. The respondent may have feared, not the true testimony of the Gooroo, but the effect of a fabricated story on the mind of a Court. Amidst all this mass of conflicting probabilities, impeaching or supporting the disputed nominations, the High Court proceeded on positive testimony, weighty enough to decide the issue if not successfully impeached. Unless native testimony is to be thrown aside entirely, and decisions are to pass on conjecture or suspicion instead of evidence, their Lordships think the High Court did not err in coming to a conclusion that the positive testimony must prevail in this case.

They were able to judge of the sufficiency of the reasons alleged by the Principal Sudder Ameen for discrediting so numerous a body of respectable witnesses. They, it should be remembered, had been the trusted officers of the deceased Rajah, and were continued by Beer Chunder in the same posts and at the same salaries. From whom but the servants, officers, friends, and members of the family of the deceased Rajah, could his successor be expected to derive his evidence? These would be the persons most likely to be present at the ceremony of the opening of the hall; and the objection that all were subject to the will of the Rajah can at most be but an argument, and not a conclusive one, for discrediting such testimony. The case is barren of any opposing evidence of persons of equal value who were present in the hall, and who state that they saw nothing of the alleged ceremony of nomination. Again, the concurrence of testimony of many intelligent witnesses, without circumstantial variety, where the facts are very few and simple, and all would be naturally attentive observers of the scene, furnishes no ground for suspicion; and if the evidence showed some sign of drilling or tutoring in the mode of narration, that, however improper, would not constitute a sufficient reason for discrediting evidence of many trustworthy witnesses; since the evidence of witnesses to a true story is too often subject in native Courts to such a kind of manipulation.

The reasons assigned, therefore, by the Judges of the High Court for differing from the Court below, and believing the evidence which the Lower Court rejected, appear to their Lordships to be satisfactory; and they think that the appellant has not succeeded in showing that the appointment insisted on by the *de facto* Rajah did not in truth take place. For these reasons their Lordships must humbly advise Her Majesty that the decree of the High Court of Judicature at Fort William ought to be affirmed, and this appeal dismissed with costs.

The 15th March 1869.

Present:

Sir James W. Colvile, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Compromise—Section 174, Act X. of 1866—Indian Companies' Act.

On Appeal from the High Court at Bombay.

The Bank of Hindoostan, China, and Japan,

versus

The Eastern Financial Association (Limited).

The compromise intended to be sanctioned by Section 174 of the Indian Companies' Act X. of 1866 might be entered into before the list of contributories has been settled, or the liabilities or competence of the shareholders has been ascertained. Such a compromise is a compromise with contributories or alleged contributories, and falls within the Section in question.

The power of sanctioning a compromise allowed to the Courts by Section 174 ought to be exercised with very great caution; it is one with which the Privy Council will not interfere unless shown to be based upon an erroneous principle.

Ex parte Tottie distinguished

In this case their Lordships must assume the validity of the order of the 26th July 1866, against which no appeal has been presented, and by which the Eastern Financial Association has been ordered to be wound up. This order is the foundation of the proceedings; and assuming its validity, there are two questions raised by the present appeal: first, whether the compromise which was sanctioned by the order of the 26th of June 1867 was one which the Court was competent to sanction; and, secondly, whether the Court, assuming it to have the power, ought to have exercised that power under the circumstances of this case.

The words of the 174th Section of the Indian Act are "that the Liquidators may, "with the sanction of the Court, where a "Company is being wound up by the Court, "compromise all calls and liabilities to calls, "debts, and liabilities capable of resulting "in debts, and all claims, whether present "or future, subsisting, or supposed to subsist, between the Company and any contributory or alleged contributory, or other "debtor or person apprehending liability to "the Company; and all questions in any way "relating to or affecting the assets of the "Company, or the winding up of the Company generally; and on such terms as may "be agreed upon, with power for the Liquidators to take any security for the discharge "of such debts or liabilities, and to give "complete discharge in respect to all or any "of such calls, debts, or liabilities."

These words are very wide and general, and they are similar to those contained in Section 160 of the English Winding-up Act of 1862. It may be conjectured that the great amount of costs and expenses incurred in the winding up of these Companies induced the Legislature to increase the powers of the Court with respect to compromises, in order to the diminishing of the amount of those costs. The words which are to be found in this Section, especially the words "liabilities "to calls, debts, and liabilities capable of "resulting in debts, subsisting or supposed "to subsist," and the words "alleged contributory," plainly show that the compromises intended to be sanctioned might be entered into before the list of contributories had been settled, or the liabilities or competence of the shareholders had been ascertained. It appears to their Lordships that the compromise in question is a compromise with contributories or alleged contributories, and consequently that it is a compromise within the words of the Section in question.

The authority of the case of *Ex parte Tottie** has been much pressed upon the consideration of their Lordships; but the real ground of the decision in that case is explained in the marginal note of the case, which states that "A Company was being wound "up compulsorily, after an attempt having "been made to wind it up voluntarily, and "the Official Liquidators agreed with thirty-five shareholders to compromise their "liabilities for a fixed sum, these shareholders insisting as a condition that the "date upon which the compromise was "founded should not be divulged. This "compromise was sworn to be founded upon "details of property and circumstances "which, if made known, would operate detrimentally to the thirty-five shareholders "and to the interests of the Company. The "Official Liquidators applied to sanction a "compromise under that condition, in pursuance of the 19th Section of the Companies' Amendment Act, 21st of the Queen. "Some of the creditors opposed on the ground "of the data not being stated, and the application was refused with costs; and on appeal the decision was affirmed."

But in that case there was no question as to the liability of the thirty-five shareholders. The question was as to the amount which was likely to be recovered from those thirty-five shareholders, and that, of course, was the

* 1 Dr. and Sm., 273; 6 Jur., N. S., 849.

question which the Court had to decide when it came to consider whether such a compromise was advisable or not; and the grounds upon which that question was to be determined were, from the very terms of the compromise itself, to be kept secret. The mere statement of these facts is sufficient to distinguish that case from the present, in which there are two very different questions: first, whether these persons, who are alleged to be contributories, are contributories at all? and, secondly, whether, assuming them to be fixed upon the list of contributories, they would be able to pay any, and, if any, what proportion of the amount of the calls which might be made upon them?

Now, the first of these questions, *viz.*, whether they are contributories at all, depends very much upon the time which is to be fixed for the commencement of this winding-up. That is a most material point, upon which the ultimate determination of the question as to who are the persons liable to be fixed upon the list as contributories would depend. All the facts relating to that point are apparent upon the affidavits and upon the orders of the Court itself: for, in truth, it mainly depends upon the effect which is to be given to the very singular orders which appear to have been made for the winding-up of this Company; there having been a winding-up order in the first instance, then a proceeding in the nature of a voluntary winding-up, then a discharge of the former orders, and then, ultimately, the order of 1866, which is the foundation of the present proceedings. Now, all these matters were perfectly patent to the Court and to all the shareholders; and they gave rise to the doubt which existed as to the date at which the winding-up of this Company ought to be considered as commencing.

So also with respect to the competency of the shareholders. The Judges had before them, on the evidence in this case, and from their knowledge of the then state of circumstances existing at Bombay, reason to doubt whether the persons who were on the list of contributories as alleged contributories would be able to pay any considerable sum, supposing they were ultimately fixed upon the list. In the present case, therefore, there was no agreement for secrecy: there was no object in secrecy; there was no attempt at secrecy; everything was brought fairly before the attention of the Court: and consequently, in the opinion of their Lordships, the case of *Ex parte Tottie* cannot be considered an authority inconsistent with the decision at which the Indian Courts have arrived.

That brings us, then, to the consideration of the second question, *viz.*, whether, assuming that the Court had power to sanction such a compromise, that power was properly exercised in the present case.

Now, the power is, as has been already said, one of so wide and extensive a character that it is doubtless one which ought to be exercised with very great caution; but, on the other hand, in accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India when two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought; and in this case that discretion appears to have been exercised with very great caution. The fact of the opposition of the present appellants to the proposed compromise was stated to the Court in the affidavit which was filed on the part of the Official Liquidator. All the creditors had due notice of the intention to bring this question before the Court, and the appellants themselves were heard by Counsel in opposition to the order which was proposed to be made for sanctioning the compromise. It appears upon the evidence that all the creditors in Bombay, that is, all the creditors who had the best means of forming a judgment upon the question—at all events upon the second of the two questions, *viz.*, the competency of the shareholders, assuming them to be fixed upon the list—all of these creditors assented to the terms of the compromise. From the first there were only three opponents, and of these, the present appellants, who are themselves a Company under liquidation, alone appear here before their Lordships; and it is stated in the affidavit, and not denied, that the persons concerned in the management of the affairs of this appellant Company, now under liquidation, had sent out orders to Bombay not to accede to a compromise whatever. In addition to this, Mr. Hamilton, one of the Official Liquidators, states in his affidavit that he, after the retirement of another Liquidator, considered himself as bound to act, and that, in point of fact, he did act, as protector of the interests of the creditors. He says that he has

given careful consideration to all the circumstances of the case so far as they bear upon the question of the advisability of this compromise, and that in his judgment there is no doubt that it is one which is very advisable, having regard to the interests of the creditors. He says that all the books of account had been from the first open to the inspection of the creditors, and that some of the principal creditors have, in fact, for a considerable time, retained possession of some of the books and accounts, or copies of them. No question has been raised as to the *bona fides* of all or any part of the proceedings which are now before us; all the material circumstances of the case were brought at the time to the attention of the Court. and were matters in respect of which the High Court of Bombay was much more competent to arrive at a satisfactory conclusion than this Board can possibly be.

As, therefore, their Lordships have, in the first place, no doubt as to the jurisdiction of the High Court to make the order in question; and, in the second, as they see no ground for controlling the discretion which that Court has exercised in accordance with the wishes of the great bulk of the creditors, their Lordships will feel it their duty humbly to advise Her Majesty that the order of the High Court of Judicature at Bombay ought to be affirmed, and this appeal dismissed with costs.

The 12th July 1869.

Present:

Sir James W. Colvile, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Hindoo Law—Adoption—Appealable amount—Costs.

*On Appeal from the High Court at Calcutta.**

Nilmadhub Doss

versus

Bishumbur Doss and others.

On the issue as to the factum of an adoption as to which there was a conflict of evidence, the Privy Council, in the absence of strong documentary evidence, confirmatory of the adoption, and on a consideration of the probabilities of the case, reversed the judgment of the High Court, which upheld the adoption, and confirmed that of the Judge of the original Court who saw and heard the witnesses, and who considered the witnesses in support of the adoption to be unworthy of credit.

In a case of alleged adoption by gift, in which the deed of gift stated that the son was taken by the person adopting as *palluck puttro*, for the purpose of securing future oblations of water and funeral cake; that he would be brought up like a son; that the ceremonies of *sungskar* had been performed, and he had been constituted representative of the person adopting;—it was HELD that the terms did not import the adoption of a son by gift, and that it was only by reason of the gift that the filial relation to the natural father was extinguished, or the right of the son in the estate of the giver ceased.

An objection to an appeal, on the ground that the amount in dispute is below the appealable amount, comes too late when made to the Privy Council at the hearing of the appeal. The costs of the suit should not be taken into consideration in estimating the amount in dispute.

THE question raised by this appeal is whether the respondents (the plaintiffs in the suit) are entitled to recover from the appellant three-fourth shares of certain property, the whole of which he claims to hold as the sole heir of his natural half-brother Ramlochun Doss, deceased. This property is admitted to have been part of the separate self-acquired estate of one Goorooproshad Doss, who was the second of three Hindoo brothers; the elder, Gungadhur, being the father of the respondents; the younger, Purmanund, being the father of Ramlochun, and (by another wife) of the appellant and two brothers now deceased. From Goorooproshad, who died in January 1830, it passed, under the circumstances which will be hereafter considered, to Ramlochun, who died in the month of November of the same year. He was succeeded by his widow and heiress, on whose death the succession opened to those who were then the nearest collateral heirs of her husband.

If the right of succession is to be determined by the test of natural consanguinity, the appellant, as the only living half-brother of the deceased, is the sole heir. But if, as the respondents contend, Ramlochun was adopted by Goorooproshad, so as to cease to be a member of his natural family, and to become the son of Goorooproshad, then in contemplation of law the respondents and the appellant are related to Ramlochun in equal degree, *i. e.*, as first cousins, and are entitled to equal shares in the property. Hence the determination of this appeal depends upon the determination of the question whether the respondents have established that there was, in fact, such an adoption.

* From the judgment of Peacock, *C. J.*, and Bayley and Kemp, *JJ.*, dated 11th February 1863, in Regular Appeal No. 35 of 1862—not reported.

The adoption is alleged to have taken place in 1804. The witnesses who have deposed to it have been treated by the Principal Sudder Ameen who tried the cause in the Court of first instance as unworthy of credit. Their Lordships are not prepared to say that they have been so treated unjustly. The testimony of some of them is directed to prove both the original adoption in 1804, and that in the ceremony of boring the ears of Ramlochun, which took place ten or eleven years later, Goorooproshad performed a part which was inconsistent with any character but that of adoptive father. Others of the witnesses speak only to one or the other of these facts. They are contradicted by the witnesses for the appellant, and in this conflict of evidence, and, considering the imputations cast on their credit by the Judge who saw and heard them, their Lordships are of opinion that their testimony, unless very strongly confirmed by the documents produced in the cause, cannot be taken to have established the alleged adoption.

The proof of another material fact, *viz.*, the existence, at the time of the alleged adoption, of an elder brother of Ramlochun, named Rajiblochun, also mainly depends on the testimony of the same witnesses. This fact is denied by the appellant; and it is inconsistent with the statements made by Gungadhur, the father of the respondents, and the eldest member of the family in 1831. There is no mention of Rajiblochun in any document of earlier date than the plaint in this suit; and their Lordships are of opinion that his existence has not been proved, and that they must deal with this case on the assumption that in 1804 Ramlochun was the eldest, if not the only, son of his natural father.

Of the documentary evidence, a large portion tends to negative the alleged adoption. The kabalas produced show that between 1817 and 1825 Ramlochun purchased various small parcels of land, sometimes in his sole name, sometimes in the joint names of himself and his half-brother Puddolochun; but that in all such transactions he was known and described as the son of Purmanund Doss, his natural father, and not as the son of Goorooproshad. There is no documentary evidence other than the hibbanamah afterwards considered, which shows that he was ever held out to the world during Goorooproshad's life as the adopted son of his uncle.

What, then, is the confirmation of the respondent's case which is to be derived from the terms of the hibbanamah, or from the acts of the appellant under it? Their Lordships agree with the learned Judges of the High Court, and differ from the Principal Sudder Ameen, in holding that that instrument must be taken to be genuine.

Mr. Mortimer has argued for the respondents that the general effect of the hibbanamah, and of the contemporary document therein referred to, was a sort of family settlement of the property of Goorooproshad. Their Lordships are disposed to think that this view of the transaction is correct. It certainly seems true that under color of a sale for 2,000 rupees of half the property to the three half-brothers of Ramlochun, they took a beneficial interest of considerable value, subject to the obligation, as the receipts which are at pages 70 and 71 of the record show, of making certain allowances to the three respondents. But if this be so, such a disposition by Goorooproshad of his property goes rather to negative than to support the hypothesis of a formal and absolute adoption. It is not likely that if Goorooproshad had regularly adopted Ramlochun, so as to make him in law his own son, and to deprive him of a right to participate in the inheritance of his natural father, he would have left away from him ten-sixteenths of the estate. On the other hand, the disposition is reasonable, if supposed to be made by a childless uncle desirous of making some kind of provision for all his nephews, but of giving the principal share of his property to a favorite nephew to whom he stood in some peculiar relation, short of that of father and son.

The evidence, therefore, of adoption to be gathered from the hibbanamah is to be found, if anywhere, in the statement: "But as I had no son or daughter, I took you as my *palluck puttro* in the month of Aughran 1211 B. S., with the *unomutty* (permission) of your parents, for the purpose of securing future oblations of water and funeral cake, and having brought you up like a son, performed the ceremonies of your sungskar, &c., and have constituted you my representative."

If these words must be taken to import a declaration of a regular and ordinary adoption, and are incapable of any other interpretation, they are of great weight, and,

when coupled with the proof of the action taken by Ramlochun under this instrument, would go far to determine the cause.

Much has been said of the old presumption which arises from the religious duty which is upon every childless Hindoo to adopt a son. Their Lordships do not deny the force of that presumption, but they cannot shut their eyes to the fact that childless Hindoos die daily without having fulfilled this obligation, or made provision for its fulfilment after their death.

Again, if there is, on the one hand, a presumption that Goorooproshad would perform the religious duty of adopting a son, there is, on the other, at least as strong a presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted otherwise than as a *dwyamushyayana*, or son to both his uncle and his natural father. This latter kind of adoption would not sever the connection of the child with his natural family.

It is admitted on all hands that the expressions in the hibbanamah are not those which properly import the adoption of a son by gift—*dattaka puttro;* and that it is only by reason of the gift that the filial relation to the natural father is extinguished or the right of the son in the estate of the giver ceases is shown by the *Dattaka Chandrika*, Section II., art. 19. The consulted Pundits differ as to the interpretation of the expressions in the hibbanamah. All agree that they do not in terms import the adoption of a *dattaka puttro;* but whilst some argue from the direction as to the performance of the funeral obsequies, that the person designated as *palluck puttro* must be taken to be a *dattaka puttro;* others use that very direction as an argument for the contrary conclusion, because, in the case of a *dattaka puttro* such a direction would have been superfluous. To their Lordships it appears that nothing is to be gathered from these Vyavashtas but the conviction that the clause in question admits of more than one construction. And they think that that construction of it is to be preferred which is consistent with the presumption that Purmanund did not commit a breach of duty by giving away an eldest or only son; with the fact proved by the kobalahs, that long after the alleged adoption Ramlochun continued to be represented and known as the son of Purmanund, and with the further fact (certainly not disproved), that he participated in the inheritance of his natural father. Nor is it necessary to decide whether Ramlochun was the mere foster-son of Goorooproshad; or was so filiated by him as to become *dwyamushyayana*, since in neither case would his natural relation to his own family be extinguished. It is sufficient to find that the hibbanamah does not necessarily affirm him to have been "a son given and received."

It remains to be considered whether what was done by Ramlochun under the hibbanamah is inconsistent with this construction. He neither claimed nor took the property of Goorooproshad as adopted son and heir-at-law. He took by virtue of the hibbanamah or deed of gift. The only plausible argument which the respondents can derive from his petition for mutation of names is his application of the term "father" to Goorooproshad. But this is not absolutely inconsistent with the hypothesis that he was only the foster-son of Goorooproshad; and is perfectly consistent with the theory that he was the son of both fathers. On the other hand, though it may be true that the respondents are not bound by the statements of their father Gungadhur, as they would be if they were claiming the title through him, yet those statements, made as long ago as 1831, by the senior member of the family, are not altogether without weight. They are not to be presumed to be false; and they both deny that the adoption took place, and affirm that Ramlochun was the eldest son of his father.

Upon the whole, therefore, their Lordships are compelled respectfully to dissent from the view taken by the learned Judges of the High Court of the effect of the hibbanamah and the other evidence in the cause. They have come to the conclusion that the respondents have failed to establish that any adoption which severed the relation of Ramlochun with his natural family took place; and that the superior title of the appellant ought to prevail. They must, therefore, humbly advise Her Majesty to allow this appeal; to reverse the decree of the High Court; and in lieu thereof, to direct that an order be made dismissing the appeal to the High Court, with costs. The costs of the appeal must follow the result.

Their Lordships deem it right to add that although they overruled the objection to this appeal, which was taken on the ground that

the amount in dispute was below the appealable amount, because it was, in their judgment, taken too late, they must not, therefore, be taken to assent to the propriety of the order made by Mr. Justice Seton-Karr, who, in estimating the amount in dispute, took into consideration the costs of the suit.

The 28th June 1869.

Present:

Sir James W. Colvile, Lord Justice Selwyn, Lord Justice Giffard, and Sir Lawrence Peel.

Documentary evidence — Section 39, Act VIII. of 1859.

On Appeal from the late Sudder Court at Agra.

Goshain Tota Ram

versus

Rajah Rickmunee Bullub.

The admission of documentary evidence at a period subsequent to the filing of the plaint is not a ground of appeal against the ultimate determination of the Court which admitted such evidence, when it is received under Section 39, Act VIII. of 1859, with the sanction of the Court.

THIS is an appeal against the concurrent decision of the two Courts below, which have found that the respondent, the plaintiff in the action, is entitled to be restored rather to an office in the nature of the headship of a temple, than to the possession of lands in the ordinary sense in which lands are sued for in ejectment, and that the title set up by the appellant cannot prevail against him.

Their Lordships have so constantly, that it is hardly necessary to repeat it, said that in such circumstances they will never disturb the concurrent decision of both Courts below upon a question of fact, unless it very clearly appears that there has been some miscarriage of justice, some mis-trial, or that the conclusion is very plainly erroneous.

In the present case it is contended that the documentary evidence which has been put in by the plaintiff in the suit—by the respondent on this appeal—was improperly admitted. It does not seem to their Lordships that that is the case, or, at least, that there has been such an admission of evidence as would be fatal to the decision of the Courts below. No doubt, the evidence was not, in accordance with the new Code of Procedure, brought in at the time of filing the plaint. It was brought in at two subsequent periods. There seems, therefore, to have been an irregularity in that respect, which is adverted to in the judgment of the Sudder Court.

Their Lordships, however, do not find that the 39th Clause of Act VIII. of 1859 makes the admission of any documentary evidence that is not so brought in, so improper as to be a ground of appeal against the ultimate determination of the cause by the Court which has admitted it. On the contrary, what that clause at the end of it says is: "Any document not produced in Court by "the plaintiff when the plaint is presented "shall not be received in evidence on his "behalf at the hearing of the suit without "the sanction of the Court."

In the present case there seems to their Lordships to be abundant proof that the evidence was received with the sanction of the Court. A great part of it (some of the documents and accounts being in the Bengalee language) seem to have been referred to a subordinate officer, an ameen, for inspection and verification; and it was ultimately acted on by the Court. It is perfectly clear, therefore, that if the sanction of the Court can purge the original defect, it has been so purged.

Their Lordships sitting here have not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted. It has always been a rule of this Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the Courts below have come. The Sudder Court, although in these cases they adverted to the irregularity in the proceedings of the Principal Sudder Ameen, have expressed their opinion that the defendant was not ultimately prejudiced by the course which had been pursued.

The contention on the side of the appellant is that this is in the nature of an action of ejectment, and that there is really no evidence whatever of the title of the respond-

ent, who, being plaintiff in the cause, was bound to make out the title. It appears, however, to their Lordships that there was ample evidence to go to the Jury that the persons who actually resided in the temple were the mere agents of the Rajah Gourbullub, and that there was also ample evidence to go to the Jury that Rajah Gourbullub was the adopted son of the person whom he claimed to represent. In that state of things their Lordships think that the burthen of proof was properly treated as shifted upon the defendant, and the transaction upon which he relies seems to their Lordships, as it seemed to the Courts below, to be one of a suspicious character. Both those Courts have found that it was not a true transaction, and that even if the instrument had been really executed by the woman with a knowledge of its contents, no title to the temple would have passed thereunder. Their Lordships are not prepared to say that either of those conclusions is wrong.

Under these circumstances, their Lordships see no grounds for disturbing the decision of the Courts below, and must humbly recommend Her Majesty to dismiss this appeal with costs.

The 7th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel, *Judges.*

Suit—Ancient tenure—Regulation IV. of 1831, Madras Code—Co-sharers—Non-payment of Government assessment—Onus probandi.

On Appeal from the High Court at Madras.

Brett

versus

Ellaiya.

Regulation IV. of 1831, Madras Code, which must be strictly construed, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council. A written order under that law is not necessary in a suit brought by a person who claims to hold under an ancient and permanent tenure in existence before the Dewanny.

Where an ancient and permanent tenure is held by several persons in separate shares, and some of the sharers make default in the payment of their quota of the Government assessment, the portion of the tenure held by the sharers who paid their share of the assessment cannot be resumed or forfeited by the Government. In such a case, the *onus* lies on the Government to make out by clear evidence under what special contract, or agreement, or Regulation, it forfeits the entire tenure.

THIS is an appeal from a decision of the High Court of Judicature at Madras, made on special appeal, whereby it reversed a decision of the Civil Court of Chittoor given in favor of the appellant, the defendant in the original suit.

The appeal comes before their Lordships *ex-parte*, and it is desirable to state in detail the case as it is to be collected from the pleadings and issues, in order that the objections to the judgment appealed from may be examined with reference to the case actually before the High Court.

The suit was brought in the Zillah Court of Salem by the plaintiff, a Brahmin, against Mr. Brett, the then Collector of that District. The plaint states succinctly the nature of the claim, which is this: The plaintiff therein described himself as a co-sharer of Neikarappatu Agraharam, which means a maintenance for Brahmins. He claims to recover 335 rupees 2 annas 2 pice, being the rent collected from him in excess of the permanent Jodikia Pottah granted to him by the Government. He then proceeds to state the circumstances of that grant as follows: "On "the assumption of his country by the Hon'-"ble Company, a permanent revenue was set-"tled in the time of Mr. Macleod for the four "shares enjoyed by my ancestors and myself "in the said Neikarappatu Agraharam for a "long time; for my one karai, consisting of "four shares, a pottah has been granted to "the effect that a Jodikai revenue should be "paid to the Government at 53 pagodahs and "$7\frac{13}{16}$ fanams, or 67 rupees 13 annas 2 pice."

He then proceeds to state due payment of his revenue, and that on a pretence that arrears were due on the whole village, it was, inclusive of his shares, attached unjustly, without ascertaining from whom the arrears were due, and collecting the same from the defaulter; and that a revenue in excess was fixed with a difference of rates, and was strictly demanded as stated by him thereafter in his plaint. He then alleges that he paid the money under duress to avoid disgrace and sale of his lands, and stating the excess exacted during three years to be the sum for which he sues, he seeks to recover that demand, and prays that the annual

revenue for the future may be adjudged to be collected from him under the pottah of Mr. Macleod.

The answer filed by the Acting Collector on behalf of Mr. Brett, after stating the object of the plaint, insists, first on a want of jurisdiction in the Court to entertain the complaint, as it was unaccompanied by a written order under Regulation IV. of 1831; and, on the other part of the case, it prays that the suit may be dismissed for want of due specification of the particular lands on which the alleged excess had been imposed.

A supplemental answer was subsequently put in, which states further, in answer to the complaint, that the village was held, not in severalty, but jointly, and that consequently the shareholders were jointly as well as severally liable for the quit-rent due on it. The reply insisted that the settlement was made for each plot, and a separate pottah was given to each sharer; that no joint pottah was given for the whole, nor the money collected accordingly, nor a joint receipt given. It contains, besides, answers of an argumentative nature to the objection on the point of jurisdiction, which it is not necessary to state in detail.

The rejoinder re-asserts and insists on the objection to the jurisdiction of the Court, and concludes by saying that the defendant does not consider it necessary to re-join to any other part of the reply.

Upon this state of the pleadings the issues were framed, which are to be found at page 4 of the record.

The points stated there for the defendant to prove are—

1. To prove that the village was not held in severalty, but jointly.

2. That plaintiff, as a shareholder, was jointly responsible with the several holders.

3. That the excess of teerwah was legally due, and under what authority or Regulation.

It appears, therefore, that the Court imposed on the defendant the *onus* of proving the legality of the re-assessment, and of showing under what authority or Regulation it proceeded.

The defendant did not appeal from the framing of these issues; nor does it now appear to their Lordships that, in the framing of them, the Court miscarried by imposing any species of proof upon the defendant from which the law exempted him.

If the new assessment was not legally imposed on the plaintiff, his liability under the old assessment remained, and his title to recover in this suit was established.

The Court of Salem decided in favor of the plaintiff on the point of jurisdiction, and on the issues it found in favor of the defendant.

On appeal to the Civil Court of Chittoor, to which the appeal was referred by the order of the High Court, the decision appealed from was affirmed.

The plaintiff then preferred a special appeal to the High Court, and that Court reversed the decision of the Civil Court at Chittoor on the third issue: on the other issues agreeing with the judgment below. The objection as to the jurisdiction was not enumerated amongst the grounds of appeal, and was not renewed before the High Court.

The objection to the jurisdiction of the Court was, however, renewed before their Lordships on the hearing of this appeal. As the proceedings before their Lordships disclose the grounds on which this objection rests, and as, if valid, it would apply to the whole litigation from its inception to its close, rendering all the proceedings null and void *ab initio*, their Lordships think it right to say that, in their judgment, the decision of this point in the Court of first instance was entirely correct; and that the Regulation, which must be construed strictly, applies only to suits brought to try the validity of grants emanating from, or confirmed or affected by, the direct act and order of the Governor in Council, and that no proof exists in the cause to bring this inam claim within the provisions of the Regulation IV. of 1831.

The judgment appealed from was, besides, impeached for error before their Lordships on these grounds: that the High Court had treated the acts of the Government as founded on Regulation XXVII. of 1802; that they had considered the case as one of resumption, and not as one of forfeiture; and had not given due effect to the hookoomnamah, as evidencing the right under which the Collector had acted.

There is some difficulty in their Lordships' minds in supposing that the High Court would have dwelt so much on the Regulation in question, had it not been in some manner relied on for the then respondent. It must be remembered that the third

issue imposed on the defendant the necessity of showing under what law or Regulation he had acted in varying and augmenting the old assessment on the plaintiff's shares; and the Court was entitled to receive distinct information on that point. Had the power exercised in this instance been an acknowledged power of the Government, acted on, and submitted to, in that part of the country, the Collector could, in the opinion of their Lordships, have had no difficulty in proving its continued exercise, Had it grown up as a custom of the country, though without any written law to sanction it, the terms of the issue were wide enough to admit proof of such custom as legalizing the acts complained of. The High Court, however, states in its judgment that no such proof was produced; and none has been presented to their Lordships beyond the hookoomnamah, on which Mr. Forsyth mainly relied.

Their Lordships are anxious to guard themselves from being understood as questioning, or in any way drawing into doubt, any practice which that instrument may indicate as to inamdars. Such an instrument being only a direction from a Government Board or officer to others engaged in the Revenue Department, cannot indeed create of itself any new law, or impose any new obligation on existing tenures from which they were antecedently free; but it may indicate in many cases subsequent to it the terms of engagements, and be proof of conditions of tenure in such cases.

As to *inams* of an admitted precarious tenure, it might serve as notice of an intention to resume them on failure of the obligation of the inamdars to pay the actual assessment. This case, however, must be determined on the facts alleged and proved. The plaintiff alleges his tenure to be ancient,—antecedent, indeed, to the assumption of the country by the East India Company. He admits, indeed, that the lands held by him were re-assessed by Mr. Macleod; but he states that assessment to be permanent, and that he held a permanent tenure under a pottah from Mr. Macleod. This case is inconsistent with an assessment variable at the will of the Government. The defendant nowhere denied in his pleading the permanency of the tenure in this sense, nor pleads that the *inam* was in its nature revocable at pleasure, or that the assessment could be raised at the pleasure of the Government. He pleads only that the village, though enjoyed in shares, was held in jointure and not severalty, and so the plaintiff's share was liable for defaults of other shareholders.

Mr. Forsyth argued, correctly, that this increase of assessment was not properly a resumption proceeding. But in this particular case the Government claims a right to increase the assessment on one who holds under an ancient and permanent tenure (for that averment is not denied), by reason of a default not arising from himself or any person holding his share. This is not a common incident of tenure, and is not involved in the right to hold the whole lands as hypothecated for the whole rent, though shares are held in severalty and subject to several assessments: it therefore lies on the defendant to prove by what authority this increase in the amount of the rent has been made. The ordinary remedies for revenue in arrear fall short of such a power; the non-payment of revenue may arise from causes implying only the misfortune of the holder; and in reason and justice, in the absence of contract or consent, a forfeiture should not be implied from a mere default of that nature: still less should the terms of an instrument alleged to evidence a right to declare a forfeiture, be constructively enlarged. Now, if the terms of the hookoomnamah be referred to they do not necessarily include such a case as the present. They are capable of being read as extending only to the forfeiture of the shares of the actual defaulters; in express terms the case of a co-sharer under a separate assessment, and not in default, is not included in it; and its language would not lead one in such a case to consider it as meant to subject him to its operation. Furthermore, the Court rightly observes that, by reason of its posteriority in time to the tenure of the plaintiff, that tenure cannot become subject to its operation; and their Lordships concur in the opinion expressed by the High Court on this point. Their Lordships think that a power of such an exceptional and anomalous kind as that which has been brought into operation, and insisted on in this case, ought to be shown to have a certain and legal origin, and cannot, in the absence of any Statute or Regulation—none such appears to exist—be presumed or established by a Court upon anything short of clear evidence of its continued exercise and prevalence. There has been no evidence amounting to proof of anything of the kind.

For these reasons their Lordships will humbly recommend to Her Majesty that the appeal be dismissed.

The 12th July 1869.

Present:

The Master of the Rolls (Lord Romilly) Sir James W. Colvile, the Judge of the Admiralty Court (Sir Robert Phillimore), Sir Joseph Napier, and Sir Lawrence Peel.

Limitation—Section 14, Regulation III. of 1793 —Clear and positive proof.

*On Appeal from the High Court at Calcutta.**

Gopee Kishen Goshamee

versus

Bindabun Chunder Sircar Chowdhry and another.

Where the plaintiff sued upon a kurarnamah, and in answer to the defendant's plea of limitation, relied upon the exception in Section 14, Regulation III. of 1793: HELD, that in order to bring the case within that exception, it is sufficient for the plaintiff to show, by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the kurarnamah, and that the defendant admitted this claim to be as of right. It is not necessary that a precise sum should have been mentioned by either party, or that the plaintiff should have specifically made a demand of the amount of debt, or that the defendant should have made a promise to pay that amount.

By "clear and positive proof" is meant such proof as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which is established to a moral certainty. It is by the combined effect of the whole evidence that it is to be judged whether the proof is "clear and positive."

THE material questions in this case are, first, whether the kurarnamah on which the suit is based was executed for the consideration, and by and to the parties, alleged in the plaint; and, secondly, whether the complainant has brought his case within the exception in the Law of Limitation, which prohibits the hearing and determining the merits, if the cause of action shall have arisen twelve years before the commencement of the suit, "unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand or promised to pay the money," &c.

In addition to the reasons set forth in the judgment of Mr. Justice Bayley, in support of his opinion that the kurarnamah was executed as alleged in the plaint, their Lordships think it proper to observe that no evidence has been offered in order to disprove the handwriting of the parties by whom the kurarnamah purports to have been executed, or of the attesting witness thereto. Instead of giving or producing any such evidence, the principal defendant has confined himself to the surmises and arguments of his pleader in this answer to the plaint.

Their Lordships are of opinion that the first question should be answered in the affirmative. Taking it, then, as established by the evidence that the kurarnamah was executed by the principal defendant and his father as alleged, it is next to be considered whether the defence of the Law of Limitation has been met by proof of demand and admission sufficient to bring the case within the exception in this law.

The action, though in form a claim of the entire sum secured to the plaintiff and his brother (Gunga Pershad) by the kurarnamah, with interest thereon, is in effect for the plaintiff's moiety. Gunga Pershad does not make any claim on his own behalf for the other moiety; he refused to join as co-plaintiff, and was made a defendant *pro formâ*, for the reasons alleged in the plaint, but he has not filed any answer thereto. He was, however, examined as a witness.

It is clear upon his evidence that between the years 1847 and 1857, he received from the principal defendant upwards of 12,500 rupees on account of a larger claim: and he does not bring forward evidence of any claim which he then had against this defendant, other than for his share of the debt, which was secured by the kurarnamah to himself and his brother jointly. These payments were made after the death of the father of the principal defendant, who, with the principal defendant, had executed the kurarnamah. There is adequate proof that after these payments were made to Gunga Pershad, the principal defendant tried to induce the plaintiff to settle the claim for his moiety upon terms such as those which Gunga Pershad was alleged to have accepted, but that the plaintiff insisted on payment in full.

Their Lordships are satisfied upon the evidence that the payments made to Gunga Pershad were on account of his moiety of the joint claim under the kurarnamah, and that the offers made to the plaintiff related

* From the judgment of *Phear, J.*, overruling *Bayley, J.*, under Section 23, Act XXIII. of 1861—2 W. R., page 221, Civil Rulings.

to his claim to the other moiety. No other claim is proved, or could be presumed, to which these payments and offers were appropriate. (Mandertson *versus* Robertson and another, 4 Man. and Ryl., 440.)

These offers were made not to buy off vexatious or doubtful litigation, but to settle a claim secured by an obligation which fixed its amount.

Their Lordships consider that upon the true construction of the Law of Limitation applicable to this case, and in order to bring the case within the exception, it was sufficient for the plaintiff to show by "clear and positive proof," that within the prescribed period he asserted his claim to what was secured to him by the kurarnamah, and that the defendant admitted this claim to be as of right. It was not necessary that a precise sum should have been mentioned by either party; or that a promise to pay should have been made by the defendant.

"Clear and positive proof" is such as, upon the case made, leaves no reasonable doubt as to the matter required to be proved, the truth of which it establishes to a moral certainty; and it is by the combined effect of the whole evidence that we have to judge whether the proof is "clear and positive."

It was contended that there is no proof that a demand of the amount of debt in dispute was specifically made by the plaintiff; or that the defendant admitted the truth of such a demand, or promised to pay it; that as to the admissions of indebtedness, there is some doubt whether any of them were made to the plaintiff himself; and that there was not any which amounted to a promise to pay the debt due under the kurarnamah, or to an acknowledgment of any specific sum; that they were but attempts at a compromise, which failed.

The authorities which have been mainly relied on, in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case, were cases of actions on promises, decided on the Statutes of 21 Jac. I and 9 Geo. IV., cap. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the common law with respect to the cause of action. The issue joined, made it incumbent on the plaintiff to prove a promise made within six years, and such as to agree with that laid in the declaration. In such cases, acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged; there is no exception within which they come; and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception, are of a different character. In these, the action must be maintained on the original security; and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied; a promise to pay is not required.

It has, therefore, been decided that in an acknowledgment within the 3 & 4 Wm. IV., Cap. 27, Section 40, it is not necessary that the amount of the debt should be specified, nor a promise made to pay it.—(Carroll *versus* Darcy, 10 Ir. Eq. Rep., 329.) It has also been held that an admission of a bond-debt contained in the answer of the executors of the obligor, although in a suit to which the obligee was not a party, was sufficient to take the case out of the operation of 3 & 4 Wm. IV., c. 42 (Moodie *versus* Bannister, 4 Drewr., 432).

It is one thing to acknowledge a debt and another to promise to pay it; and this distinction is recognized by the terms of the law relied on by the defendant. The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of Limitation, have (as Sir Edward Sugden has observed) "proceeded on a liberal but yet a fair and just construction of these Statutes."—(Blair *versus* Nugent, 3 Jo. and Lat., 677).

Giving a like construction to the Law of Limitation that applies to the present case, their Lordships are satisfied that all that is required to be shown to bring the case of the plaintiff within the exception, has been shown sufficiently. If the conclusions at which they have arrived upon the material facts of the case needed confirmation, they are fortified by the omission of the principal defendant to tender himself as a witness in support of his defence in a case, the circumstances of which were all within his own knowledge; and by the unsatisfactory character of the evidence given by Gunga Pershad, who has kept back (evidently from hostility to the appellant), the books which he ought to have produced. Such a course suggests the natural inference that the evidence which has not been produced, was felt to be adverse, and subjects the parties who take such a course to the construction

that is least favorable to the views and interests which they seek to support by imperfect or inferior evidence.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed; that the judgment of the High Court at Bengal, and the judgment affirmed thereby, should be reversed and set aside; and that the appellant should have judgment for his moiety, with interest at the full legal rate and costs. He must also have the costs of this appeal.

The 13th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Damages—Plunder of property—Credibility of witnesses—Defendants declining to give evidence.

On Appeal from the late Sudder Court at Agra.

Gunesh Sing

versus

Ram Rajah and others.

Where it was found as a fact that a number of persons, in pursuance of a common object, plundered the property of *A*, it was held that all that was necessary in a civil suit by *A* for damages was to identify the persons who were present co-operating in that common design, and that each and every person co-operating in any extent in the plunder was responsible to recoup *A* for the loss he sustained.

Where two witnesses identified some of the defendants as having been present at the plunder, and these defendants did not think fit to avail themselves of the opportunity they had of exculpating themselves by their own evidence from the charge against them, it was held that their reluctance to give evidence justified the Court in relying on the unopposed testimony of the two witnesses.

In this case their Lordships are of opinion that the judgment appealed against cannot be supported.

In their judgment the Judges of the Court of the Adawlut express their opinion that the whole foundation of the claim of the complainant fails. The parties that they had before them were only a portion of the defendants against whom the decree of the Principal Sudder Ameen had been made. They say in their judgment: "We are of "opinion that the plaintiff-respondent, so "far from establishing his claim against the "defendants-appellants, has not even prov-"ed that the acts of plunder complained of "ever occurred. We are, therefore, com-"pelled to differ from the Principal Sudder "Ameen, and, reversing his decision, to "dismiss the respondent's claim, not only "against these defendants who have appeal-"ed, but all those defendants who have "been included in the decree of the Lower "Court, as it would not, in our opinion, be "consistent to allow this decree to stand "against these latter parties, while the "entire claim preferred by the plaintiff-"respondent, has been declared by us un-"founded and unestablished."

Now, that decision seems rather an indiscriminating decision, for thirteen of the defendants had confessed to their having been present at the plundering, and some of them had partaken of the booty; twenty-seven did not appeal.

Their Lordships cannot entertain a reasonable doubt, on the whole of the evidence, that there had been a plunder of the plaintiff's property to some extent, and that it was a joint transaction. During the time of the Mutiny, the chiefs of some villages collected people together with a preconcerted purpose of plundering the plaintiff's property; and it is quite plain upon the evidence, that all were acting with a common purpose of plunder; that they went to the plaintiff's house for the purpose of plundering, and each co-operated more or less; and where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose: as the purpose is common, so must be the responsibility.

Well, then, taking it as plainly established upon the evidence that there was a plunder of the property, that it took place in pursuance of a common design of all these parties who co-operated in carrying it out, the only question was to identify any of the persons who were present co-operating in that common design. In a criminal matter punishment may be apportioned, but in a matter of this description, where the plaintiff is to be compensated for the loss he has sustained, the law does not allow men to apportion their own wrong, and does not

apportion it for them. Each and every person co-operating to any extent in a plunder of this description is responsible to recoup the party plundered for the loss he has sustained.

That being the case, there was no question in reality that involved difficulty in decision, but to identify the persons who were present and formed part of that plunder-party. No doubt in the circumstances of the country at the time, there was a great temptation to accuse, and, perhaps, considerable facility in charging particular persons suspected, or upon whom it might be desired, from any motive, to impose responsibility. But there is this fact, as was very properly observed by Mr. Wood, that none of these parties who now belong to the group of respondents tendered his own evidence to contradict the evidence of the two witnesses required by the Principal Sudder Ameen. His principle seems to have been, that he would not attach responsibility on any individual who had not been shown, by two witnesses at least, to have been present on the occasion. Then, when persons so accused do not think fit to avail themselves of the opportunity they have had of exculpating themselves, by their own evidence, from the charge made against them, surely that general reluctance to meet by their own evidence the evidence brought forward against them justifies the Court in relying on such unopposed testimony. Some of them in the defences which have been made seem to have imagined that because they had not got a large share of the plunder, or because, as they allege, they were coerced to join in the transaction, that excuses them from responsibility. If the matter were to be disposed of in a criminal proceeding, where the Judge had to inflict a punishment or a fine, all that might be taken into account: but here, in a civil proceeding to obtain compensation for the loss the plaintiff sustained, by a transaction for which all who joined in it are responsible in the eye of the law—you have nothing to do but simply to see that, in point of fact, the parties accused were part of the common assembly which had, and executed, a common purpose of plundering this man's house, and are bound, each and all, to make him compensation for the loss that he has sustained by the demolition and abstraction of his property. It is very likely that at first, in the confusion of the whole thing and the difficulty of proof, there was exaggeration in the claim which was made, but the claim in respect to the jewels and other things has been reduced, and the plaintiff has certainly confined it within reasonable bounds. It certainly does appear on the evidence that he was plundered at least to the extent at which he now lays his claim, and perhaps considerably more. The judgment appealed against states that the entire claim was unfounded and unestablished, and that the decree was wrong against *all* the parties. But, confining it to the case of parties who had appealed, they were parties who, instead of giving their own evidence before the Principal Sudder Ameen to exculpate themselves and show that they did not form a part of that plundering party—instead of simply doing this and putting their own evidence against that of the two witnesses who were brought forward against them, they appeal to the superior Court, and argue upon the whole transaction, and get the Court of the Adawlut not to institute a discriminating inquiry into the credit of the witnesses in each case, but to come to the conclusion that there was no foundation for the claim at all. There could not have been any adequate sifting of the evidence, and it does seem to be an unreasonable conclusion, on the whole of the evidence, to say or suggest that the plaintiff had not been plundered at all.

Under these circumstances, their Lordships feel no difficulty in saying that, in their opinion, the judgment of the Adawlut ought to be reversed. The Principal Sudder Ameen had the advantage of having had the witnesses examined before him, and their evidence not having been contradicted by any of the parties themselves, his judgment may be safely adopted.

Their Lordships, therefore, will humbly recommend Her Majesty that the judgment of the Court of Sudder Dewanny Adawlut be reversed, and that the judgment of the Principal Sudder Ameen should be affirmed with costs. The appellant is to have the costs of the appeal.

The 13th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Partition—Metes and bounds.

On Appeal from the High Court at Madras.

Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor

versus

Rajah Suraneni Lakshmi Venkama Row.

The principle in *Appovier* vs. *Rama Subha Aiyan*—that although an agreement for a partition has not been carried out by actual partition by metes and boundaries of the property, it was nevertheless binding upon the contracting parties and operated as a division of the family—confirmed and supported by further authorities.

The *Shivagunga* case explained.

THIS appeal has been very ably argued by Mr. Latham, who has stated in support of it everything which in their Lordships' opinion could be said; but the facts and the authorities are too strong for him, and their Lordships are unable to see any ground upon which the appeal can be supported.

The proof in this case has, perhaps, been somewhat complicated and rendered less effective than it otherwise might have been by the introduction of an issue which is now admitted to be out of the case—the issue as to the alleged adoption.

The only question now arguable is, whether at the date of the death of the respondent's husband, this family was a divided or an undivided Hindoo family, because the course of succession, of course, depends upon that fact. The property is admitted to be ancestral, and it is now also admitted that the zemindary which forms part of it is not one of those impartible zemindaries of which there are many in the south of India, but must be treated, as, in fact, it appears upon some of the earlier documents to have been decided to be, as in its nature partible. Therefore the question is simply whether at the date I have mentioned the family was still an undivided family, as it was up to a certain period, or whether it became divided by virtue of the agreement which is at page 23 of the record, and which has been the chief subject of the argument before us.

Now, although Mr. Latham has pointed out here and there some minute differences in the wording of the two agreements, their Lordships find it impossible to distinguish the arrangement come to in this case from the arrangement which had been entered into in the case of *Appovier* vs. *Rama Subha Aiyan and others*,* 11 Moore's Indian Appeals 75, in which this Committee held that although the agreement for a partition had not been carried out by actual partition, by metes and boundaries of the property, it was nevertheless binding upon the contracting parties, and operated as a division of the family. Their Lordships observe that the judgment delivered by Lord Westbury was, in fact, an affirmance of the judgments of two of the Courts below, and was fully supported by the authorities then before the Court. It is, however, satisfactory to find in the present case that the High Court of Madras, not adverting to the case in Moore, which probably had not then come to their knowledge, has in its learned judgment arrived at the same conclusion, and that upon independent grounds and upon the earlier authorities. The passage which they quote from the Mitakshara fully supports the proposition involved in the judgment. The passage runs thus: "If partition be "denied or disputed, the fact may be known "and certainly be obtained by the testimony "of kinsmen, relatives of the father or of "the mother, such as maternal uncles and "the rest, being competent witnesses as "before described;" that is one mode of proving partition. It then goes on in the disjunctive, "or by the evidence of a writing or record of the partition," which we have here. And then it says: "It may also be ascertained by separate or unmixed house and field," that is, if other evidence of partition be wanting, it may be supplied by proof that the houses and fields had been actually divided and were held separately.

It follows from what has been said that in their Lordships' view, this question is really concluded by authority.

It has, however, been argued by Mr. Latham, that even if this agreement amounted to proof of a partition, yet upon the evidence in the cause their Lordships ought to come to the conclusion either that the agreement was waived, or that there had taken place that which might, according to Hindoo Law, have taken place, namely, a re-union of the two brothers. Their Lordships, however, looking at the issues in the

* 8 W. R., page 1.

cause which are stated at page 3, cannot find that those points have ever been raised. Certainly there is no suggestion of such a thing as a re-union, which would imply that there had been an actual division, and then a coming together by mutual agreement of the two brothers; and their Lordships are further of opinion that they must presume, that although there was no division of the zemindary or of the lands, by metes and boundaries, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the plaintiff to show that such was the case. It seems to their Lordships that he has entirely failed to do so, and therefore they can see no ground whatever for interfering with the judgment of the Court below.

Their Lordships deem it right (although it has really no bearing upon the decision of this appeal) to make a remark upon one passage in the otherwise very learned and able judgment of the Court below. The passage is this: "If it" (that is, the zemindary) "was not partible, and the brothers "were, as the plaintiff contends, undivided, "at the brother's death, the widow would, "according to the decision of the Privy "Council in the Shivagunga case, be en-"titled to the whole estate; so that, whe-"ther the plaintiff's own view, or that "which we here take is correct, the plaintiff "is not entitled to succeed in this action."

Now that seems to proceed upon a singular misapprehension of the effect of the Shivagunga case.* It is immaterial, as I said before, to the decision of this case, because it is admitted that the zemindary was not impartible; but the Shivagunga case was this, the family was shown to be undivided, but the impartible zemindary was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute. The ruling of this Court was, that in that case the zemindary should follow the course of succession as to separate property, although the family was undivided; but if that zemindary had been shown to have been an ancestral zemindary, as in this case, the judgment of the Board would, no doubt, have been the other way.

Their Lordships think it necessary to make this observation, in order to avoid future misconception as to what was decided here in the Shivagunga case.

They must humbly recommend Her Majesty to dismiss this appeal with costs.

* 2 W. R., Privy Council cases, p. 15.

The 14th July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Marriage—Sudra caste—Illegitimate children—Inheritance—Maintenance.

On Appeal from the High Court at Madras.

Inderun Valungypooly Taver

versus

Ramasawmy Pandia Talaver and another.

A marriage between two persons of the Sudra caste is not invalid, because they belong to two different classes or divisions of that caste, or because the wife was the offspring of an illegitimate father.

In the Sudra caste, illegitimate children may inherit, and have a right to maintenance.

THE question on this appeal is, first, whether there was a marriage in fact; and, secondly, if there was a marriage in fact, then whether there was a marriage in law?

We have the judgment of both the Courts below coming to the conclusion, from the evidence, that there was a marriage in fact; there was evidence before them, on the consideration of which they might fairly come to that conclusion. Unless a finding of that sort—where two Courts are unanimous in their opinion—is unsupported by, or contrary to, the evidence, it is not the course of this Board to interfere with that finding.

There were eight witnesses who spoke to the marriage having taken place, then two of the three urzees, and besides the very material fact of the appellant having admitted before the tehsildar, or done that which was tantamount to an admission, that such a marriage had taken place.

With reference to the urzees, the two first urzees which have been alluded to are very plain and very explicit. The first of them is in these terms: "Kulalvoy "Moli, whom I had married before my suc-"cession to the zemindary, had, in defiance "of the prescribed observations of my caste, "separated from me before giving birth to "any issue, and married Vellaiya Tevan,

"of Nauja Nadu. That Taugammai Nachi-"yar, whom I married after inheriting the "zemindary, and made my paita-sri (or "royal wife) might beget issue, vows were "made to Tirumalai Sevamaiya, of Teukosi, "and by the grace of that deity, and by "your good wishes, she has borne me a "son and a daughter. Before this I had "on your order No. 1, dated the 24th "January 1856, proceeded to offer up my "prayers to the said Twamiya. To do the "same once more, now it is necessary that "I should send my royal wife and my child-"ren. As for their assistance, about thirty "persons, both bearers of palanquins and "servants, will be sent to accompany them. "I request that an order may be issued "providing against any obstruction of them "on their way."

The second urzee is as follows: "I had "been for a long time suffering from para-"lysis, and now I have slightly recovered. "When first I was married to the daughter "of Govindapera Pandya Tolaivan, I was "exceedingly young, and the bride was my "senior in age, but perceiving her levity of "conduct, I repudiated her. Subsequently, "in contravention of the prescribed usage of "the zemindary, she married Vellaya Tavan, "of Nauju Nadu. I then married Tau-"gammai Nachiyar, the daughter of Kum-"araswami Tadiya Talaivar of Kadambur, "who has borne me a daughter and son. "I now learn that as I am taken ill, it is "intended fraudulently to report to the "Government in disparagement of my dig-"nity that my first wife, who on being di-"vorced by me for misconduct, had married "another, has borne me a male child. I "deny that he is my son; I further dis-"claim any relationship to him. As a "report of these matters at the time of her "repudiation would have derogated from "my respectability, I abstain from notifying "the same. These matters have also been "brought to the notice of the sub-collector. "I, therefore, pray that your benevolence "may afford protection to my children and "my younger brother."

Those urzees are plain and explicit enough, and probably little doubt would have been entertained on the matter, but for the urzee which is found at page 49. With reference to that urzee, without saying whether the signature is or is not genuine, but assuming that it is, if we take first of all the date of it, the 3rd of July, the zemindar having died on the night of the 7th in a state of paralysis, and then look to its contents, little effect can be given to it. We cannot read the third urzee through without seeing that it was obtained with an object, and that it bears internal evidence of not being the voluntary, and scarcely, we should think, the conscious act of the zemindar. First of all it refers to the preceding urzees in this way: "With reference to the urzees addressed by "me to your honor and to the sub-collect-"or in regard to my disease, on the 1st "June, an order having been issued to the "tehsildar of the talook of Saukara Pania "Kovil, he came and saw me, showed to me "the urzee which had been addressed by me, "and asked me about it. I saw my signa-"ture in the urzee, and admitted it." And then follow these statements: "I have also "reported to the tehsildar that the daughter "of Pandia Talavau of Chengottai had been "married to me at my infancy; that she, "being guilty of misconduct, married Nan-"janadu Vellaiya Taven again, and got child-"ren by him; that I brought and kept the "daughter of Kadumbur Kummarasami "Talavau, and got two children by her, but "that she was of a different caste." These last expressions certainly do appear to their Lordships to be put into the mouth of the zemindar, with a view to the case which has since been brought forward, especially the alleged difference of caste; and, taking the whole together, their Lordships are of opinion that as against the two other urzees, no effect or weight is due to this urzee, and that there is no sufficient reason for differing from the finding of the two Courts.

Then, if there was marriage in fact, was there a marriage in law? When once you get to this, *viz.*, that there was a marriage in fact, there would be a presumption in favor of there being a marriage in law. The zemindar, according to the usages of his country and nation, on parting with his first wife, would be naturally desirous of marrying again and having male issue. It would be a most unlikely thing for a person of his race to go through the ceremony of marriage, if it was known that that marriage was a marriage which was invalid in law. Then upon what is it that the invalidity of the marriage, in law, depends? It depends upon this, and upon nothing else, *viz.*, that all the parties being, as is clear from the evidence, of the Sudra caste, it is said that because it is shown by a decree that the father of the mother of the present plaintiff and respondent was illegitimate, therefore the child of that father could not contract a

valid marriage, and was in substance of no caste at all. The only foundation for this is the opinions of the Pundits; those opinions are not satisfactory; no decision or authority is brought forward supporting any such proposition. The opinions are matter of reasoning, and where they refer to authority, it is to authority which applies to persons of two different but higher castes, not to the Sudra caste at all, and still less to what may be called different classes or divisions of one and the same Sudra caste.

Their Lordships are not aware that there is any authority—there has been none quoted; and it does not appear that there is any authority supporting any such proposition as that which is contended for by the Pundits; and, though their Lordships do not agree in everything that has been stated in the Court of appeal, they are satisfied that in the Sudra caste illegitimate children may inherit and have a right to maintenance; and that in this very instance the illegitimate father of the mother of the plaintiff, as well as his daughter, were treated as members of the family; and on the whole, seeing that these parties are both of the Sudra caste, and that the utmost that has been alleged really is, that the zemindar was of one part of the Sudra caste, and the lady to whom he was married was of another part, or of a sub-caste, their Lordships hold the marriage to have been valid; to hold the contrary would, in fact, be introducing a new rule, and a rule which ought not to be countenanced.

For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and dismissed with costs.

The 15th July 1869.

Present:

Sir James W. Colvile, the Judge of the High Court of Admiralty, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Res judicata—Leave to bring fresh suit—Nonsuit—Transfer by putneedar—Regulation VIII. of 1819.

*On Appeal from the High Court at Calcutta.**

Watson and others

versus

The Collector of Rajshahye and others.

HELD that the reservation by a Judge of an Indian Court in a decree in a former suit, giving the plaintiff liberty to bring a fresh suit, does not prevent the Court, when such fresh suit is brought, from entering into the question of *res judicata*. Such liberty may be given in a decree only when the suit has failed on some point of form, and not when issue has been joined and the plaintiff has failed on the evidence.

Regulation VIII. of 1819 regarding the relative rights of zemindars and putnee talookdars considered. Where a share in a putnee talook is transferred by a registered putneedar without the express consent of the zemindar and in disregard of the Regulation cited, the transfer is not binding on the zemindar.

THEIR Lordships have formed so clear an opinion on both the points on which the determination of this appeal depends, that they do not think it necessary to prolong the discussion by calling on the other side.

The first question, and that which is the sole question raised by the case of the appellants is, whether the High Court was wrong in holding that the plea of *res judicata* ought to prevail.

The suit is brought to set aside the sale of a putnee talook which took place as long ago as 1849. There was considerable delay, even in the institution of the former suit to set aside that sale, which was not brought till the year 1856. The case is obviously one in which it was the duty of the Courts below, as it is the duty of their Lordships, to look closely to the right of the appellants, the plaintiffs in the suit, to impeach proceedings which took place so long ago, and under which so many fresh rights may have accrued.

* From the judgment of Raikes and Seton-Karr, JJ., dated 30th September 1863, in Regular Appeal No. 274 of 1861—not reported.

Be that, however, as it may, the first question is whether the High Court was right in holding that, notwithstanding the reservation contained in the decree dismissing the suit of 1856, the question was to be treated as *res judicata*.

We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is, what is technically known in England as a non-suit, known in those Courts. There is a proceeding in them called a non-suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected because it has not borne the proper stamp; and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them.

The decision in this first suit was carried by appeal before the Sudder Court. It was treated, in the first instance, as not being the subject of such a summary appeal as would have taken place in the case of what is ordinarily known as a non-suit, but as being necessarily the subject of a regular appeal. A regular appeal was accordingly brought, and was heard by three Judges, and, as their Lordships read the opinion of those three Judges, each of them seems to have had very considerable doubt, to say the least, whether it was competent to the Judge in the circumstances to make any such reservation.

The result, however, was that they refused to remand the suit for re-trial, and dismissed the appeal. They did not, however, make any correction of the reservation; and so the case stood, until the question arose again in the present suit. In the present suit, the Principal Sudder Ameen seems to have considered that he was bound by that reservation, and therefore he decided that issue in favor of the appellants.

He decided against them on the other question, which is now to be disposed of, namely, of their title to sue. They, therefore, appealed against his decision, and the High Court, without going into the second question upon which the case had been decided in the Court of first instance, appears to have called upon the appellants to show that notwithstanding the former decree they were still entitled to sue.

It has been argued that that decree not having been appealed against by the respondents in the original suit, was at all events, whether regularly or irregularly made, binding in the particular case; and that it was not competent to the High Court in this suit to question its propriety. Their Lordships are not disposed to take that view. Without laying down positively that in no case could such a reservation be properly made by a Judge in one of the Indian Courts, they think that it was open to the High Court in a case in which the former decree had been pleaded as *res judicata*, and in which all the circumstances under which it was made were before the Court, to consider the propriety of the reservation, and they entirely agree with the Judges of the High Court in thinking that, admitting that the Judge of the Lower Court had in any case such a discretion as was exercised in making the reservation in question, that discretion was improperly exercised in the particular case.

They are of opinion that the appeal must fail upon the first ground. They are, however, further of opinion that the appeal must also fail, and that the decree of the Principal Sudder Ameen is to be supported upon the second ground, namely, that the present appellants have shown no sufficient title enabling them, supposing it was open to any person at this distance of time to do so, to question the propriety of the sale of the putnee talook.

It will be convenient to consider, first, what has been the ostensible devolution of the talook; next, what is the nature of such a tenure; and, lastly, how it is sought to establish that the title to that talook, and the consequent right to impeach the sale, have passed to the present appellants.

The talook was created in favor of Mr. John Compton Abbott, in May 1837, by the instrument which is at page 101 of the Appendix. It is in the ordinary form, their Lordships apprehend, of a grant of a putnee tenure, and it provides for that for which the Regulation makes provision, namely,

the notice to the zemindar of any alienation of the talook in order that it may be duly registered. The words are—"If you "make a gift or sale, or give away in dur-"putnee, the eight annas of the above-men-"tioned *dehee* being your own putnee, you "must give instant notice of the same in my "Sudder Cutcherry." On the 7th of Pous 1248, which we are told was in 1841, Mr. Abbott sold, for the expressed consideration of C. R. 11,465-12, this putnee to a firm known as French, Hodges, and Company. In the deed, there is a requisition to the purchasers to cause themselves to be duly registered in the archives of the zemindar; and although the instrument was not registered in the ordinary register of deeds till 1844, it is probable that they were before that date duly entered and accepted by the zemindar as the putneedars.

Of this there is some evidence in the petition which will be referred to hereafter, of the assignees of Cockerell and Company, for they speak of French, Hodges, and Company as "our benameedowners of the talook at the "time of the sale."

The sale took place in 1849, and the proceedings from the Collector's office show that it was treated as the sale of a putnee standing in the names of French, Hodges, and Company; inasmuch as it appears from them that the surplus proceeds of the sale passed to, and were divided amongst, the judgment-creditors of that firm.

That is then the ostensible devolution of the putnee talook. Of course, the later deed of the 4th of April 1855, in which Mr. Compton Abbott, assuming to be the absolute owner of the putnee talook which had been long previously sold, conveyed it formally to Watson and Company, the present appellants, can have no bearing on the question of title.

It only shows that if under the deeds by which the appellants now endeavour to trace such title or right, the putnee talook had got back into Mr. Abbott, or the right to question the sale of 1849 of that talook belonged to Mr. Abbott, he has transferred that right, whatever it was, to the appellants.

It has been admitted at the Bar that in order to show that the title to this putnee talook, and the consequent right to question the sale, has passed to the appellants, it is necessary to rely on certain general words in the various deeds that transfer certain interests in the Bansbarreah Indigo Concern,—and to hold that the talook was, in fact, an incident to the factories, and that those words must be taken to have passed them.

It appears that at the time when the putnee was granted, Mr. John Compton Abbott was the sole proprietor of the Bansbarreah Concern, and it may be conceded that (as Mr. Leith has argued) the general object with which an indigo planter takes this kind of tenure is to acquire that power over the ryots which a zemindar has, and which enables him to stipulate that upon parts of their lands at least they shall grow indigo at his rates for the benefit of his factory. Nevertheless, in acquiring those rights, putneedars acquire other very considerable rights; they acquire the zemindar's rights over a large district, comprising lands all of which do not grow indigo; and it is perfectly conceivable that one partner in a factory may have that sort of talook, and the consequent power which the ownership of the talook gives; that he may use that power for the benefit of the factory, and yet that the talook itself may form no part of the assets of the factory. Then, again, it is to be considered as between the parties between whom this question arises, that the zemindar who has sold, and the purchaser who has bought, at the Collector's sale, have nothing to do with the motives under which the talook was originally taken: have nothing to do with those arrangements which the ostensible owner of the talook may make; that the zemindar has granted a tenure of a particular kind, the incidents of which are well defined by law, to a tenant, and that he has a right to look to the ostensible tenant, and is not bound to take notice of the various interests which may be created otherwise than by an authorized alienation. This much is clear, it is certainly not proved by positive evidence: it is only an inference drawn from the assumed nature of things,—that this talook was part of the assets of the Bansbarreah Concern.

Now, before going to the deeds on which the appellants rely, it may be convenient to look at some of the provisions of the Regulation VIII. of 1819, which apply to this kind of tenure. The scope of the Regulation is, first to legalize the tenure, the legality of which had been doubted; after declaring that putnee tenures are valid, it provides that they shall be transferable and answerable for the debts of the putneedar. It next declares that such tenures are not voidable for arrears of rent, but that the zemindar's remedy, where there is an arrear of rent, shall be a

sale under the provisions of the Regulation. It further declares that the zemindar is not entitled to refuse to give effect to a transfer; and then follow certain provisions which are in favor of the zemindar. The Regulation provides that, in conformity with established usage, he shall be entitled to exact a fee upon every such alienation. It fixes the maximum fee; it provides that he shall also be entitled to demand substantial security from the transferee, or purchaser, to the amount of half the jumma rent, or yearly rent payable to him from the tenure transferred, and that the same thing shall happen when the tenure passes in a sale made in execution of a decree or judgment of Court; that the zemindar may refuse to sanction a transfer until the fee and security be tendered; that if there is a dispute as to the sufficiency of the security, it is to be determined by appeal to the Civil Court; and it gives him further powers. In the 6th Section there is this express provision, "That the rules of this and of the preceding "Section shall not be held to apply to trans-"fers of any fractional portion of a putnee "talook, nor to any alienation other than "that of the entire interest; for no appor-"tionment of the zemindar's reserved rent "can be allowed to stand good unless made "under his special sanction."

The 11th Section shows that the consequence of one of these sales is:—It gives to the purchaser—assuming, of course, that the sale has been regularly conducted—what we may call a parliamentary title. It declares that the tenure shall be sold "free of all incum-"brances that may have accrued upon it by "act of the defaulting proprietor, his repre-"sentatives or assignees, unless the right of "making such incumbrances shall have been "expressly vested in the holder by a stipula-"tion to that effect in the written engage-"ments under which the said talook may "have been held. No transfer by sale, gift, "or otherwise, no mortgage or other limited "assignment, shall be permitted to bar the in-"defeasible right of the zemindar to hold the "tenure of his creation answerable in the "state in which he created it, for the rent, "which is, in fact, his reserved property in "the tenure, except the transfer or assign-"ment should have been made with a con-"dition to that effect under express authori-"ty obtained from such zemindar."

This being so, it seems extremely questionable whether, if it had been even expressly stated in the various deeds about to be considered, that shares in this putnee talook were transferred in that manner, such transfers of interest would have been binding on the zemindar; whether he would not have been entitled to look to French, Hodges, and Company as the registered owners of that talook; and whether any of the persons who took these limited interests, some by mortgage, some absolutely, but of portions only, would have been entitled to come forward and say, "We claim to be treated as your putneedars." In fact, however, the deeds do not, any of them, expressly purport to convey this talook; and if the dates of the transactions are considered, there is strong ground for inferring that it was the intention of the parties to keep the two things separate,—the tenure separate from the Bansbarreah Concern, —probably from a knowledge that the former could not be dealt with in the way in which it is now pretended that it was dealt with.

It has already been stated that Abbott sold the putnee in 1841 to French, Hodges, and Company for value. The foundation of Messrs. Cockerell's interest in the Bansbarreah Concern is the deed of the 9th of March 1842. That is the deed by which Abbott sold out-and-out to Cockerell and Company three-sixteenth shares of the Bansbarreah Concern. Now, as he had the year before sold the putnee talook as a whole to French, Hodges, and Company, it is difficult to see upon what principle the general words contained in this conveyance can be construed to include and convey three-sixteenths of the talook, supposing that it was competent to the putneedar to sell three-sixteenths of the talook separately.

Then, on the 23rd of May 1842, Gilson Rowe French, who probably was one of French, Hodges, and Company—though it is not shown distinctly that he was—mortgages to Cockerell five-sixteenth and a fraction of another one-sixteenth of the Bansbarreah Concern. As far as a mere mortgage went, supposing that any interest in the talook passed by the general words, that clearly would not operate as against the right of the purchaser under the sale, because the Regulation provides that the effect of the sale shall be to sweep away any mortgage created by the defaulting putneedar. Again, on the 30th of May 1842, Septimus Hodges mortgages two-sixteenth, and the remaining fraction of another sixteenth, of the same indigo concern, to Cockerell and Company; and on the 28th of May 1847, his executors sell to Cockerell a third absolutely of the Bansbarreah Concern, which I take it, included that which had been already mortgaged by their testator. Therefore, at the date of

their insolvency, which, I think, preceded the sale of the putnee talook, and certainly at the date of the sale of the putnee talook, Cockerell and Company, or their assignees, were owners of three-sixteenths and one-third of the Bansbarreah Concern absolutely, and were mortgagees of the shares transferred by Gilson Rowe French, and thus either as absolute owners or as absolute mortgagees, were entitled to fourteen-sixteenths of that concern, but the remaining two-sixteenths were still outstanding, and belonged to one Henry Gloster French, and in respect of those two-sixteenths Cockerell and Company seem at most to have been equitable mortgagees by deposit of title-deeds.

In this state of things the sale of the putnee talook took place. An application was made by the assignees impeaching the sale, in which they speak of French, Hodges, and Company as the benamee owners of the talook for them; but at that time, as I have just shown, even supposing that the beneficial interest had passed under the general words of the conveyances of shares in the Bansbarreah Concern, they were not absolute owners even of fourteen-sixteenths of that concern, and they were only equitable mortgagees of two-sixteenths. The two-sixteenths were not vested in them, until, I think, the 14th of April 1853, and probably the difficulty of completing the title to the whole Concern was the reason of the very great delay which took place before the appellants came into Court to impeach the sale in a regular suit.

It is unnecessary to go in detail through the subsequent deeds. The general effect of them is that in 1853, the assignees, the representatives of Glyn, Halifax, and Company, who had acquired some beneficial interest in this Bansbarreah Concern by the pledge of deeds from Cockerell and Company, of London, and a variety of parties, all concurred in getting the whole interest in the Bansbarreah Factories into the assignees of Cockerell and Company, who at the same date transferred it to John Compton Abbott. All these transfers were, however, of nothing but the Bansbarreah Concern. Neither the title to the talook, nor the right to impeach the sale of it, could pass to John Compton Abbott, or from him to the appellants, unless they were previously vested in Cockerell and Company. It has been shown that, in their Lordships' opinion, the general words in the several conveyances to Cockerell and Company cannot be taken to have passed even an equitable interest in the talook, which cannot be assumed to have been an asset of the factories merely because it was originally taken by Mr. John Compton Abbott when sole proprietor of the factories. In their Lordships' opinion the putneedars, at the date of the sale, were Messrs. French, Hodges, and Company, a firm which, although some of its members may have had shares in the Bansbarreah Concern, appears on the evidence to have been something distinct from that Concern, and is not even proved to have been trustees for it. In these circumstances their Lordships, without laying down any general rule as to the degree of interest which might entitle a party to impeach the sale of a putnee talook under the Regulations, are of opinion that the appellants have failed to show that they have acquired that interest in this putnee talook which entitles them to dispute the sale in 1849, and that the decision, therefore, of the Principal Sudder Ameen upon that point was correct.

They must, therefore, humbly advise Her Majesty to dismiss this appeal with costs of both respondents.

The 22nd July 1869.

Present:

Sir James W. Colvile, Sir Joseph Napier, Lord Justice Giffard, and Sir Lawrence Peel.

Sale by Hindoo Widow—Onus probandi—Consent of husband's kindred.

*On Appeal from the High Court at Calcutta.**

Rajlukhee Debia,

versus

Gokool Chunder Chowdhry.

A Hindoo widow sold a portion of her husband's property under a deed of sale, upon the face of which there was a statement that the property was sold in order to liquidate the husband's debts. HELD, that that statement was not sufficient of itself to prove that the property was sold for the purpose stated, but that it was on the party seeking to uphold the sale to prove by evidence that the property was sold for that purpose.

HELD, further, that a transaction of this sort may become valid by the consent of all the husband's kindred who are likely to be interested in disputing it or by such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindoo Law.

The mere attestation of a deed of sale by a relative does not necessarily import his concurrence.

THE question raised by this appeal is whether the sale by two Hindoo widows of

* From the judgment of Steer and Seton-Karr, JJ., dated the 10th May 1864, in Regular Appeal No. 428 of 1861,—not reported.

part of the estate of their late husband, one Gooroo Pershaud, Talookdar, to the respondent, can be upheld as valid?

The suit was brought to impeach this transaction by the appellant as the adoptive mother and guardian of one Mohesh Chunder. The fact of that adoption is not now in dispute, nor is it disputed that Mohesh Chunder was, by virtue of it, at the time of the institution of the suit, the next heir to Gooroo Pershaud or to the sons of Gooroo Pershaud, failing his widows or the survivor of them. Mohesh Chunder was still living at the date of the final decree which is the subject of the present appeal; but he afterwards died childless, and the appeal is brought by his adoptive mother, who, as such mother, is his heiress. There is a suggestion in the appellant's case that she has, under the authority given to her by her husband, made a second adoption, but inasmuch as the validity of that adoption is incapable of being discussed in this suit, their Lordships cannot take that into their consideration.

The validity of this transaction is sought to be upheld upon two grounds, first, upon the construction of the hibbanamah, or deed of gift, at page 37 of the record, which, it is contended, gave to the widows an absolute interest, subject to be divested in the event of their sons or either of their sons coming of age. If that construction were correct, there would, of course, be an end of the case, because the deed of the widows would be good against all the world. Their Lordships will, therefore, first dispose of that question.

Upon the best consideration which their Lordships have been able to give to this document, they are of opinion that it provides only a species of trust for management, and that it does not interfere with the devolution of the estate, according to the ordinary law of succession, under the Hindoo Law. The deed was executed by Gooroo Pershaud in the year 1823, at a time when he states himself to have been not only suffering from corporeal illness, but to have a purpose of going to reside at Benares, and, therefore, from his then circumstances, there is ground for the argument of Sir Roundell Palmer, that he meant to provide for the management of the estate, not only after his death, but during his life, and that seems to their Lordships to be the true construction of the deed. The learned Counsel for the respondent have laid some stress upon the direction "you shall perform the ceremonies of Sraddo, etc., according to my means," and have contended that that implies a change in the person to perform the funeral ceremonies of the donor, and, therefore, must be taken to imply a change in the course of the succession to his estate.

Their Lordships, however, are of opinion that the words "Shraddo, etc." are somewhat wide and ambiguous, and that if the deed be taken, as they think it ought to be taken, to be an arrangement providing for the management of everything from the date of it during the life of the donor himself, they may be taken to refer to, certainly to include, those family ceremonies which he, from time to time, would, if he remained in his home and in possession of his strength and faculties, be bound to perform. They, therefore, cannot give to those words the force which, it has been contended, ought to be given to them.

That being their Lordships' view of the construction of the deed, it may be convenient here to consider what has been the course of the succession to the property. If the succession were not altered by the deed, then of course, upon the donor's death, the two sons became entitled to his estate. Those sons are shown to have survived him. Each is also shown to have died in the lifetime of his mother, and to have died childless and under age. The consequence of that is, that on the death of each, his interest would have passed to his mother, and that Mohesh Chunder, who was the adopted son of the testator's nephew, became, on his adoption, the collateral heir of each son, subject to the interest of his mother. The result, of course, is that upon the death of the widow, who is dead, Gouree Dabea Mohesh Chunder became entitled to a present interest in the property, which is the subject of this contention, unless it can be shown that that property has been validly passed by the act of alienation which is the subject of the suit.

Their Lordships have next to consider whether, treating this deed as one executed by women having only the limited interest of Hindoo females in property which they take either from their husband or their sons, the transaction can be supported upon any of the grounds on which such a transaction is recognized as valid by the Hindoo Law. The law upon the point is well ascertained, and has been established by many cases. Some question has been made to-day at the bar as to the right of a person who is a presumptive heir in reversion to question such a transaction: but their Lordships, if it were necessary to

decide the point, would find it extremely difficult to overrule the many cases in which that right has been more or less recognized. But, in the view which they have now taken of the hibbanamah and of the present right of Mohesh Chunder, upon the death of Gouree Dabea, to enter into possession of two annas of this property, it really is not necessary, in order to support the suit, to express any more decided opinion upon that question.

Then, upon what grounds are we to treat this transaction as valid? The statement upon the face of the deed is, that the property was sold in order to liquidate the husband's debts. It recites: "Now our husband's debts not being liquidated, the "liabilities are being gradually increased by "loss in interest. The debts due to the "creditors cannot be liquidated at once, by "the average profits of the above zemindaries, particularly the debts of the time "of our husband for which we had made an "instalment-bond in Court in our own names "with the creditors, Narain Dass and others. "Now, that money not being paid, the above "creditors are about to have all our zemindaries sold by auction, by putting in force "the said instalment-bond in Court." Therefore, there is a clear allegation that the transaction was entered into for the purpose of defraying debts of the husband, including a particular debt, secured by an instalment-bond and an agreement made in Court, and under the threat of an immediate execution against the zemindaries; though the deed goes on to say that it was executed for the further purpose of performing "the Shrad, etc., of our husband at Gya."

It is not easy to see why, if the case so stated was true, there should have been any difficulty in giving far more satisfactory evidence of it than has been given in this suit. There is the reference to an agreement in Court, there is the reference to a threat of execution and to the instalment-bond which constituted the debt at least of Narain Dass. These things, if they had any real existence, were presumably capable of being proved.

But what has been the course of the litigation? The burden of proof was unquestionably on the party seeking to support the transaction, that is, the present respondent. But it is an admitted fact that in the Court of first instance he gave no evidence in support of the transaction except the deed itself. In that state of things the Principal Sudder Ameen very properly decided the issue against him.

The case then went to the High Court by appeal. When the appeal was heard in the first instance, the High Court, with some variation in the form of the order, confirmed the decision of the Principal Sudder Ameen. There was then an application for a review, and a suggestion made upon that application that the respondent had been shut out by the Principal Sudder Ameen from giving the evidence which he was ready to give in the suit. The judgment of the Principal Sudder Ameen contains a distinct statement that no such application was made. He says: "It was "indispensable, however, that he should "prove that the sale was made to pay "the husband's debts and the debts contracted for his funeral obsequies. but he "has filed no decree of Court, nor any other "voucher proving these points. He has not "applied for a summons in the name of any "witness whatever. He has not even named "a single witness, nor adduced any description of evidence whatever." Certainly it appears somewhat singular that, if the learned Judges of the High Court had no other contradiction of that solemn and direct statement upon the face of the judgment of the Lower Court that no evidence had been tendered, they should have acted upon the very wild story told by the witness Gooroochurn Odheekary, and the copy of a petition said to have been made from an original petition lost in the extraordinary manner in which that witness states it to have been lost. It may be that the learned Judges did ascertain, by reference to the Principal Sudder Ameen or to the proceedings, that evidence had been offered and had not been taken, but certainly there is no record of anything of the kind. Upon this record, they seem to have acted solely upon that singular evidence to which I have just adverted.

Their Lordships, however, think that whether it were right or wrong in the Appellate Court in those circumstances to admit the additional evidence taken before it, it would not be right for their Lordships to exclude that evidence from their consideration; and they will, therefore, consider it as if there were no objection whatever to its admission.

The material portion of the evidence taken on review is the deposition of Khadem Ally, who describes himself as the jemadar of Gokool Chunder Chowdhry, the respondent. He gives a very detailed account of the execution of the deed and of the payment of the money, which he professed to have seen made at the time of the execution of the deed—he states in particular that he was a witness

to the payment of 9,500 rupees, part of the consideration-money to Narain Dass Mahajun upon account of the instalment-bond. Although he had not mentioned Narain Dass in the first instance as among the parties present, yet he does distinctly state that he was present. "Narain Dass, who had taken "Rs. 9,500, was present there. Seetul Talook-"dar had given him the said Rs. 9,500. On "the said Narain Dass returning the instal-"ment-bond, Seetul gave it to the Thakoo-"ranies. On my employer asking for it, "they did not give it."

Here, then, is very specific evidence of a transaction which took place many years ago; but the singular thing is, that when it is contrasted with the statements of the respondent himself, it does not tally in any degree with his recollection of what passed on the occasion. His statement is that the price of the property was paid in order to pay off the debts of Mahajuns, but he does not recollect the debts of what Mahajuns were paid and he says: "I gave Gouree Dabea and Surbo Mungola "the money myself." The learned Judges of the High Court seem to have thought that in that conflict of evidence, it was impossible to give the credit to Khadem Ally which they otherwise would be disposed to give. Their Lordships think that in a case in which the party himself having an imperfect recollection of the transaction, and having stated that he paid the money to the vendors personally, a servant—a jemadar—comes forward after the decision of the case by the Court of first instance and the Court of appeal, to make out this elaborate proof of payments of debts to Narain Dass—the least that can be said of evidence so given is that it is wholly untrustworthy. Nor does the deposition of the other witness, also a servant, deserve more credit. The learned Judges, however, finally decided the case, partly upon the mere fact that Juggut Ram was an attesting witness and must, therefore, be taken to have been a concurring party to the transaction, and partly upon the corroboration which they seem to think that fact afforded to the evidence of Khadem Ally. Their Lordships cannot see how the one can be any corroboration of the other. The fact that Juggut Ram attested the deed is perfectly consistent with the fact that Khadem Ally is a tutored witness brought forward at the last moment to depose to having seen what he never saw.

Again, with respect to the effect of the attestation of the deed by Juggut Ram, it seems to their Lordships that the learned Judges have attached to that circumstance a weight which it really does not possess. Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindoo Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *præsumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction. And one of the difficulties of allowing the present decree to stand is that this point, which was raised at the last moment, was decided upon the mere proof, by the production of the deed, that Juggut Ram was an attesting witness to it. The point had never been raised before. The opposite party has had no opportunity of examining Juggut Ram as to the circumstances under which he became an attesting witness, or what his understanding of the transaction really was. The utmost that the Judges ought to have done in that state of things, was to remand the case to be re-tried for the full consideration of that question.

Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was, and what the circumstances of this family were, their Lordships are further of opinion that his concurrence would not in this case be sufficient to set up the deed. In the first place, it is not proved, though on the other hand it certainly is not disproved, that at the date of the execution of this deed, which was executed before the adoption took place, Juggut Ram was the next heir in reversion. He was unquestionably a very distant relation, and although he appears to have taken a considerable part in the management of this family, and even in the adoption of the plaintiff, he is not proved to have been the next heir. On the other

hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that therefore his interest, even if it existed, as next reversioner, was in all probability likely to be defeated. Therefore, if his concurrence were proved, it would not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim. Their Lordships have already said that, if anything could have been made of that point, it would have been rather a reason for a remand of the cause to be tried upon such an issue than for the immediate decision of the case against the plaintiff; but in their Lordships' opinion there was no ground in the circumstances for such a remand, because such an issue had never been raised upon the pleadings or in the earlier stages of the cause. The case of the party who sought to support the validity of this transaction was that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram either as supplying the want of proof of the existence of the debts and the necessity of the sale or as a consent equivalent to such proof.

Their Lordships are, therefore, of opinion that the decree which is under appeal must be reversed; and the only question is, what should be the form of the order to be made? They have been furnished by Sir Roundell Palmer with the minutes of the order which he thought he was entitled to claim; and to some extent their Lordships adopt those minutes. They think that the minutes should stand thus: "Declare that the deed of the "16th of November 1845 was and is in-"valid as against Mohesh Chunder and the "appellant as his heir, and declare that "Mohesh Chunder became on the death of "the widow Gouree Debia, and that the "appellant, as such heir, is now entitled in "possession to one moiety of the four annas, "and order that the respondent do deliver "up to the appellant such moiety, and do "pay to her the profits thereof received since "the death of Gouree Debia."

Their Lordships will, therefore, humbly advise Her Majesty to allow the present appeal, to reverse the decree of the Sudder Court, and to direct that, in lieu thereof, a decree be made to the effect above stated, and further directing that the respondent do pay to the appellant the costs incurred by the plaintiff in both the Courts below. The appellant must also have the costs of this appeal.

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